SOCMA

SYNTHETIC ORGANIC CHEMICAL MANUFACTURERS ASSOCIATION

COMMENTS OF THE

SYNTHETIC ORGANIC CHEMICAL MANUFACTURERS ASSOCIATION

ON THE

SUPPLEMENTAL REPROPOSAL ON

REVISIONS TO THE

DEFINITION OF SOLID WASTE

72 Fed. Reg. 14171 (March 25, 2007)

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INTRODUCTION

The Synthetic Organic Chemical Manufacturers Association ("SOCMA") is pleased to offer the following comments on the Supplemental Proposed Rule for Revisions to the Definition of Solid Waste. (the "Proposed Rule") (72 Fed. Reg. 14171 (March 25, 2007)). By a notice dated April 24, 2007, EPA extended the deadline for comments on the Proposed Rule to June 25, 2007. (72 Fed. Reg. 20304.)

SOCMA is the leading trade association representing the batch and custom chemical industry. SOCMA's 300+ member companies make the products and refine the raw materials that make our standard of living possible. From pharmaceuticals to cosmetics, soaps to plastics and all manner of industrial and construction products, SOCMA members make materials that save lives, make our food supply safe and abundant, and enable the manufacture of literally thousands of other products. Over 70% of SOCMA's active members are small businesses.

In connection with their regular manufacturing operations, SOCMA members routinely generate and manage materials which are presently regulated as hazardous waste. In many instances, SOCMA members could recycle secondary materials from their operations but presently do not do so, because of the regulatory constraints imposed by a set of EPA regulations known as the "definition of solid waste." SOCMA and its members have consistently sought revision of these regulations with one goal in mind – to enable members to recycle valuable secondary materials.

SOCMA supports EPA's pursuit of developing exclusions from the definition of solid waste, given the additional legitimate recycling opportunities that could be pursued under this approach. SOCMA and its members have a direct and substantial interest in the relief to be provided in the final rule.

SUMMARY OF COMMENTS

SOCMA commends EPA for its development of a series of meaningful improvements to one of the more complicated environmental regulations — the Definition of Solid waste provisions under RCRA. EPA, the States and the regulated community have been commenting on, criticizing and collaborating on revisions to these regulations for over 20 years. The Proposed Rule presents significant improvements to these regulations that will, upon promulgation, lead to increased and environmentally sound reuse and recycling of valuable secondary materials.

As detailed in Section III of these comments, SOCMA's primary focus in these comments is on EPA's recognition of the unique needs and recycling opportunities of the many SOCMA members who engage in toll manufacturing and toll contracting. Under the Proposed Rule, these companies will be able to effectively reuse and recycle valuable secondary materials that presently must be disposed of due to the overly broad reach of the current Definition of Solid Waste regulations. As a result, SOCMA members will be able to pursue recycling opportunities that will have significant economic benefits, allow them to avoid unnecessary and

costly incineration of valuable materials, and enable reuse of those resources and minimize impacts on the environment.

Other SOCMA members anticipate that the proposed on-site recycling exemption may be of particular value for batch manufacturing operations, as it will increase their ability to store materials on-site until the next production operation in which these materials can be reused or recycled. Given the variable product mix that typifies specialty batch manufacturing operations, this added flexibility will increase the ability of SOCMA members to recycle and reuse valuable secondary materials from their own operations. Other SOCMA members anticipate being able to benefit from the "intra-company" recycling provision that has been added as part of the Proposed Rule. Overall, SOCMA members project that these exemptions will enable various facilities to avoid unnecessary incineration costs and save money and valuable resources through further reuse and recycling of valuable secondary materials.

The regulatory premise for these exemptions – the "under control of the generator" concept – provides a strong and effective foundation for both industry and regulators to promote productive reuse of valuable secondary materials, while also establishing an effective structure for documentation and safe management of these materials. As EPA explains in the preamble, '[b]ecause the facility owner in these situations still finds value in the hazardous secondary materials, has retained control over them, and intends to use them . . .," EPA is proposing to exclude them from the regulatory definition of solid waste.[1] This a sound, if not inevitable, legal conclusion, as there is no "discard" associated with this type of ongoing reuse and recycling activity.

In addition, SOCMA is pleased that the Proposed Rule recognizes and builds on the use of sound manufacturing and recordkeeping practices that are core elements of the specialty batch chemical manufacturing sector – notably, careful use of contracts, diligence and other documentation to assure quality production and safe management of both actual manufacturing operations and of the materials produced from those operations. EPA recognizes that companies should fairly be able to rely on existing business records that document production activities, inventories and shipping arrangements, to substantiate that materials are legitimately recycled. SOCMA agrees that these records, in conjunction with initial notifications to regulators, will provide a sound basis on which both industry and regulators can confirm qualifications for reliance on the "under control of the generator" exemption.

Initial assessments of the potential economic impact of these provisions confirms that SOCMA members will be able to reduce waste disposal costs and also reduce purchasing costs through increased reuse and recycling of secondary materials. For certain types of materials, SOCMA members will no longer be required to destroy valuable secondary materials by sending them for incineration as hazardous waste. While it is a challenge to "crystal ball" fully the opportunities that will be provided by promulgation of the Proposed Rule, SOCMA members' reaction is that the economic benefits will, in fact, exceed the projections in the background documents for the Proposed Rule.

Furthermore, assessing the aggregate economic impact does not necessarily measure the incremental benefit that the Proposed Rule will have on smaller businesses. For

[1] 72 Fed. Reg. at 14185.

SOCMA members, over 70 % of which are small businesses, even small cost savings on individual production runs can be very significant, given the relatively smaller profit margins in the specialty batch chemical manufacturing sector and the significant foreign competition that U.S. industry faces in this essential manufacturing sector.

Overall, SOCMA commends EPA for developing new regulatory approaches to tailored revisions to the Definition of Solid Waste that will promote increased recycling based on demonstrated industry opportunities, in an effective and focused manner. Both EPA and industry have long sought answers to these challenges, and SOCMA urges EPA to move forward to promulgate final regulations based on the "under the control of the generator" provisions.

COMMENTS

I. SOCMA Supports the Proposed Revisions to the Definition of Solid Waste as Effective Steps to Promote Recycling of Secondary Materials by Its Members

SOCMA and its members have consistently sought revisions to the "definition of solid waste" for the purpose of providing increased opportunities for expanded reuse and recycling of secondary materials in the batch specialty chemicals manufacturing sector. SOCMA is extremely pleased that the Proposed Rule will greatly expand the ability of its members to reuse and recycle valuable secondary materials.

A. The Proposed Rule Will Provide Expanded Opportunities For Increased Recycling and Resource Recovery by SOCMA Members

In evaluating the potential impact of the Proposed Rule, SOCMA has consulted directly with various member companies who have long advocated for revisions to the Definition of Solid Waste in order to be able to increase recycling and reuse of valuable secondary materials. These members have confirmed that the Proposed Rule will create new opportunities for increased recycling and resource recovery in the specialty batch chemical sector.

SOCMA highlights below specific aspects of the Proposed Rule that its members consider notable improvements over the current rule. This is particularly important since many of these factors may not be caught in a classic "economic impact" analysis, but nonetheless have potential to significantly boost pursuit of recycling opportunities in the real world:

- Use of straight-forward regulatory concepts and language. The "under control of the generator" exemptions are sufficiently straight-forward and easy to implement that even smaller facilities and smaller companies that do not have access to outside legal counsel will be able to determine how to structure and maintain their operations to comply with the exemptions. The extreme complexity and conflicting interpretations of the current regulations have prevented many small companies from even trying to evaluate options for increasing recycling opportunities.

- Establishment of tailored exemptions that address focused recycling opportunities and needs. The "under control of the generator" exemptions are well-designed to provide appropriate recycling opportunities directly to specialty batch chemical

manufacturing facilities, which have the knowledge and equipment to recycle and reuse valuable secondary materials but would do so only in the context of ongoing manufacturing and reuse opportunities. The "under control of the generator" concept thus appropriately distinguishes these facilities from large commercial recycling operations.

- Reliance on existing business practices and documentation. By recognizing established business practices and allowing facilities to rely on production, inventory and shipping records kept in the ordinary course of business, EPA has avoided unnecessarily burdening the "under the control of the generator" provisions with reporting and recordkeeping burdens that otherwise might deter smaller businesses that lack the resources to take on additional paperwork burdens. Thus, the Proposed Rule is consistent with the Paperwork Reduction initiative and the increased focus on burden reduction in connection with RCRA generator obligations. Yet, the Proposed Rule still assures effective documentation will be maintained as companies must still be ready to demonstrate that the terms of the relevant exemption are met.[2]

- Avoiding mandatory reporting of commercially sensitive product information. SOCMA and its members also applaud a second aspect of the recordkeeping and reporting elements of the Proposed Rule. The specialty batch chemical manufacturing sector is highly competitive, with frequently changing product lines, and information of product types and quantities is commercially very sensitive. SOCMA commends EPA for not requiring these details to be reported to regulators. This is important as SOCMA members have indicated that they might be forced, due to confidentiality concerns, to forgo recycling activities if public disclosure of competitively sensitive information were to be required.

- Providing equivalent opportunities for special sector manufacturing practices. SOCMA also commends EPA for recognizing the unique attributes of specialty batch chemical manufacturing practices, including the use of toll manufacturing in the specialty batch chemical manufacturing sector. Unlike the commodity chemical sector, this sector is characterized by fluctuating product mixes in response to demand, batch production operations, diverse customer bases spread across a wide range of industry sectors, and commercially sensitive and competitive production operations. The inclusion of the focused toll manufacturing provision in the Proposed Rule will be highly effective tool to promote recycling of secondary materials in this segment of the specialty batch chemical manufacturing sector.

- Increased flexibility for on-site recycling operations. In the past, many SOCMA members have not pursued potential on-site recycling opportunities, due to their inability to store secondary materials on-site for longer than 90 days without a full RCRA permit. Given the sporadic and varying timing of production runs at batch operations, companies recognized that there was little certainty of being able to recycle or reuse a given secondary material within the 90-day time frame. However, with the addition of an on-site recycling exemption, SOCMA members believe this

[2] See, 40 C.F.R. § 261.2(f).

exemption would provide additional flexibility will enable their operations to pursue additional recycling opportunities.

Overall, for these and other reasons, SOCMA and its members are convinced that the Proposed Rule will significantly expand reuse and recycling opportunities within the specialty batch chemical manufacturing sector. SOCMA strongly supports the "under the control of the generator" elements of the Proposed Rule. EPA has done an excellent job in crafting these proposed exemptions to strike the right balance between effective oversight of legitimate recycling practices and mitigation of unnecessary regulatory requirements that would be burdensome for small businesses.

B. Given the Long Rulemaking History and Record Supporting the Focused Exemptions in the Proposed Rule, SOCMA Urges EPA To Take Final Action on the Proposed "Under Control of the Generator" Exemptions

The definition of "solid waste" regulations have been a source of concern to SOCMA members since their initial promulgation in 1985. Over the years, SOCMA has repeatedly presented information and data substantiating the need for regulatory reform in this area, including the potential benefits of a focused exemption for secondary materials from toll manufacturing operations in the specialty batch chemical manufacturing sector. At this juncture, as discussed below, EPA has a substantial rulemaking record and should take prompt action to promulgate the focused exemptions set out in the Proposed Rule.

SOCMA and its members have been active participants in many rounds of consultation and rulemaking efforts to develop effective proposals to promote increased reuse and recycling of secondary materials. As early as 1990, EPA's RCRA Implementation Study determined that the regulatory definitions of "solid waste" were too complex and needed to be simplified. SOCMA voiced these same concerns on behalf of its members, many of which are small businesses that do not have immediate access to the sophisticated regulatory analysis needed to determine whether or how smaller volumes of varying streams from batch operations could ever be reused or recycled under the definition of solid waste regulations, interpretive letters and associated "lore."

