



Environmental Technology Council

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To the Docket Clerk:

The Environmental Technology Council (ETC) submits these comments on the supplemental proposed rule entitled "Revisions to the Definition of Solid Waste." 72 Fed. Reg. 14,172 (March 26, 2007).

Statement of Interest

The ETC is a national trade association of commercial firms that provide technologies and services to customers for the treatment, recycling, and secure disposal of industrial and hazardous wastes. ETC member companies own and operate solvent recycling facilities, oil recovery facilities, metals reclamation units, airport de-icer (glycol) recycling plants, photographic chemical and film recovery facilities, wastewater treatment plants, collection and transfer stations, landfills, incinerators, industrial furnaces, and a variety of other types of facilities for the management of industrial and hazardous wastes.

ETC members have made the investment necessary to obtain RCRA permits and have worked with their state agencies and EPA in completing effective public participation programs to support the permitting process. These companies have highly trained employees and advanced environmental management systems to comply with the strict standards of RCRA and all other environmental laws. In short, ETC firms comprise the commercial hazardous waste recycling industry, and they provide professional, safe, and environmentally protective recycling services to customers throughout the United States. ETC member companies will be directly regulated and substantially affected by the supplemental proposed rule upon promulgation by EPA.

ETC's comments follow the format of the proposed rule, with citations to the Federal Register as appropriate.

ETC Comments on Supplemental Proposed Rule

I. Exclusion for Generators That Legitimately Reclaim Their Own Hazardous Secondary Materials, 72 FR 14184-86, 14173-74

A. Conditions Necessary To Exclude Materials From RCRA Must Be Adequate To Protect Human Health And The Environment

EPA proposes to exclude from the RCRA definition of solid waste certain hazardous secondary materials – spent materials, listed sludges, and listed byproducts – that are legitimately reclaimed under the control of the generator. This exclusion would be subject to certain conditions; *e.g.*, legitimate recycling, no speculative accumulation, and a one-time notification. A material that did not meet these conditions would be considered discarded, and therefore a solid and hazardous waste.

The conditions for the exclusion are critical. EPA cannot lawfully determine that hazardous materials are not discarded prior to recycling if the conditions are not adequate to protect human health and the environment. *Safe Food and Fertilizer v. EPA*, 350 F.3d 1263, 1268 (D.C. Cir. 2003) (court upheld EPA rule that excluded hazardous materials used to make zinc fertilizers, provided conditions were met that ensured the excluded materials would “not endanger human health or the environment.”). However, the minimal conditions in the proposal are not sufficient to protect against discard and must be strengthened.

For example, EPA proposes to codify only two of the four factors for determining legitimate recycling. The most important factor – that hazardous contaminants are not disposed by incorporation into the recycled product as “toxics along for the ride” – is merely a consideration, not an enforceable requirement for legitimate recycling. For materials handled in tanks and containers, EPA has proposed no standards whatever for protecting against releases that would constitute disposal, such as secondary containment or air emission controls. For materials managed in land-based units such as impoundments and waste piles, EPA has proposed only a vague standard that the units must “contain” the materials, rather than the industry practice of engineered liner systems and monitoring devices for discovering releases that constitute discard.

In the proposal, EPA considers that hazardous secondary materials destined for recycling are “under the control of the generator” in three specific circumstances:

- The material is generated and then reclaimed at the generator’s facility;
- The material is generated and reclaimed within the same company; or
- The material is generated and reclaimed pursuant to a written agreement between a tolling contractor and batch manufacturer.

In each of these circumstances, tailored conditions are necessary to prevent discard and adequately protect human health and the environment. We discuss each one in turn below.

B. Materials Generated And Reclaimed At The Generator's Facility

A generator that directly reuses a hazardous secondary material in its ongoing production process has not discarded that material. An example of direct reuse is a mineral processing operation that extracts lead from feedstock ores and then reclaims the slag, revert, or other secondary materials in a subsequent processing step. This fact pattern was addressed by the court in *Association of Battery Recyclers v. EPA* ("ABR"), 208 F.3d 1047 (D.C. Cir. 2000), which EPA relies on as a guidepost in the proposed rule.

However, EPA's proposal goes further than direct reuse, and would exclude materials that are no longer useful to the generator, that are accumulated and stored for potentially lengthy periods of time, and that are reclaimed in a recycling process that is not part of the generator's production activities. An example is a manufacturer that recycles F-listed spent solvents from equipment cleaning in a thermal distillation unit that is separate and distinct from its manufacturing operation. This generator is not directly reusing the solvent in its production process, but rather is collecting, storing, and processing a RCRA-listed spent solvent just like a commercial solvent recycler. This situation is similar to the reclamation of oil-bearing wastewaters at petroleum refineries, which the court held could be subject to RCRA jurisdiction. *American Petroleum Institute v. EPA* ("API II"), 216 F.3d 50 (D.C. Cir 2000).

The basic rationale for EPA's broad exclusion for generator on-site recycling is that: "[b]y maintaining control over, and potential liability for, the recycling process, the generator ensures that the materials are not discarded." 57 FR 14178, citing *ABR*, 208 F.3d at 1051. This rationale is reasonable when applied to a generator's direct reuse in production, as in the *ABR* case, especially because the generator is unlikely to reuse hazardous secondary materials in a manner that would contaminate its own production equipment and products. However, we are concerned that EPA is extending the principle too far. Mere control and potential liability are by no means sufficient to "ensure" that materials are not discarded, especially when the generator thereby avoids the cost of proper recycling or disposal. EPA's Damage Case Study¹ includes examples of generators that recycled their hazardous materials in ways that caused environmental harm, despite their potential liability, presumably to avoid proper disposal costs. Likewise, EPA's Market Forces Study² makes clear that firms with a low net worth that

¹ "An Assessment of Environmental Problems Associated With Recycling of Hazardous Secondary Materials," EPA-HQ-RCRA-2002-0031-0355. See 72 FR 14180-82.