SOCMA consulted with the Agency again regarding the counterproductive limitations that these regulations placed on members in conjunction with the final "Definition of Solid Waste Task Force Report" that was issued in 1994. That initiative, in turn, led to a further round of consultation and collaboration with the Agency's establishment of a Federal Advisory Committee Act panel to address the Definition of Solid Waste in 1997.

SOCMA participated in the Small Business Outreach Review on Options To Revise the RCRA Regulations on Recycling. SOCMA submitted written comments, dated February 19, 1997, from Sherry Edwards, to Jim O'Leary, on the Definition of Solid Waste SBREFA Analysis, that identified the specific regulatory issues and constraints that prevented its members from being able to recycle and reuse economically valuable secondary materials. These concerns were reiterated in a letter to Administrator Browner, dated June 19, 1997. In addition, members of SOCMA's Hazardous Waste Committee provided specific examples of the regulatory hurdles to recycling in a meeting on the Definition of Solid Waste on October 27, 1997.

After EPA decided not to pursue further development of the "transfer-based" and "in commerce" rulemaking initiatives in later 1997, SOCMA and its members worked hard to develop and provide the Agency with a focused proposal and rationale for an exemption that recognized the unique nature of specialty batch chemical manufacturing operations and the potential for reuse and recycling of secondary materials in this industry sector. The Committee conducted a survey of members in 1998 and 1999 effectively to define the key attributes of these operations and identify the core contractual elements that effectively enable the toll manufacturer to serve as an adjunct production facility with a manufacturing process, ingredients and equipment all predefined by the company contracting for the toll manufacturing process run.

On the basis of this work, the Committee developed and refined a proposal for the establishment of a toll manufacturing exemption from the definition of solid waste. The concept and proposal have been presented to various offices within the Agency and has also been discussed during Sustainable Industries tours of member facilities to demonstrate the additional recycling and resource conservation measures that SOCMA members would like to pursue.

When EPA issued proposed revisions to the Definition of Solid Waste in 2003, SOCMA worked closely with members to evaluate whether the "NAICS Code" concept could be effectively implemented in the Specialty batch chemical manufacturing sector. SOCMA conducted a further survey to identify potential recycling opportunities for its members. This survey confirmed that SOCMA members would pursue reuse and recycling of valuable secondary materials **if** EPA established effective regulatory exemptions that would enable smaller companies in the specialty batch chemical sector to pursue these recycling opportunities. In its comments on the 2003 Proposal, SOCMA provided specific examples of how members had been prevented from pursuing economically valuable opportunities to reuse and recycle secondary materials from specialty batch chemical manufacturing operations.[3]

Accordingly, SOCMA strongly supports the "under the control of the generator" exemptions in the Proposed Rule and believes that EPA has a strong rulemaking record to substantiate that materials recycled "in the control of the generator" are valuable secondary materials, are not "discarded" and are not appropriately classified as "solid waste."

SOCMA urges EPA to act promptly to issue final regulations to establish these focused exemptions and achieve the fundamental statutory objectives of resource recovery and recycling.

II. The Specialty Batch Chemical Manufacturing Sector Is Defined Both by Its Unique Products and by Use of Batch Manufacturing and Toll Manufacturing Operations, and These Are Key Factors in the Effectiveness of any Conditional Exemptions

SOCMA is pleased that the Proposed Rule responds to the significant opportunities for recycling and recovery of secondary materials in the specialty chemical batch manufacturing sector. The following discussion reviews the key attributes and manufacturing

[3] See, Comments of the Synthetic Organic Chemical Manufacturers Association on the Proposed Rule on Revisions to the Definition of Solid Waste, RCRA Docket No. RCRA-2002-0031, dated February 25, 2004.

practices of this sector. This information is essential background for understanding how the Proposed Rule will remove current restrictions on the ability of SOCMA members to recycle and recover valuable secondary materials.

A. Nature of Specialty Chemical Products and Markets

The term "specialty chemicals" refers to a category of chemicals that are specially formulated to meet detailed specifications. Specialty chemicals usually have unique, special purposes, such as to make nylon fibers stronger, or to make an active ingredient in medicine. Specialty chemicals are often essential ingredients in the manufacture of another product.

Specialty chemicals are chemical products that contain distinctly placed atoms to give the resulting molecules a special function. More often than not, the chemical has a very limited number of specific uses. Specialty chemicals can be used to enhance the performance of various materials, or they can be an ingredient, a formulation or a mixture.

SOCMA members typically produce intermediates, specialty chemicals or ingredients that are used as feedstock in the manufacture of a wide range of commercial and consumer products. The market and potential applications for specialty chemicals cover a broad range of uses. The range of potential applications include, for example, adhesives and sealants, chemical processing, coatings, cosmetics, industrial chemicals, inks, paints and coatings, pesticides, pharmaceutical intermediates, resins, solvents and specialty polymers.[4]

The diverse product lines and customer base for SOCMA members was confirmed by SOCMA when it conducted surveys of its members in connection with the potential use of NAICS classifications in the 2003 Proposed Rule.[5] At that time, a member survey indicated the following range of activities among members based upon the "primary" NAICS code for their facility:[6]

46%	3251	Basic Chemical Manufacturing
10%	3252	Resin, Synthetic Rubber and Artificial Synthetic Fibers and Filaments Manufacturing
3%	3253	Pesticide, Fertilizer, Agricultural Chemical Manufacturing
23%	3254	Pharmaceutical and Medical Manufacturing
15%	3259	Other Chemical Product and Preparation Manufacturing
3%	Other	

In this same survey, SOCMA asked members to identify all NAICS codes (up to the first four digits) which apply to manufacturing activities at their facilities:

[4] See, e.g., *Chemical Week,* November 19, 2003, special issue on the specialty chemicals sector, at page 33. *Chemical Week* is billed as "the world's leading information source providing business and technical information for the global Chemical, Plastics, Chemical Process, Oil, Gas and Energy Industries."

[5] See SOCMA Comments, dated February 25, 2004, OSWER Docket No. RCRA 2002-0031, at pp. 17-24.

[6] In this context, SOCMA asked members to consider criteria and activities consistent with the guidance set out in the NAICS Manual (2002 edition) at p. 22.

67%	3251	Basic Chemical Manufacturing
15%	3252	Resin, Synthetic Rubber and Artificial Synthetic Fibers and Filaments Manufacturing
18%	3253	Pesticide Fertilizer Agricultural Chemical Manufacturing
41%	3254	Pharmaceutical and Medical Manufacturing
8%	3255	Paint, Coating and Adhesive Manufacturing
13%	3256	Soap, Cleaning Compound, and Toilet Preparation Manufacturing
38%	3259	Other Chemical Product and Preparation Manufacturing
21%	Other	

The answers confirmed the diversity of production activities that is typical of facilities within the specialty batch chemical manufacturing sector.

To remain competitive in a tough global market and address this diverse market base, specialty batch chemical producers must be able to respond quickly to new requirements by customers, fill small market niches and develop new products. U.S. batch producers are at the cutting edge of new technology and are engaged in developing and providing products often made nowhere else in the world. Making these products is thus an ever-changing business, often requiring small quantities in a timely manner. The specialized nature of SOCMA's members' products thus typically calls for batch manufacturing operations, which are discussed below.

B. Distinctive Nature of Batch Manufacturing Is Key to Specialty Chemical Manufacturing Operations and Competitiveness, and to Recycling Opportunities

Batch manufacturing provides an efficient, and frequently the only, method to make small quantities of chemicals to meet specific needs and customer demands for specialized products. Batch processes are very different from continuous chemical manufacturing operations that produce commodity chemicals. A continuous chemical operation constantly feeds the same raw material into the process. That process consistently and constantly manufactures the same product.

By contrast, production at a batch manufacturing facility is not continuous. Both the processes and the raw materials used can change frequently. Products are manufactured in separate, distinct "batches" by operations that start and finish within relatively shorter periods of time. Batch specialty chemicals are often produced in quite brief production campaigns for a focused time period. As discussed in Section II.D. below, batch manufacturing can also involve "toll manufacturing," a subcategory of batch specialty chemical manufacturing in which a particular type of contractual relationship is established that specifies in detail the process and materials to be used by the toll manufacturer to make the product entirely according to the customer's advance specifications.

Because the products and the processes change, the process operating conditions and even the configuration of the equipment can change frequently as well. A single piece of equipment can be put to multiple uses and may well contain a range of different materials over the course of a year. Batch specialty chemical producers often use the same equipment to make

small quantities of 10, 20 or even more different products on an annual basis. By way of example, one SOCMA study found that one member company produced a total of 566 different products over a seven-year period at one facility.

Maintaining and maximizing the flexibility inherent in batch operations is a key factor in being competitive in global specialty chemicals market. The ability to rapidly respond to changing customer demand and market fluctuations is particularly critical in this industry sector. Regulatory flexibility, in turn, can be a critical factor in the ability of U.S. specialty batch chemical manufacturers to maintain their competitive status.

C. Small Facility and Small Business Profile of SOCMA Members Is Critical Factor To Be Addressed in Establishing Scope and Terms of an Effective Conditional Exclusion

Over 70% of SOCMA members are small businesses. In addition, even where specialty chemical manufacturing operations are part of a business division in a larger company, size is still a factor as most facilities at which these operations are located are smaller sites.

The overwhelming majority of SOCMA members carefully manage operations to avoid the need for a RCRA Part B permit for their facilities. The cost and burden of a Part B permit cannot be justified for the volumes of wastes generated at these facilities. Further, the Part B permit system is not well-suited to management of the varying and not necessarily predictable streams of secondary materials that result from the fluctuating product mix at specialty batch chemical manufacturing facilities. Accordingly, SOCMA member facilities predominantly rely on the 90-day on-site storage provision in 40 C.F.R. § 262.34. This 90-day time period is a significant constraint on the ability of SOCMA members to reuse and recycle valuable secondary materials. Given the varying production schedules, a production run that would allow direct recycling of a secondary material does not occur within the 90-day on-site storage window established under 40 C.F.R. § 262.34.

The 90-day storage exemption is not the only factor limiting on-site recycling activity. For some SOCMA members, the ability to store and recycle secondary materials on-site is often constrained by the limited physical space available at their facilities. Space is often at a premium at these plant sites. Priority is given to providing the space needed for equipment reconfiguration for varying production runs. Thus, even if the secondary materials were able to be stored for a longer period, many facilities still would not be in a position to recycle on-site. Physical space constraints would still limit the ability of a facility to store and accumulate any significant volumes of secondary materials on-site pending an appropriate recycling opportunity.

Cost and limited resources are also factors limiting the ability of these smaller companies to store and then recycle secondary materials on-site. These businesses often cannot justify the capital and operating resources needed to construct and dedicate separate lines solely to recycling operations. Not only would the recycling equipment only be in use on a sporadic basis, but the dollar return on the recycling activity would be significantly lower than the profit that could be achieved by instead using that space, equipment and capital for production activity.

Smaller companies are also extremely sensitive to the cost impact of different alternatives for management of secondary materials from production operations. The additional

cost and burden of having to recycle materials as "hazardous waste," either on-site or off-site, often cannot be justified due to impact on profitability. Routine disposal of these secondary materials is often the less complicated and more efficient alternative, notwithstanding the resulting loss of valuable materials. On the other hand, if legitimate recycling of these secondary materials could be accomplished without the "solid waste" regulatory constraints, then these recycling opportunities become much more viable and could be a positive factor in reducing costs and enhancing the ability of smaller companies to produce new and additional specialty chemical products.

A final issue is the fact that a good portion of SOCMA member companies manufacture specialty chemicals for pharmaceutical production. Hence, these operations must also comply with applicable FDA requirements, including various production and quality control specifications. FDA regulations impose burdensome and costly requirements for safety, efficacy and purity of the drug product. These limitations are another significant real-world constraint on the ability of these SOCMA members to recycle secondary materials on-site back into their own production activities. A common example of this limitation is the inability of companies to reuse on-site in pharmaceutical production of solvents that have been used once, even though these solvents are of a high purity and are still suitable for ongoing use as solvents. The FDA requirements effectively preclude reuse of these solvents in pharmaceutical production, and off-site recycling is severely constrained by the hazardous waste regulations. Accordingly, these high quality solvents typically are unable to be recycled and are instead sent for off-site energy recovery or for incineration, at significant expense.

As discussed in Sections III and IV below, SOCMA is pleased that the "under the control of the generator" exemptions in the Proposed Rule address many of the current regulatory challenges that have precluded expanded recycling and recovery in the specialty batch chemical manufacturing sector.

D. SOCMA Members Frequently Contract with and Engage in Toll Manufacturing Operations as an Established Practice within the Specialty Batch Chemical Manufacturing Sector

A significant number of SOCMA's members engage in "toll manufacturing," which involves a particular type of contractual relationship between two parties for the production of a specific specialty chemical.[7]

In a batch toll manufacturing arrangement, one party contracts with a second party to have a particular specialty chemical intermediate or product made at a facility owned or operated by the second party. The contract between the two parties identifies the specialty chemical or intermediate to be made, the materials to be used, the quantity to be made, and the manufacturing process to be employed. Both parties know in advance what secondary materials will be produced and can agree in advance, prior to production, on which secondary materials will be designated for recycling.

Toll manufacturers typically use the same equipment to make small quantities of many different products in response to customer specifications. These specialty chemicals are

[7] See SOCMA Comments, dated February 25, 2004, OSWER Docket No. RCRA 2002-0031, at pp. 35-38.

often produced in quite brief batch production campaigns for a focused time period. Toll manufacturing arrangements are a key factor in the competitiveness of the U.S. specialty batch chemical manufacturing sector, as these arrangements allow companies to respond quickly to customer demands, to produce niche products and to leverage their own manufacturing operations with the specialty expertise and manufacturing capability provided by at another facility.

A company may contract with a toll manufacturer for specialty batch chemical production for any of a number of reasons, such as a need for special production techniques or equipment, research and development, special expertise of the toll manufacturer, relatively small volume to be produced, or variable or sporadic demand for the material to be produced. Regardless of the reason for the toll manufacturing arrangement, both parties to the toll manufacturing arrangement agree in advance on certain critical details of the production run, such as the production specifications to be met, the materials to be used, and the manufacturing process to be employed.

The focused nature of these toll manufacturing arrangements assures that both parties to the toll manufacturing contract know in advance not only the exact composition of the specialty chemical or intermediate to be manufactured, but the parties also know the exact composition of any secondary materials that will result from the production process. These secondary materials often have significant value and present meaningful opportunities for resource recovery and recycling.

As discussed in Section III below, SOCMA members strongly support the provision in Proposed Rule to establish an exemption for recycling of secondary materials from toll manufacturing operations. This exemption will allow SOCMA members to pursue a range of recycling opportunities that are not available to them under the current regulations.

III. SOCMA Supports EPA's Proposal to Establish a Conditional Exemption To Allow Recycling and Reclamation of Secondary Materials Pursuant to Toll Contracting Arrangements

In the Proposed Rule, EPA has established a series of exemptions for the recycling of secondary materials in circumstances where the nature of the relationship between two parties or between two facilities is such that there is both agreement and intent that the secondary materials will not be discarded and will be recycled. SOCMA is particularly pleased that one of these exemptions is based on the unique contractual and manufacturing relationship that exists in a toll manufacturing context.

As discussed above, toll manufacturing is an integral part of specialty batch chemical manufacturing. SOCMA and its members have consistently advocated approaches that would promote increased recycling and resource recovery in the context of toll manufacturing operations. The toll manufacturing exemption in the Proposed Rule will finally enable SOCMA members to pursue these additional recycling opportunities.

A. EPA's Proposed Exemption for Toll Manufacturing Correctly Recognizes The Underlying "Control of the Generator" Relationship Between the Parties

In the Proposed Rule, in the context of the "under the control of the generator" exemptions, EPA has correctly recognized that the contractual agreements underlying toll manufacturing in specialty batch chemical manufacturing operations assure that the parties can agree in advance on which secondary materials from the toll manufacturing operations have value and hence can be productively recycled or reused. This determination is made by the party contracting for the toll manufacturing operations based on both the inherent value of the secondary material and the ability of the contracting party to productively reuse or recycle that material.

In the preamble to the Proposed Rule, EPA offers the following summary of the basis for the toll manufacturing exemption:

> Concerning the tolling arrangements, we also believe that the type of tolling contract common in the specialty batch chemical industry does not constitute discard as long as the recycling is legitimate and the hazardous secondary material is not speculatively accumulated. Under a typical type of arrangement, one company (the tolling contractor) contracts with a second (often smaller) company (the batch manufacturer) to produce a specialty chemical (sometimes because of a lack of capacity, or because the batch manufacturer has specialized equipment or expertise). . . . The typical contract in the specialty batch chemical industry contains detailed specifications about the product to be manufactured, including management of any hazardous secondary materials that are produced and returned to the tolling contractor for reclamation. Under this scenario, the hazardous secondary material continues to be managed as a valuable product, so discard has not occurred. Moreover, if hazardous secondary materials are generated and reclaimed pursuant to a written contract between a tolling contractor and a batch manufacturer, and if the contract specifies that the tolling contractor retains ownership of, and responsibility for, the hazardous secondary materials, there is a strong incentive to avoid any mismanagement or release. (72 Fed. Reg. at 14185.)

Based on the unique contractual relationship and terms established by these types of toll manufacturing contracts, EPA has proposed the following exemption for toll manufacturing operations as part of the "under control of the generator" exemption:

> **§ 260.10 Definitions**. Hazardous secondary material generated and reclaimed under the control of the generator means: . . .
>
> (3) That such material is generated pursuant to a written contract between a tolling contractor and a batch manufacturer and are reclaimed by the tolling contractor, if the tolling contractor retains ownership of, and responsibility for, the recyclable material that is generated during the course of the production of the product. For purposes of this paragraph, tolling contractor means a person who arranges for the production of a product made from raw materials through a written contract with a batch manufacturer. Batch manufacturer means a person who produces a

> product made from raw materials pursuant to a written contract with a tolling contractor. (Proposed Section 260.10, 72 Fed. Reg. at 14214.)

Under the terms of the Proposed Rule, the secondary materials that fall within this "under control of the generator" language are specifically carved out from regulation as "solid waste." This is accomplished by inclusion of the "under control of the generator" language in the list of materials specifically excluded from the definition of solid waste:

> (ii) A hazardous secondary material is not discarded if it is generated and reclaimed within the United States or its territories, provided that the material is only handled in non-land-based units, it is a hazardous secondary material generated and reclaimed under the control of the generator as defined in §260.10, and it is not speculatively accumulated as defined in § 261.1(c)(8). (Proposed Section 261.2(a)(2)(ii).)

By adding this provision to the list of exclusions under Section 261.2, EPA is confirming that any secondary materials that meet the terms of the exemption are **not discarded** and hence are not regulated as "solid waste" under the RCRA regulations. As a result, materials meeting these conditions are also exempt from regulation as "hazardous waste" under RCRA.[8]

SOCMA agrees with EPA that it is appropriate to condition the exemption of secondary material from toll manufacturing operations on the additional elements set out in Proposed Section 261.2(a)(2)(ii). The materials that are generated and managed by SOCMA members under toll manufacturing arrangements are not stored in "land-based units" currently and would not be suitable for storage in land-based units in any event. SOCMA also recognizes that the "speculative accumulation" provisions should apply to assure that secondary materials are recycled in an appropriate time frame. These conditions are consistent with good management practices for the types of valuable secondary materials that would be recycled under the toll manufacturing exemption.

SOCMA also supports EPA's proposal to tie the toll manufacturing exemption to the existence of a written contract between the two parties to the toll manufacturing agreement. As discussed previously, these contracts take a variety of forms and have varying levels of detail, but typically will address with specificity the particular material to be manufactured, the materials to be used in the manufacturing process, the production process itself, and the management of the product and the residuals from the manufacturing process. In those instances in which the production process also generates a valuable secondary material, the parties to the contract will address the subsequent management of that material prior its generation. Where the toll contractor is able to recycle or reuse that material, the contract will confirm that the secondary material belongs to, and is to be sent to, the toll contractor for further recycling and reuse.

Hence, the written agreement documents the intent of the parties that this particular secondary material is not to be discarded and is, instead, to be managed and shipped

[8] Only materials that meet the regulatory definition of "solid waste" under Section 261.2 are subject to regulation as hazardous waste. See 40 C.F.R. § 261.3.

back to the toll contractor. The toll contractor has agreed to have that material returned to it and has assumed responsibility for continuing to manage the secondary material in accordance with the terms of the exemption, i.e., legitimately recycling the material without speculative accumulation. These requirements, taken together, assure that there is no "discard."

Further, as EPA notes, these types of contractual arrangements require the two parties to focus specifically on the potential for recycling and reuse in advance. The toll contractor will only agree to have the secondary material returned to it if it has made a commercial determination that the economic benefit from recycling of that material is sufficient to justify the additional transportation, management and storage of the material prior to recycling. The toll contractor also would not incur these additional costs absent a high degree of confidence that the material will actually be legitimately recycled. The toll contractor will be in control of the management of the material and will be motivated to manage and recycle it safely, as the toll contractor will bear the costs and responsibility for any spills or releases.

Overall, the requirement for a written contract assures that parties seeking to rely on the toll manufacturing exemption will have documented in advance their common agreement that the secondary material is not to be discarded, and is instead to be recycled or reused by the party contracting for the toll manufacturing operation. Based on its own and its members' knowledge and experience with toll manufacturing agreements, SOCMA strongly supports reliance on this premise as the basis for the "under control of the generator" exemption in the toll manufacturing context.

B. SOCMA Offers Clarifying Terminology To Assure Consistent Application of the Exemption for Secondary Materials from Toll Manufacturing

In this section, SOCMA offers some comments and suggestions for clarification of the terminology used by EPA in the proposed language for the toll manufacturing exemption. EPA's basic identification of the roles of the two parties to a toll manufacturing contract is accurate, as its description and assessment of the core contractual elements and purpose of a toll manufacturing contract. Thus, these comments are not intended to alter the scope of, or detract from SOCMA's overwhelming support for this proposal. Instead, these suggested clarifications are intended to help assure that the exemption will be understood and implemented in a consistent manner, using language that reflects common terminology and practices.

1. Terms to identify the parties to a toll manufacturing contract. Both SOCMA and EPA agree on the core elements of a toll manufacturing relationship – the use of a toll manufacturing agreement to set the terms under which one party contracts with a second party to have a particular specialty chemical or intermediate made at a facility owned or operated by the second party. In the Proposed Rule, EPA uses the term "tolling contractor" to identify the first party and "batch manufacturer" to identify the second party. SOCMA agrees with the use of the term "tolling contractor" but recommends, for the reasons discussed below, that the term "toll manufacturer" be used instead of the term "batch manufacturer."

The common industry understanding of the term "batch manufacturer" is much broader than how EPA uses the term in the Proposed Rule. As discussed in Section II.B of these comments, batch manufacturing is a process in which products are manufactured in separate and

distinct "batches" by operations that start and finish in a relatively short period of time. By way of example, batch specialty chemicals are often produced in quite brief production campaigns for a focused period of time. In this regard, batch operations are very distinct from continuous chemical manufacturing operations that produce commodity chemicals.

EPA has recognized these general attributes of "batch manufacturing" in the context of various air regulations:

> Batch operation or Batch process means a noncontinuous operation involving intermittent or discontinuous feed into equipment, and, in general, involves the emptying of the equipment after the batch operation ceases and prior to beginning a new operation. (40 C.F.R. § 63.1251.)

In essence, batch manufacturing is characterized by its use of distinct, short production campaigns to manufacture specific products. Batch manufacturing is used in the ordinary course of specialty batch chemical manufacturing and hence references a broader universe of activities. A batch manufacturer is any company that engages in batch manufacturing and is not in any way specifically tied to a two-party contractual agreement. SOCMA members engage in batch manufacturing in the ordinary course to produce specialty chemicals at their own facilities in response to customer demand.

"Toll manufacturing" in turn is a specific subset of these batch manufacturing operations, engaged in pursuant to a contract that sets out the specifications from the first party – the "toll contractor" – for the manufacturing activity to be undertaken by the second party – the "toll manufacturer." The toll manufacturer is the party that actually undertakes the manufacturing activity pursuant to the terms of a toll manufacturing contract. This is the terminology used within the chemical industry, and the term "toll manufacturer" more accurately and specifically identifies the role of the party engaged in the manufacturing activity under the proposed exemption.

Accordingly, SOCMA recommends that, in both the regulatory language and the preamble for the final rule, EPA replace its current use of the term "batch manufacturer" with the narrower and more accurate term "toll manufacturer."

2. Terms used to identify the inputs to and outputs from the toll manufacturing process. In the Proposed Rule, EPA identifies the "tolling contractor" as "a person who arranges for production of a *product* made from *raw materials* through a written contract . . . ." (Emphasis added.) In their review of this language, SOCMA members identified two concerns.

First, SOCMA members often use toll contracts for the production of intermediates, and not just final products that are ready for sale to a customer. Thus, SOCMA wants to be certain that EPA recognizes that the output of a toll manufacturing operation could itself then be used in further manufacturing steps prior to the ultimate production of a "final product" that is directly marketable to a customer. Thus, it is quite important that EPA clarify that "product" in this instance includes intermediates and should not be understood to refer to final products. Accordingly, SOCMA recommends that EPA broaden this definition to refer to "production of a *product or intermediate* ...."

Second, SOCMA members often not only identify the materials to be used in toll manufacturing but may also supply some or all of those materials. In many instances, a number of these materials are themselves specialty chemicals, intermediates or other inputs that may not properly be characterized as "raw materials." In the ordinary course, "raw materials" may be understood to mean materials that themselves have not yet been processed. Accordingly, SOCMA recommends that EPA not use the phrase "specified materials" rather than "raw materials."

From a liability perspective, unless SOCMA members can easily and confidently determine that the terms of an exemption have been met and that a secondary material is therefore exempt, they will forgo recycling activities due to the significant liability exposure inherent in an improper interpretation of the regulations. Thus, SOCMA believes that these suggested changes will help clarify the exemption and enhance the ability of its members to confirm the scope and intent of the proposed exemption.

C. The Proposed Exemption Will Significantly Expand Resource Recovery and Recycling Opportunities for Toll Manufacturing

As discussed above, a significant number of SOCMA members engage in "toll manufacturing." SOCMA has previously provided comments to EPA voicing its concern that many members were unable to pursue recovery and recycling of valuable secondary materials due to the regulatory constraints imposed by the current RCRA hazardous waste regulations. SOCMA and its members believe that the exemption in the Proposed Rule for secondary materials from toll manufacturing operations will effectively remove a number of these regulatory constraints and provide members with new opportunities for recycling and resource recovery.

For example, when SOCMA surveyed members engaged in toll manufacturing operations in 1999, SOCMA found that a majority of toll contractors:

- Want to recover valuable constituents from RCRA spent materials and by-products generated by their toll manufacturers but cannot do so because of the regulatory consequences of the RCRA definition of "solid waste."

- Cannot receive secondary materials back from their toll manufacturers because the toll contractors either do not have RCRA Part B permits or have Part B permits that prohibit receipt of wastes not identified in advance in the Part B permit.

- Stated that the existing RCRA regulation of "hazardous waste" is impeding toll manufacturing and therefore constraining production and growth because disposal costs are too high.

- Stated that the existing RCRA regulation of "hazardous waste" does not promote recycling and is wasting natural resources.

Unfortunately, these regulatory hurdles have had the effect of precluding SOCMA members from pursuing legitimate recycling opportunities within the specialty batch chemical manufacturing sector.

For example, SOCMA members have provided various examples that illustrate the range of recycling opportunities that are not pursued under the current regulatory scheme.

1) Examples from Member C. A SOCMA member provided broader perspective on the potential impact on its operations. Member C is a custom chemical toll manufacturer that makes a variety of products using batch operations in four plants. As a toll manufacturer, Member C can potentially be requested by existing or new customers to manufacture a wide variety of chemicals. Member C's primary products are polymers that are used by its customers, and by their customers, to manufacture other intermediates and/or finished products.

The first example involves a butanol/water waste stream which Member C cannot recover on-site. Member C has never explored whether this customer could recover this material as the customer's facility does not have a Part B permit and sending this material back to the customer is not allowed under the current regulations. In 2003, Member C disposed of over 300,000 pounds of this butanol waste stream.

Member C generates a second stream from a product which is still being developed commercially. The waste stream is a water soluble solvent and water mixture which is not suitable for distillation recovery. However, other technology, such as drying the waste solvent/water mixture using caustic could potentially work. Although Member C disposed of less than 25,000 pounds of this material that year, the quantities generated if this product is commercially successful could exceed 250,000 pounds per year.

2) Example from Member D. Member D has provided an example involving a secondary material presently handled as ignitable D001 waste. This material is generated by a toller that makes an active intermediate for a toll contractor that is a pharmaceutical company. The toller generates approximately 2 million pounds per year of a secondary material containing approximately 627,000 lbs per year of Tetrahydrofuran (THF) (THF is a valuable material that is sold for about 90 cents per pound.).

In evaluating its options, the toller has evaluated the following alternatives:

1. The toller currently sends the material for off-site energy recovery at several RCRA Part B permitted cement kilns at a cost >$758,000 per year.

2. The toller has also evaluated off-site Clean Fuels energy recovery which would cost approx. $573,000 per year.

3. The alternative of off-site reclamation at a Part B facility is the least cost effective (e.g., costs approximately $1.34 mm per year.)

4. The existing RCRA definition of solid waste regulations prevent the toller from implementing a fourth option that would generate a profit of

approximately $270, 000 per year. To realize this profit, the toller would have to be able to arrange for off-site reclamation at another plant owned by the same Corporation that has available distillation and tankage.

3) Example from Member G. At its own manufacturing site, Member G produces chemical intermediate "A," which is in extremely short supply and is used to also manufacture final product "D." Member G contracts with a toller to also manufacture final product "D" because the toller has excess capacity, while Member G is already at 100% capacity. As agreed by Member G and the toller, Member G provides chemical intermediate "A" to the toller who uses it in the process prescribed by Member G to manufacture final product "D" (e.g., reacts it with commodity chemical "B" in the presence of solvent "C" to produce final product "D"). Member G thus provides the toller with its proprietary process manufacturing specifications and requires the toller to use the same process for manufacturing product "D" as Member G uses at its own facility.

As a result of using the same manufacturing process and the same materials, both companies generate the exact same waste stream-a RCRA spent solvent containing 90% intermediate "A". Member G is able to reclaim intermediate "A" from its waste stream in an on-site, closed-loop reclamation facility which is exempt from RCRA. Member G would like to also reclaim intermediate "A" from the toller's waste stream in the same on-site reclamation facility because this raw material is quite valuable and in short supply. However, the current RCRA regulations prevent Member G from doing so. Member G takes a double hit: it has to pay the toller to incinerate the excess intermediate stream off-site and loses the value of the raw material. The total cost to Member G exceeds $1 million per year.

In this instance, Member G has a clear economic incentive to recover and reuse as much of raw material "A" as possible. However, the spent solvent stream which contains "A" cannot be shipped to Member G because Member G's facility does not have the RCRA Part B permit needed to receive and store the spent solvent stream. Unfortunately, the multi-year lead time, costs and related burdens associated with a Part B permit cause Member G to forgo this recycling opportunity. Further, the economics of this situation might change, due to a shift in demand for final product "D", before the lengthy Part B permit process is even finished.

In each of these real-world examples, the exemption for secondary materials from toll manufacturing operations set out in the Proposed Rule would remove the current regulatory barriers that prevent SOCMA members from pursuing these recycling opportunities. The proposed exemption thus has potential to be particularly valuable in enabling the smaller companies typically engaged in batch toll manufacturing to increase recycling of valuable secondary materials. Under the terms of the proposed exemption, it is clear that in these situations the recycled secondary materials would not be "discarded" and hence would be excluded from the definition of solid waste.

The most significant change made by the proposed toll manufacturing exemption is the removal of the current need for the toll contractor's facility to have a Part B permit in order to receive materials back from a toll manufacturer. Batch toll manufacturing operations are typically conducted by smaller companies or at smaller facilities that manage materials under the 90-day provision in 40 C.F.R. § 262.34 and deliberately structure their operations to avoid the costs and burdens of a Part B permit. A Part B permit cannot accommodate the varied activities

of the typical toll manufacturer who generates numerous batches of varying products and secondary materials over the course of a year. It is neither feasible nor cost-effective to attempt to obtain frequent modifications of a Part B permit to enable varying amounts and types of secondary materials from toll manufacturers to be returned and then stored or managed prior to recycling or reuse.

By exempting from classification as "solid waste" secondary materials from toll manufacturing that will be recycled, the proposed exemption will remove the regulatory barriers that currently preclude companies from taking advantage of these opportunities. While the volumes that would be recycled will vary from facility to facility, and will also vary depending upon product mix, the aggregate benefits of the proposed regulatory change will be substantial. Batch toll manufacturing facilities face unique challenges with respect to pollution prevention and product stewardship, and the proposed exemption will finally allow increased resource recovery and recycling in the context of toll manufacturing in specialty batch chemical manufacturing sector. Hence, it is important to recognize that in the proposed toll manufacturing exemption is a way to level the playing field in circumstances where the toll manufacturing site is too small to otherwise take advantage of the proposed on-site recycling or intra-company recycling exemptions.

In addition to evaluating the aggregate economic impact of the proposed toll manufacturing exemption, SOCMA urges that EPA also evaluate the incremental cost-benefit of the proposal from the perspective of small companies and small businesses. Admittedly, toll manufacturing is typically done in smaller volumes than continuous or non-tolling batch manufacturing sties. Hence, the aggregate dollar benefit or tons recycled for this specialized industry sector may be relatively smaller, but SOCMA maintains that it is the incremental impact and benefit of enabling a small business to pursue these additional recycling opportunities that is worth assessing. The continued economic viability of these small companies, along with their highly specialized expertise, is vital in terms of maintaining the viability and competitiveness of the U.S. specialty batch chemical manufacturing sector.

SOCMA notes that, in EPA's Regulatory Impact Analysis, landfill costs are used as the reference point for evaluating alternative cost scenarios for secondary materials that would be able to be recycled under the "control of the generator" exemptions. However, both due to general bans on liquid in landfills and due to the need to consider actual industry practices in order to have an effective impact analysis, it is important to note that the relevant industry disposal cost and disposal practice is incineration.

As noted previously in these comments, the current costs of incineration of waste solvents can be particularly significant for small businesses and small sites. Smaller businesses have little leverage with or access to the larger reclamation facilities. Frequently, smaller volume waste streams must be incinerated because commercial reclamation facilities prefer to handle high volumes. RCRA-permitted reclaimers that willingly accept small volumes are exceptionally hard to find. In addition, absent use of a closed-loop system, this type of reclamation cannot currently be conducted in-house absent a RCRA permit. In addition, smaller facilities often bear comparatively higher transportation costs because transporters are less willing to manage small volumes of hazardous wastes.

Overall, the cleaner a waste solvent is the more value it has either for subsequent use and application as a solvent or for energy recovery. Thus, the ability of a toll contractor to use existing equipment to reclaim even smaller volumes of solvents from toll manufacturing operations is economically a meaningful option to pursue. Relatively cleaner solvents also typically have a higher BTU value and hence can have greater value for energy recovery. Under the best scenarios, for relatively cleaner solvents, sites may pay $0.25/gallon for local incineration and up to $0.50/gallon if the material has to be transported 1,000 miles. This converts to about $0.24/lb and $0.48/lb respectively. The incineration prices increase from those levels, based on percent water, halogen or other constituents that may be present in the solvents. For example one member has an incinerator cost of $1.80 per gallon of waste stream, where transporting a fill tanker truck to an incinerator would cost $2,050.00. Other members have full tank load costs of up $2,640.00 to an incinerator. Considering the number of waste streams a specialty batch chemical manufacturer may produce, and the fact they will have to pay the cost of a full load to have the waste leave their site within 90 days, an ability to use existing equipment to reclaim these solvents can make a significant difference in terms of handling costs and options for the solvents.

As a final point with respect to the potential impact of the proposed toll manufacturing exemption, SOCMA would like to reiterate a point made in its prior submissions regarding the need for a national exemption that is broadly adopted by authorized states to address recycling of secondary materials from toll manufacturing operations. A national exemption is needed to assure a consistent regulatory basis for determining that materials qualifying for the exemption are not "discarded" and are not "solid waste" for purposes of 40 C.F.R. Part 261. It is not possible for these small companies to obtain timely exemption rulings for individual batches through a petition or case-by-case mechanism.

In the real world, decisions about and contracts for batch toll manufacturing of products and intermediates are made by business people, not environmental regulatory specialists. The policy goals of integrating recycling and product stewardship into this up-front decision-making process will only be achieved if business people can easily and confidently determine in advance that a secondary material will be exempt when recycled, reused or reclaimed. SOCMA is pleased that the toll manufacturing exemption in the Proposed Rule is sufficiently straight forward that business people, as well as regulators, should be able to understand and be comfortable with this approach.

IV. SOCMA Supports the Proposed "Under Control of the Generator Exemptions" for Intra-Company and On-Site Recycling of Secondary Materials

In the Proposed Rule, EPA appropriately identifies two other circumstances in which the "under the control of the generator" rationale warrants the establishment of specific exemptions from the definition of solid waste. Specifically, EPA has proposed exemptions for on-site recycling of secondary materials and for recycling of secondary materials between facilities that are under common ownership or corporate control. As discussed below, SOCMA supports the adoption of both of these proposed exemptions, but also has some suggestions for several areas where further clarification of the exemptions would be helpful.

A. SOCMA Supports EPA's Proposal for On-Site Recycling of Secondary Materials

SOCMA supports EPA's proposal to exempt on-site recycling of secondary materials from the definition of solid waste. While this proposed exemption generally will be of greater utility at larger facilities, a number of smaller SOCMA members may also benefit from an on-site exemption as it will enable members to store secondary materials on-site until the next recycling opportunity arises in the batch manufacturing cycle, rather than be required to send all such materials off-site within the 90-day on-site storage period that is otherwise imposed under the current regulations.

In the Proposed Rule, EPA sets out the following provision for the exemption for on-site recycling of secondary materials:

> **§ 260.10 Definitions**. 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 paragraph, generating facility means all contiguous property owned by the generator) . . . . . (72 Fed. Reg. at 14214.)

SOCMA strongly concurs with EPA's legal premise that such materials are managed under the control of the generator, in circumstances where the generator is the party responsible both for proper management of the secondary material and for any cleanup, reporting or remediation that might be needed in the event of an accidental release. Similarly, given the speculative accumulation limitation, the generator will have to either reclaim the material within a reasonable time or identify it for management as a waste.

As a practical matter, the facility will only incur costs for storing this material if it has a well-founded expectation that the material will be recycled and reused and, as such, the facility will manage the secondary material as having value. Furthermore, the established network of regulatory obligations, such as the hazardous waste generator requirements that would apply in the event of a spill, and the joint and several liability provisions in Superfund and counterpart state laws assure the facility is further motivated to handle the material responsibly and is liable for the consequences if it does not.

In the preamble to the Proposed Rule, EPA acknowledges that there are some challenges involved in hot defines the scope of the "generating facility" for purposes of this proposed exemption:

> The first part of the definition would apply to hazardous secondary materials generated and reclaimed at the generating facility. This definition would include situations where a generator contracts with a different company to reclaim hazardous secondary materials at the generator's facility, either temporarily or permanently. For purposes of this exclusion, ''generating facility'' means all contiguous property owned by the generator. We are proposing to exclude hazardous secondary material that is reclaimed ''at the generating facility'' rather than ''on-site'' as defined in 40 CFR

> 260.10 (as we proposed in October 2003) because the latter definition may encompass facilities not under the control of the generator. For example, an industrial park meets the definition of ''on-site,'' even though facilities operating at an industrial park may be completely separate and under separate ownership. However, EPA solicits comment on whether facilities under separate ownership, but located at the same site, should be included within this proposed exclusion. Additionally, EPA solicits comment on other definitions which might be equally compatible with generator control as the definition proposed in today's notice. (72 Fed. Reg. at 14186.)

SOCMA appreciates that EPA recognizes that application of this exemption as proposed may not sufficiently describe the varying fact patterns that would satisfy the basic policy goal of assuring that the generator of the secondary materials is and can be held legally responsible in the event that the hazardous secondary materials are not reclaimed as anticipated or are somehow spilled or released at the site.

For example, SOCMA members have questioned whether the wording of the proposed exemption would mean that a company that has entered into a long-term lease and hence does not own the underlying property, but owns and operates the manufacturing facility at a leased site would be precluded from relying on the on-site reclamation provision. SOCMA is concerned that, in the case of longer-term leases or any other circumstances in which the ownership and control of the manufacturing "facility," manufacturing facilities would not be eligible to rely on the exemption as presently worded. In various circumstances, SOCMA members with smaller facilities may not hold legal title to the property underlying their facility. Hence, these small companies may again be disadvantaged compared to larger facilities that own the underlying real property.

SOCMA recommends that EPA consider revising this language to clarify that an ownership interest in the manufacturing facility that generates the secondary material to be reclaimed is the key factor, not the ownership of the underlying real property. The rationale for the "under control of the generator" concept is better met by this approach, as the lease terms for any industrial operation will assure that the generating facility is responsible for reporting, cleanup and remediation of any spills or releases that occur during the lease term. By contrast, the entity that owns and leases out the real property but does not own or operate the manufacturing facility does not have a similar "under the control of the generator" role relative to the activities of the manufacturing.

On this same basis, SOCMA agrees with EPA's position that the generating facility could still rely on the exemption if it contracted with a second company to operate a reclamation process at its facility. In these circumstances, the terms of the contract would assure that the secondary material would be reclaimed, that the reclamation would occur on the terms set by the generator, that the reclaimed material would be returned to the generator and that the operator of the reclamation facility would also be responsible if any releases were to occur in connection with the reclamation activity. These circumstances would also satisfy the core elements of the "under the control of the generator" legal premise, i.e., that the circumstances

and the relationship between the parties are such that there is a legitimate expectation and sound factual basis for determining that no discard will occur.

B. SOCMA Supports EPA's Proposal for Recycling of Materials within the Same Corporate Structure

SOCMA supports EPA's recognition that an additional exemption for recycling activities conducted by facilities that are part of a common corporate structure is an effective means to promote additional recycling and resource recovery, given that these entities will have an additional incentive and ability to coordinate activities so as to manage and recycle secondary materials properly.

In the Proposed Rule, EPA sets out the following exemption for recycling activities conducted by facilities that are under common corporate ownership:

> **§ 260.10 Definitions.** Hazardous secondary material generated and reclaimed under the control of the generator means: . . . .
>
> (2) That such material is generated and reclaimed by the same ''person'' as defined in § 260.10, if the generator certifies 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 recyclable material . . . .

In its discussion of this provision, EPA offers the following points for consideration:

> The second part of the definition of hazardous secondary materials generated and reclaimed under the control of the generator would apply to hazardous secondary materials generated and reclaimed by the same company (i.e., by the same ''person'' as defined in § 260.10). The generator must certify that the hazardous secondary materials will be sent to a company under the same ownership as the generator, and that the owner corporation has acknowledged full responsibility for the safe management of the hazardous secondary materials. Because of existing complexities in corporate ownership and liability, we are proposing to require the generator to certify regarding ownership and responsibility for the recyclable hazardous secondary materials. EPA solicits comment on any other certification language that might accomplish the same end, and we also seek comment on other definitions of ''same-company.'' (72 Fed. Reg. at 14186.)

While this proposed exemption is more likely to benefit larger companies with several tiers in their corporate structure, a number of SOCMA members have indicated that their companies

could use and benefit significantly from the proposed "intra-company" reclamation exemption. Based on its discussions with these members, SOCMA also concurs with the inclusion of this concept in the overall "under the control of the generator" exemption.

At the same time, however, SOCMA would like to offer some comments and suggestions regarding modification of the regulatory language to better mirror real world circumstances. First, rather than use the phrase "the same ownership," SOCMA suggests that EPA use the phrase "common ownership." Stock ownership interests within a corporate structure may vary in percentages, but still overall meet the core element of "common ownership" and hence both a common interest in mitigating liabilities and enhanced access to information and knowledge regarding the capabilities and performance of the related corporate entity.

Second, it is not realistic to expect that the type of certification sought will be provided by the ultimate "common owner" as proposed by EPA. In the specialty chemical manufacturing sector, this would require a different certification form to be completed for each new shipment, which would not be a realistic task for a high level corporate official to perform, particularly given the relatively lower volumes of secondary materials typically generated from batch manufacturing operations.

Third, as a legal matter, it is also not realistic to expect a parent corporation to execute this type of certification on behalf of two lower tier subsidiaries. One of the basic concepts behind the observance of corporate form and structure is to hold each individual corporate entity responsible for its own actions and to guard against steps that could connote piercing the corporate veil. Given the case law regarding interpretation of parent-subsidiary liability in this context, a parent corporation could not be expected to execute this type of certification.

Fortunately, there is also no regulatory or policy need for the parent corporation to play that role. In this exemption, as in the others that are proposed to be "under the control of the generator," the party that generates the secondary material and selects and controls the actions of the reclamation facility with respect to management of that secondary material is the party that must establish the relationship, assess the reclamation potential and make the commitment that the secondary material will be reclaimed. In the context of this exemption, the overall corporate connection between the two facilities provides a further tie in terms of access to information and knowledge about the facility that would conduct the reclamation and an overall common interest in assuring that the terms of the exemption are fulfilled. On this basis, it seems both more appropriate from a policy perspective and certainly more feasible as a practical matter, to place the burden for documenting and the corporate interrelationship on the company that is the generator of the secondary material.

V. Comments on Proposed Notification and Recordkeeping Provisions and Other Conditions under Consideration for the "In Control of the Generator" Exemptions

SOCMA and its members have carefully reviewed and considered the notification and recordkeeping requirements being proposed in connection with the "under the control of the generator" exemptions. Since over 70% of SOCMA's members are small businesses, the

additional time and burden associated with these categories of paperwork requirements can make a significant difference in the ability of SOCMA members to manage the administrative burden associated with these types of exemptions. The cumulative burden and impact can also be disproportionately greater in those circumstances where the reporting or notification obligations are triggered by individual shifts in the secondary materials under consideration, as these facilities typically have a diverse and varying product mix.

As discussed below, SOCMA supports a straight-forward one-time notification requirement that confirms that a facility will be managing materials under the "under the control of the generator" exemptions. No additional information is needed for regulatory purposes, and SOCMA strongly opposes the various regulatory options being considered by EPA for collection of information that would be "useful" for policy or informational purposes that are separate from the Agency's regulatory compliance and enforcement activities under this program.

With respect to recordkeeping, SOCMA recognizes that generators will continue to bear the burden of demonstrating that materials qualify for an exemption and is pleased that EPA intends that generators can rely primarily on ordinary business records for documentation of the "under the control of the generator" exemptions.

A. SOCMA Supports a One-Time Notification Requirement

In the preamble to the Proposed Rule, EPA discusses and solicits input on what type of notification should be part of a recycling exemption. SOCMA believes that each facility that generates secondary materials and plans to recycle them under the proposed exemption should be required to file a one-time notification with EPA or the relevant state. The fact that a facility has filed for such an exemption would then become part of the basic databases that compile regulatory information on regulated facilities. This information would put regulators on notice of the intent to manage materials under this exemption and would also allow receiving facilities to confirm that the generating facility has properly filed the notification required to qualify for the exemption.

In addition, SOCMA supports the filing of a one-time notification by facilities that intend to receive secondary materials under the proposed exemption. This notification will again enable EPA and the states to identify these facilities in general databases and be positioned to consider whether these materials are properly handled by the receiving facility. This information would also provide another reference point for generators to confirm the receiving facility's intent to recycle secondary materials in accordance with the terms of the exemption.

SOCMA does not, however, consider it necessary for either of these notifications to contain information on the estimated annual volume of the material that is expected to be excluded or the types of materials expected to be excluded. In this regard, SOCMA notes that the Proposed Rule currently states that the initial notification would require information on "the type of material that that will be managed according to this exclusion." Proposed Section 260.42. However, neither the Proposed Rule nor the preamble provides any elaboration on what is intended by that phrase.

There is no valid regulatory purpose served by requiring this information, and the generator's initial projection of the types of materials may well need to be a very soft

"guesstimate." This is particularly true in the context of the specialty batch chemical manufacturing sector due to the multiple and varying product lines, that in turn result in a varying and unpredictable sequence of secondary materials generated by those varying production operations.

SOCMA also urges the Agency to recognize that it is equally inappropriate to consider requiring the generating facility to disclose projected volumes to be shipped to particular manufacturers. In the highly competitive specialty chemical manufacturing industry, information on manufacturing relationships and the types of products produced is closely guarded and is often subject to a contractual confidentiality obligation. Further, collecting information on volumes or even on types of materials must be recognized as an inappropriate request for public disclosure of commercially sensitive information. Given that the primary purpose of the notification is to identify the facilities that plan to rely on the exemption, collection of information on types or volumes of materials serves no legitimate regulatory purpose in this context.

For these same reasons, SOCMA opposes any obligation to update information on the type of waste after submission of the initial notification. Under the Proposed Rule, a facility relying on the exemption would be required to submit a revised notice in the event of "a change in the type of material generated."

Overall, SOCMA has three key concerns regarding any notification or reporting requirement that is triggered solely and automatically as a result of a change in the materials to be handled under the exemption. First, either of these requirements would place an unjustified and disproportionate burden on specialty batch chemical manufacturers. As discussed ad nausea, specialty batch chemical manufacturers routinely make multiple products at a time in small batches and have a product mix that changes frequently in response to varying customer demands. The secondary materials generated necessarily change as well. There is no benefit or value to requiring either multiple notifications to reflect these various operational changes or detailed annual reports that track in detail the management of individual exempt recycling transactions. EPA provides no specific rationale for how this information is necessary or even appropriate from an administrative perspective.

Second, any requirement to submit this detailed information on each secondary material stream either as it is generated (revised notifications) or in an annual report is inconsistent with the status of these streams as secondary materials that are exempt from regulation as solid waste. SOCMA recognizes and accepts the appropriateness and the value of a submission that identifies the facilities intending to rely upon the exemption; however, this level of detail and frequency of filings in a "notification" requirement cannot be justified. EPA has correctly recognized in other contexts the need to reduce paperwork burdens established under the RCRA program. It would be a bizarre and unjustifiable outcome if the result of claiming an exemption from classification as "solid waste" were the triggering of a level of paperwork requirements that actually exceeded those presently required for off-site hazardous waste shipments. SOCMA also does not believe that EPA has the authority under RCRA to require this level of reporting with respect to the ongoing management of secondary materials that are exempt from hazardous waste regulation. In numerous contexts in the course of the RCRA program, EPA has repeatedly confirmed that it does not have jurisdiction over ongoing recycling activities under RCRA.

Third, specialty batch chemical manufacturers would face a true dilemma if such filings were a condition of qualifying for an exemption. In many instances, confidentiality agreements with their customers would preclude their being able to provide the level of detail discussed in the preamble. Hence, they would have to forgo the recycling opportunity due to an inability to fulfill an unrelated and unnecessary paperwork requirement. Even in instances where they are not affirmatively bound by a confidentiality agreement, the highly competitive nature of the specialty batch chemical manufacturing industry is likely to cause companies to conclude that it is preferable to forgo the recycling opportunity than to publicly make available to their competitors highly sensitive information that effectively identifies their routine products, frequency and level of production, customer relationships, as well as new product lines.

As to frequency of routine notifications, SOCMA strongly agrees with EPA that an initial one-time notification should suffice. In this regard, SOCMA notes that EPA has similarly concluded in other exemptions, such as the comparable fuels exemption, that no more than one-time notification is necessary or productive.[9] Requiring ongoing notification on an annual basis is neither necessary nor appropriate, as it would not provide regulators or the regulated community with any additional information. Perhaps all that would be accomplished would be the creation of an ongoing paperwork burden for both regulators and the regulated community.

SOCMA and its members have also discussed EPA's request for comment on the potential use of Form 8700-12 for this initial notification requirement. SOCMA strongly supports this approach, as it would establish a uniform basis for collection of this information and would also enable EPA and the states to enter this information on a the RCRAInfo data management system, so that it would become readily available and would not be submitted on a form that would end up collecting dust in a file cabinet. The regulated community is already familiar with this form and will have filed it out with most of the required information already, which will significantly reduce the incremental recordkeeping burden associated with this requirement. The form is available on-line and can be filled out on-line as well. SOCMA would support electronic submission of this information as well.

SOCMA recommends that EPA modify the form by simply adding a box to be checked by a facility that would indicate that the facility is relying on one of the "under the control of the generator" exemptions for generation and management of excluded secondary materials. The notification requirement under this regulation should not request any specific information about the excluded materials and should focus only the initial information and updates needed to correctly identify the facility, the site owner and the site operator.

While EPA has not suggested using this approach, SOCMA would like to underscore its position that it is important for these exclusions to be self-implementing, i.e., to become effective without need for any specific approval or response from the regulatory agency. Under the current RCRA statutory scheme, no overseeing agency notification, review or approval is required prior to an exclusion becoming effective. Rather, if operating under a current recycling exclusion, such as the closed loop recycling exclusion, facilities need only maintain documentation showing that only tank storage was involved and the entire process was

[9] See 40 C.F.R. §§ 261.4(a)(16), 261.38(c)(1)(A). See preamble discussion of one-time notification requirement at 63 Fed. Reg. 33823, 33797-98 (June 19, 1998). EPA similarly used the one-time notification requirement in the exemption for facilities engaged in recycling various wood preserving streams. 40 C.F.R. § 261.4(a)(9).

closed by being entirely connected with pipes or other comparable closed conveyance. This self-implementing approach should continue to be used.

B. SOCMA Supports Reliance on Basic Business Records for the "Under the Control of the Generator" Exemptions, In Lieu of Further Reporting Requirements

As stated previously in prior SOCMA submissions regarding the Definition of Solid Waste, there is no need under the Proposed Rule to prescribe a new set of forms or to detail information required to be reported because, as is the case under the current regulations, the burden is on the facility to be able to demonstrate that material is legitimately recycled and that the terms of the exemption are met. For this reason, SOCMA strongly supports EPA's recognition that it is appropriate for facilities to be able to rely on basic business records to document compliance with the "under the control of the generator" exemptions in the Proposed Rule.

SOCMA believes that normal business records can and should be relied upon as the "appropriate documentation" for managing secondary materials that are recycled under the proposed exemptions. As EPA correctly notes, the current standard in Section 261.2(f) requires that facilities be able to demonstrate that exempt materials qualify for the exemption and confirms the appropriateness of reliance on regular business records for this purpose. SOCMA does not believe that EPA is warranted in altering that approach here or would be justified in establishing a new or different standard applicable only to those materials exempted pursuant to the "under the control of the generator" exemptions.

In the Proposed Rule, EPA implemented this approach and refrained from the establishment of additional paperwork or recordkeeping requirements. At the same time, EPA asked for comment on this issue:

> Nevertheless, in addition to the notification requirements discussed above, we are considering the option of requiring generators and reclaimers to keep on-site records relating to types of and volumes of materials they handle. For example, we are considering requiring generators of material subject to this exclusion to keep records of volumes generated, volumes reclaimed onsite, and volumes sent offsite, while requiring offsite reclaimers to keep records of shipments received and volumes actually recycled.

EPA indicated that it rejected this option, in part, based on its assessment of the potential burden it would create. As EPA recognized, these requirements would essentially fly in the face of the RCRA Burden Reduction Initiative undertaken specifically to eliminate unnecessary or duplicative RCRA reporting and recordkeeping requirements.

SOCMA strongly urges EPA to continue to refrain from imposing any additional paperwork or recordkeeping burdens as conditions to the proposed exemptions. The primary thrust of the Office of Solid Waste Burden Reduction Project was to provide relief from the

cumulative burden of the paperwork already required under RCRA.[10] It certainly makes sense for the Agency to avoid creation of further paperwork requirements in connection with new regulatory provisions as well. Given that over 70% of SOCMA's members qualify as "small businesses" that may have limited staff or resources, the burden of additional paperwork is all the more difficult to meet. Further, the cumulative impact of these types of requirements is magnified for the specialty batch chemical manufacturing industry due to the multiple and shifting product and secondary materials streams resulting from individual batch production campaigns.

In this regard, SOCMA commends EPA for effectively recognizing that the recordkeeping and paperwork inherent in ordinary business and commercial practices provides an appropriate basis for identifying and tracking the management of secondary materials. Imposition of separate "RCRA" records would be duplicative and redundant. Standard business records, along with DOT shipping papers, will identify the materials being generated and shipped, as well as the recipient of the material being shipped. Business records (such as purchase orders and contracts) will also document the type of materials, the exchange of funds associated with the transaction, and the basic nature of the transaction.[11] In today's world, companies carefully track and document the disposition of the materials that leave their facilities.

As a final point, SOCMA notes that the imposition of any significant paperwork conditions is inconsistent with the "exempt" status of secondary materials that are recycled without being discarded. The preamble to the Proposed Rule does not provide any rationale for asserting that the imposition of the equivalent of "hazardous waste" recordkeeping requirements could be an appropriate prerequisite for qualifying for "exempt" recognition from the definition of solid wastes. Accordingly, SOCMA urges EPA, for both legal and policy reasons, not to pursue any additional recordkeeping requirements for materials that are recycled in accordance with an exemption. By conditioning the exemption on reasonable documentation and management standards, EPA has increased the likelihood that the exemption will be a viable option and consequently have the desired effect of promoting recycling.

C. SOCMA Opposes Any Use of Regulatory Reporting Obligations To Obtain Supplemental Information Sought for General Policy or Agency Performance Assessment Purposes

As discussed previously in these comments and in prior submissions, SOCMA is seriously concerned about the aggregate impact of paperwork requirements on its members overall and on its smaller members in particularly. For this reason, SOCMA opposes the imposition of unnecessary paperwork burdens and is concerned about the disproportionate impact of notice and recordkeeping requirements on its members and on the specialty batch chemical manufacturing sector in general.

Consequently, SOCMA is extremely concerned about EPA's interest in using this rule to collect "useful" information not immediately needed to assure and maintain regulatory compliance. By way of background, in the preamble to the Proposed Rule, EPA references the

[10] See 64 Fed. Reg. 32859 (June 18, 1999). SOCMA's perspective on the impact of unnecessary recordkeeping and reporting requirements on its members is addressed at greater length in its comments on the Office of Solid Waste Burden Reduction Project, dated Sept. 17, 1999, Docket No. F-1999-IBRA-FFFFF.

various "performance results "and "program assessment" evaluations that now apply to EPA as an agency. With respect to this rulemaking, EPA comments:

> In particular, measurement of the performance outcomes for this supplemental proposal will enable EPA to evaluate actual effectiveness with regard to encouraging industrial recycling, affecting future industrial recycling trends, and targeting possible future regulatory and non-regulatory initiatives directed at furthering safe and beneficial industry recycling practices. (72 Fed. Reg. at 14207.)

Thus, EPA does not seek to collect this additional information for any purpose related to the compliance of facilities with the elements of the RCRA regulatory program or with the terms of the exemptions. EPA explains further:

> We are also interested in measuring the extent to which industrial recycling that is affected by today's supplemental proposal occurs onsite or offsite, and the extent to which small quantity and large quantity hazardous waste generators (i.e., SQGs and LQGs) are able to take advantage of such an exclusion. Such information on the actual outcomes of these regulatory changes could enable the Agency to measure, rather than estimate, the actual cost savings benefits to industries affected by the regulatory changes, as well as to measure environmental benefits (e.g., annual quantities of specific materials conserved, avoided raw material inputs, reduced pressure on landfill capacity, water and energy conserved). (Id.)

While SOCMA recognizes the potential interest in obtaining this information and conducting such an analysis, this purpose again has no direct relationship to the regulatory reporting and compliance objectives at issue.

Overall, SOCMA considers it extremely important that EPA impose only the minimum regulatory reporting obligations necessary in connection with a particular regulatory mandate. SOCMA has an obligation to represent its members effectively, and its smaller members simply do not have the manpower or other resources to allocate to other than core regulatory compliance matters.

Further, it would be particularly unfair in this instance to impose those burdens on the very companies that have been desperately advocating for relief from regulatory burdens on their business operations. After having been told that their operations do not involve discard and hence would no longer be classified as involving generation or management of hazardous waste, SOCMA members would now be told that the price of finally obtaining relief from this overly broad set of regulations is a new set of compliance obligations and new paperwork and reporting requirements to provide information to EPA to be used for other purposes and programs. It is essential that the recordkeeping and paperwork burdens of being "exempt" not overwhelm the smaller companies and facilities, or the consequence will be that smaller companies and facilities choose not to pursue these exempt recycling activities.

Nor does it alter or decrease the overall regulatory burden or impact for EPA to seek to collect this information through other mechanisms, such as TRI or BRS reporting. The impact on the regulated community is still there. SOCMA is also concerned that EPA may not have clear sense of direction on the specific data that it is most helpful or relevant to meet its goals. In this regard, SOCMA believes that it is particularly important and helpful for EPA to have to collect such information through an activity, such as a survey, that would be subject to OMB comment and approval in accordance with the provisions of the Paperwork Reduction Act.

Overall, SOCMA is very supportive of and shares the Agency's interest in promoting increased recycling and resource recovery. However, adding long-standing, broad regulatory reporting obligations as part of this rulemaking program is not an effective approach to accomplish this goal. SOCMA would, however, be willing to partner with the Agency to seek additional information from its members regarding the impact of the Proposed Rule and other potential recycling initiatives.

In order to avoid recreating the situation identified in the RCRA Burden Reduction program (i.e., years of paperwork records and reporting, without any actual use of the information), it is essential that an honest assessment be made upfront of whether and how the information will be used and to then balance any information need against both the burden created and the exempt status of the material at issue. In addition, the collection of this information must proceed on a legally sound footing, not unduly burden participants or even forestall potential participants from exempt recycling activities.

It would be better for EPA and the states to use their general information gathering authority to obtain information specifically developed with reference to ongoing regulatory initiatives. In addition, SOCMA and its members would willingly partner with EPA and the states in various programs to assess and evaluate recycling activities. SOCMA has a number of new initiatives that are relevant to the further areas of interest to EPA.

D. SOCMA Does Not Consider Any Additional Requirements to Be Necessary or Appropriate for the "Under Control of the Generator" Exemptions

In the preamble to the Proposed Rule, EPA reviews its bases for concluding that the proposed terms of the "under control of the generator" provisions assure that no discard will occur and that, in the event of any spill, the secondary materials will either be immediately cleaned up or appropriately managed under the hazardous waste regulations.

SOCMA agrees with EPA's assessment that the proposed exemptions put forward as "under the control of the generator" effectively assure that the parties claiming the exemptions will be obligated to manage the secondary materials as valuable secondary materials and to actually reclaim them in an appropriate time frame. The current conditions and overlay of the hazardous waste regulations also assure that the secondary materials will not be discarded in the ordinary course. The same types of containers and vessels that are used to store and process other manufacturing materials will be used for these materials as well. The materials will be subject to DOT hazardous materials shipping requirements and thus will be shipped in appropriate containers with the necessary documentation.

Any unduly extended storage of these materials pending reclamation or reuse is effectively precluded by the speculative accumulation provision. The legitimate reclamation

requirement also serves to substantiate the type of recycling or reuse activity that is pursued. In any event, in the real world, the generator would only rely upon these exemptions where the generator has made an economic assessment that these secondary materials have sufficient value to warrant reclamation and that continued disposal of the materials as waste is not desirable.

As EPA discusses in the preamble, in any circumstance in which the secondary material is spilled or cannot be reclaimed as intended, the exemption is no longer met and the generator again is subject to the full range of the hazardous waste generator obligations. Any spill would have to be cleaned up immediately or managed as hazardous waste. An unforeseen change in circumstance that would preclude timely reclamation would also mean that the terms of the exemption were not met and that the materials would be considered hazardous waste and would have to be managed as such.

While EPA appropriately concluded that the existing provisions adequately assure that no discard will occur under the terms of the "under the control of the generator" exemptions, EPA nonetheless solicited comment on whether some additional conditions should be considered:

> Our analysis has led us to conclude that discard has not occurred and releases are highly unlikely when hazardous secondary materials are generated and reclaimed under these circumstances except possibly when such materials are managed in land-based units. Nevertheless, we are requesting comment on other points of view. An example of such conditions would be recordkeeping requirements, such as those proposed today in 40 CFR 261.4(a)(24)). Another example would be appropriate limitations on storage, such as performance-based standards designed to address releases to the environment. The Agency solicits comment on whether additional management requirements are appropriate for hazardous secondary materials that are generated and reclaimed under the control of the generator. If commenters believe such additional requirements are 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. (72 Fed. Reg. at 14187.)

As SOCMA has noted previously, the addition of these sorts of unnecessary conditions to the "under the control of the generator" exemptions substantially decreases the willingness and ability of small facilities and small companies to implement the exemptions. SOCMA has fully addressed its concerns regarding additional reporting and paperwork burdens in the preceding section. The extensive and complicated due diligence provisions set out under Section 261.4(a)(24) would be inappropriate and unnecessary to document at that level of detail in the context of the "generator control" scenarios that have been proposed.

The application of "performance based" standards to prevent releases is not needed or appropriate for the management of valuable secondary materials covered by the "under the control of the generator" exemptions. These materials will be stored and managed in the

same manner and containers as other raw materials or products. Further, given that there is no element of discard associated with these materials, there is no legal basis for imposing extra management or storage conditions on them.

VI. Materials that are Generated and Transferred to Another Person or Company for Reclamation under Specific Conditions

SOCMA generally supports the proposed exemption from the definition of solid waste for hazardous secondary materials that are generated and subsequently transferred to another company for reclamation. As discussed below, however, SOCMA considers it essential that the terms and conditions for this exemption be clearly focused on the regulatory requirement of assuring that the secondary materials are recycled such that they do not constitute "solid waste." SOCMA cautions against overloading this exemption with either overly prescriptive requirements or extraneous conditions that are not essential to this regulatory standard.

A. Comments on Scope of "Due Diligence" and "Reasonable Efforts" Requirements

The Proposed Rule would require generators to make "reasonable efforts" to ensure that their materials are safely and legitimately recycled, before shipping or otherwise transferring them to a reclamation facility. SOCMA supports EPA's concept of reasonable efforts but does not believe that it warrants codification. SOCMA cautions EPA that this provision is redundant given RCRA's self-implementation provisions and puts undue burden on the generator to take advantage of the beneficial reuse opportunity.

As evidenced by EPA's own studies, generators and recyclers use a variety of mechanisms to ensure proper management of materials given the regulatory and legal liabilities they face. Under the Proposed Rule's options, EPA proposes to include within this new "reasonable efforts" standard, a list of six questions, some with multiple components that a generator would need to address with respect to the reclamation facility before transferring materials to that facility for reclamation. Given current RCRA provisions as well as the legitimacy criteria provisions of the Proposed Rule, SOCMA believes these are redundant and overly burdensome. SOCMA agrees that at the very least these provisions should not apply when materials are transferred to a RCRA permitted facility, but believes they are unwarranted for other facilities as well.

If EPA chooses to finalize the Proposed Rule with a "reasonable efforts" standard, the identified actions should not be prescriptive or exclusive but should instead serve as effectively a "safe harbor" list of actions that EPA would consider to constitute a "reasonable effort."

B. Comments on Financial Assurance Options for Reclaimers

SOCMA does not support imposition of a requirement for full RCRA Subpart H financial assurance for previously unpermitted sites that would receive and recycle exempt secondary materials under the 3rd party reclamation exclusion. EPA's own survey of recycling damage cases does not substantiate any need for such a draconian measure.

Full RCRA Subpart H financial assurance requirements would be impractical and inhibit many qualified sites from becoming third party reclaimers. There is no reason for these sites, which more than likely will not be full time waste management sites, to be required to have the same type of financial assurance as a permitted TSDF. SOCMA believes the majority of the sites that may pursue 3rd party reclamation activities are already chemical manufacturers and will likely have some type of sudden spill and pollution prevention assurance in the range of $1-$5 million dollars. As the majority of these new 3rd party reclaimers will not be full time TSDF waste recycling sites and will likely be dealing in intermittent and small volumes, SOCMA believes that this type of more general demonstration of coverage for sudden and accidental releases is more appropriate. Any higher level of assurance or more complicated regulatory requirement will simply limit the ability and willingness of qualified facilities to undertake legitimate recycling of exempt secondary materials.

VII. Comments on Proposed Codification of "Legitimate Recycling" "Factors"

As part of the Proposed Rule, EPA is considering codifying four proposed "factors" for identifying legitimate recycling, with the intent that these factors would then be considered for evaluating all recycling of exempt materials. SOCMA fully supports the use of legitimacy criteria to distinguish between "sham" and legitimate recycling and agrees with EPA's proposal that only two of the four criteria should be codified as mandatory. SOCMA's comments on the overall approach to codification and application of these "factors" are set out below.

As discussed in the preamble to the Proposed Rule, the development of EPA's current understanding of how to identify "legitimate recycling" has evolved over time. There presently is no "bright-line" litmus test. Instead, EPA's understanding is laid out in a series of guidance and discussions. Based on the experience of members trying to evaluate the full range of the legitimacy guidance and factors, SOCMA is concerned about the difficulty that small companies and businesses would have in the event that EPA changed course and decided to make all four of the factors mandatory.

Due to the regulatory implications of an inaccurate assessment, SOCMA members would be much more likely to forgo new recycling opportunities unless they were overwhelmingly certain about how the assessment would come out under the regulatory language. Small companies and facilities simply will not have the time or resources to conduct investigations of the regulatory background and interpretations that might confirm that a situation that is not "spot on" could still be undertaken in the event that all four of the factors were to become mandatory.

This situation sounds oddly similar to the current dilemmas and difficulties posed by efforts to understand and apply the current definition of solid waste provisions. Yet, there is one profound difference. The lore and wisdom for the redefinition came only after and as a result of the codification of that language. Here, the situation is the reverse. The guidance and concepts are substantially developed and have been able to be applied in an effective manner. Altering those concepts and trying to codify some regulatory short-hand that is imprecise and will trigger new rounds of interpretation and assessment is not productive. In this regard,

SOCMA notes that its members are most concerned about having to interpret the two additional criteria that EPA does not propose to make "mandatory:" Hence, SOCMA urges EPA not to alter this aspect of the current proposal.

In addition, SOCMA considers it essential that EPA explicitly state as part of the regulatory language, which would then be a visible component and reference point under state programs as well, that legitimacy determinations are to be case-specific assessments that involve a weighing of a range of factors and an overall evaluation of whether the activity is legitimate recycling. Thus, in the event that the factors are codified, SOCMA considers it essential that EPA confirm that the criteria are not meant to be applied in a formulaic fashion and that overall assessment is to be made of the legitimacy of the activity.

For this reason, in past comments, SOCMA strongly recommended that an additional listing for "Other relevant factors" be added to the criteria. SOCMA recommends that this language be incorporated into the Proposed Rule.. This will allow both regulators and the regulated community latitude to consider and give weight to circumstances and factors not adequately captured by the codified language. This is particularly important in light of the mutual goal of expanding the quantities and types of recycling that occurs. New and innovative recycling activities may be developed that are legitimate but whose attributes are not fully reflected by the particular language that is codified. The ability to consider "other relevant factors" will provide the flexibility needed to make an overall assessment of legitimacy, in the manner most effective for potentially changing recycling practices. Absent such language, regulators may not feel authorized to consider the additional information that companies may be able to provide to demonstrate the legitimacy of emerging recycling opportunities.

Overall, assuming that appropriate additional language is added regarding the weighing and balance of the criteria and the need for case-by-case assessments, SOCMA supports the codification of the two factors that EPA proposed to make mandatory: 1) that the material provides a useful contribution to recycling process or product of process, and 2) the product of recycling is valuable. These two criteria should be relevant in all circumstances and would be evaluated in advance in the ordinary course before industry would embark on any recycling or reclamation activity.

However, in response to the issue of the "economics" of legitimate recycling, SOCMA considers it important the EPA further clarify the need for a broad approach to assessing relative economics of different activities and costs. By way of example, absent a broader approach, SOCMA members have identified a number of scenarios in which application of an "economic assessment of the recycling transaction" could preclude implementation of otherwise legitimate recycling activities. In some circumstances, for a variety of factors, a generator of a secondary material will pay a recycler to accept and recycle the secondary material. Usually, this makes sense where the cost of the recycling is less than the cost of disposal to the generator, and the generator (often due to the batch nature of its production) is not able to produce a sufficient quantity on a regular basis. The contribution of the secondary material to the recycling activity is still just as valuable, but the activity is not run on a scale that is profitable.

In other instances, the generator pays the recycler or receives only a nominal sum. This can occur because the cost of the recycling activity to the recycler detracts from the "profit"

available to pay the generator. The cost for the generator of that stream might also include the cost of transportation, thus further defraying the overall "profit" of the recycling activity to the generator. In this regard, it is worth noting that transportation costs are comparatively higher for smaller companies and smaller facilities, both due to the diverse small quantities to be shipped and the need for more frequent shipments due to storage space limitations. These types of factors, again, have no bearing on the "value" that the secondary material contributes to the recycling activity or resulting product, as the case may be.

For SOCMA members, there may be a range of considerations regarding economics that might not be present in other industry sectors. As noted above, the costs and opportunities for management of smaller volumes may be different. On the other hand, the ability of a member to take advantage of a shift in production and make productive use of manufacturing equipment for a reclamation activity that might otherwise be idle would need to be considered. The economics may also vary over time, depending on shifts in prices for different specialty chemicals and intermediates, and shifts in costs such as transportation, where surcharges are presently having a very significant impact.

Thus, SOCMA considers it important that EPA develop clearer guidance and information on the flexibility needed in assessing the "economics" of a particular recycling transaction and believes that the addition of regulatory language that underscores the need for an overall assessment and weighing of factors is important, as is additional language that allows for consideration of other relevant factors beyond the codified language.

VIII. Materials that EPA Deems Nonwaste through a Case-By-Case Petition Process

SOCMA is pleased that EPA has provided a defined petition mechanism as a back-up to address circumstances where the regulated community needs a clearly considered and defined ruling on the "nonwaste" status of materials in a particular recycling scenario. However, SOCMA would be concerned if this elaborate petition process, which is notably lacking in any timeframes for action, were to become the routine default mechanism for assessing the scope of the proposed exemptions. SOCMA believes that only unusual cases or circumstances where the stakes are particularly high should need to be addressed through the petition process.

In particular, SOCMA members would be concerned if the addition of this mechanism were viewed by EPA and States as requiring all requests for guidance and determinations to be made through this process. Particularly in the case of the small volumes and sporadic generation patterns that are typical within the specialty batch chemical manufacturing sector, this type of elaborate petition alternative would not provide effective relief. It is essential that SOCMA members be able to work directly and effectively with their state regulators to make timely evaluations of recycling opportunities. In this regard, SOCMA is concerned that the preamble discussion of state determinations makes it seems as though a state decision made outside of the state petition process would need formal EPA approval. SOCMA strongly urges EPA to clarify that states can and should continue to provide direct guidance and determinations to the regulated community outside the petition process as well.

SOCMA also recommends that the petition process require that EPA or a state establish and be required to meet a schedule for consideration of and action on petitions. SOCMA understands the difficulty that overburdened agencies have in managing these petitions,

but many members have had the experience of never receiving a response or even a timeline for further consideration of these types of requests. At a minimum, EPA or the State should be required to establish a schedule and time line for action on individual petitions. This may be an extended schedule due to limited regulatory resources, but this information will at least enable the petitioner to have some sense of when or whether it will receive the assessment needed and plan production activities and make business decisions accordingly.

IX. Additional Issues for Comment

While the Proposed Rule presents many additional issues and areas for comment, on behalf of its members, SOCMA has had to focus its resources and efforts to the areas likely to have the greatest impact. In this regard, however, SOCMA would like to offer its comments on the two additional points discussed below.

A. SOCMA Supports the Proposal to Continue to Maintain Current Exclusions

In the preamble to the Proposed Rule, EPA discussed the extent to which it believed it would be appropriate to eliminate or modify certain existing exemptions from the definition of solid waste in conjunction with promulgation of a final rule. SOCMA strongly opposes this step and strongly urges EPA to maintain intact all of the current exemptions from the definition of solid waste.

First, SOCMA believes that EPA has not accurately evaluated the overlap (or lack thereof) between a number of the current exemptions and the proposed exemption. Even if EPA believes that a streamlining of the regulations ultimately is desirable to remove redundant provisions, this step should not be taken until the proposed exemption has been promulgated and its scope fully understood following several years of implementation.

Second, SOCMA is extremely concerned that EPA has not considered the ramifications of removing current exemptions at the authorized state level. SOCMA is concerned that companies will have a patchwork quilt of implementation stages as various states opt to adopt the additional exemption. However, not all states necessarily will proceed to adopt the proposed exemption, and they are not required to do so. Recycling partners thus could be left with inconsistent sets of exemptions depending upon the states in which they are located. Retaining the existing exemptions intact will at least preserve the status quo for the regulated community.

Third, for smaller companies with limited resources, it may be more efficient to continue to rely on existing exemption that have been effective than to have to work through whether and how the currently exempt circumstances are affected by the proposed exemption.

B. Uniform Adoption by the States Is Critical to the Goal of Increased Recycling

In prior submissions, SOCMA has specifically advocated for the establishment of a national exemption that would enable small companies that engage in toll manufacturing in the specialty batch chemical manufacturing sector to recycle secondary materials from those

operations.[12] SOCMA recognizes that for this proposal to become effective, authorized states must act to adopt the rule after its promulgation by EPA.

SOCMA commends EPA for proposing straight-forward language for the under the "under the control of the generator" exemptions that should be easy for regulators to understand and evaluate. The notification provisions, particularly with use of Form 8700-12, will effectively provide a national basis for identifying facilities that are relying upon these exemptions. The detailed business records that these facilities maintain in the ordinary course can be made readily available to authorized states, as needed. More importantly, these exemptions are structured so that the "generator" continues to have both responsibility and liability for management of the secondary materials and will immediately again become subject to the hazardous waste regulatory program in the event that the secondary materials are not appropriately recycled in accordance with the terms of the exemptions.

SOCMA urges states to adopt these exemptions as promulgated by EPA and to avoid adding on additional conditions or additional reporting or recordkeeping obligations that would then vary from state to state. Given the small volumes involved in most of these recycling opportunities, the burden of trying to evaluate multiple state programs for interstate shipment and recycling, coupled with the significant liability risks of inadvertently not complying with additional state-specific requirements, can deter SOCMA members from pursuing these recycling opportunities.

Uniform adoption by the states of the EPA exemptions will best serve the common goal of promoting additional resource recovery and recycling under the carefully crafted terms of the "under the control of the generator" exemptions.

CONCLUSION

SOCMA applauds the initiative, time and effort devoted by EPA to the development of the various exemptions and options set out in the Proposed Rule. SOCMA members have confirmed that the various "under the control of the generator" exemptions will provide significant new opportunities for recycling and reuse of valuable secondary materials. SOCMA is particularly pleased that the Proposed Rule contains a tailored toll manufacturing exemption that recognizes the effectiveness of toll manufacturing contract terms as a legitimate construct for establishing that secondary materials generated with the intent of being recycled are not "discarded." SOCMA members similarly anticipate being able to pursue additional legitimate recycling opportunities under the terms of the on-site and intra-company recycling provisions.

SOCMA and its members also support EPA's development of a more effective exemption to promote off-site recycling of valuable secondary materials under circumstances that do not entail discard. SOCMA urges EPA to continue to balance the feasibility of implementation of this provision against the establishment of too many prescriptive terms and conditions that may place this exemption effectively out of the reach of smaller companies and smaller facilities.

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[12] See SOCMA Comments, dated February 25, 2004, OSWER Docket No. RCRA 2002-0031, at pp. 37-38.

Overall, while SOCMA has detailed comments and concerns about various aspects of the Proposed Rule, SOCMA commends EPA for its development and proposal of effective new exemptions that will serve as effective reforms to some significant elements of the Definition of Solid Waste. SOCMA urges EPA to move quickly to final promulgation so that SOCMA members are finally positioned to pursue these additional recycling and resource recovery opportunities.