² "A Study of the Potential Effects of Market Forces on the Management of Hazardous Secondary Materials Intended for Recycling," EPA-HQ-RCRA-2002-0031-0358.

recycle products with a low value are likely to have what the report calls “sub-optimal recycling outcomes.” We know these outcomes to be despoiled property, contaminated groundwater, and potential harm to human health.

In the Damage Case Study, EPA identified 208 damage cases that are post-RCRA and Superfund. This large number of damage cases justifies the need for management standards as further described below. In particular, the ETC is very concerned with the large number of damage cases related to over-accumulation and abandonment (33%) and damage cases related to mismanagement of recycling residuals (also 33%). 72 FR 14181 col 2. Furthermore, ETC comments to the 2003 proposed rule included 75 damage cases that occurred following the enactment of RCRA. Contrary to the views of some commenters, 72 FR 14179 col 1, all of these cases were recycling facilities that either overlapped the effective date of RCRA standards or occurred post-RCRA, with operations that continued into the late 1980’s and 1990’s, and several that were post 2000. The practices documented in these damage cases need to be addressed by protective management standards in the final rule.

EPA must make the exclusion for generators conditional on meeting standards that truly do ensure proper management and legitimate recycling. We recommend conditions that responsible generators are meeting today, as documented in EPA’s Good Practices Study.³ These conditions are (1) recordkeeping on the nature and quantity of the hazardous secondary materials and legitimate recycling; (2) performance-based standards for tanks and containers designed to prevent releases to the environment; and (3) engineered containment and monitoring systems for land-based units. *See* 72 FR 14187 (EPA request for comment on general provisions for generators).

Potential liability under Superfund or state laws is not sufficient in many cases to prevent or minimize the types of leaks and fugitive emissions that are addressed by good management practices.⁴ EPA is well aware that enforcement actions under these cleanup

³ “An Assessment of Current Good Practices for Recycling of Hazardous Secondary Materials,” EPA-HQ-RCRA-2002-0. With respect to the three studies cited above, EPA has solicited comment on “the policy and regulatory implications of the information in these studies.” 72 FR 14179.

⁴ Despite Superfund liability, the damage cases compiled by EPA show that generators still improperly managed their hazardous secondary materials. For example, the Standard Chlorine facility in Delaware (Appendix 2: Profiles of Damage Cases from Hazardous: Materials Recycling Operations, EPA-HQ-RCRA-2002-0031-0350, page 69) produced a variety of polychlorobenzenes products and stored byproducts that were intended for use as recycled feedstock. However, when the market turned and the byproducts were no longer of value, the improper storage led to significant contamination when the storage facilities collapsed. Nucor Steel improperly handled its electric arc furnace dust (K061) leading EPA to require clean up of contaminated groundwater. *Id.* at 229.

[Footnote cont’d...]

authorities require substantial resources and are generally targeted on significant contamination sites. In order to ensure general adherence to the good management practices that prevent routine discard via releases to the environment, and which are therefore the underpinning of the proposed exclusion, the conditional exclusion for generator on-site recycling must include these standards.

1. Notification and Recordkeeping

A one-time notification by the generator is critical to EPA and state oversight of the exclusion for generator on-site recycling. Today EPA does not have any database of generators that are recycling their hazardous wastes, and thus cannot ensure preventive management and legitimate recycling. Under EPA's proposal, a revised notice would also be required in the event of a change to the name, address, or EPA ID number of the generator. 72 FR 14187.

However, EPA mistakenly views this notification as a paperwork requirement, rather than a critical element of the conditional exclusion. The proposal states:

[T]his notification would not be a condition of the exclusion. Thus, failure to comply with the requirement would constitute a violation of RCRA, but would not affect the excluded status of the waste.

Id. EPA's timorous view is contrary to the statutory purpose of the notification and to all prior precedent. Section 3010 of RCRA, on which EPA partially relies, expressly provides that "[n]o identified or listed hazardous waste subject to this subchapter may be transported, treated, stored, or disposed of unless notification has been given as required under this subsection." 42 U.S.C. § 6930(a). Thus, under the normal application of section 3010, it is unlawful for a generator to manage hazardous waste unless as a condition to any management the generator submits the required notification. Failure to submit the notification is not merely a paperwork violation of RCRA, but is failure to satisfy a statutory prerequisite to lawful conduct. Consistent with this statutory scheme and Congressional intent, the generator notification of hazardous materials to be recycled – which are hazardous wastes if not properly recycled without discard – must be a

[Footnote 4 cont'd...]

Circle Smelting, a primary zinc smelter, deposited recyclable materials throughout the site, contaminating 21 million square feet of soil. *Id.* at 121. Continental Steel, a manufacturer of rods and wire products, mishandled its waste leading to contamination of chromium, cadmium, lead, and iron when impoundments that failed. *Id.* at 131. These are but a few relevant examples. As EPA noted in the study (page 9): "In any case, it should be noted that several of the on-site damage cases, including Standard Chlorine of Delaware and the Monsanto P4 facility were apparently among the most expensive cleanup sites that we documented [out of the 208 damage cases]."

condition to the exclusion. Failure to file the notification should mean that the generator has not lawfully qualified for the exclusion.

Otherwise EPA will create a perverse incentive for generators *not* to notify. A generator who submits the notification knows he will become subject to EPA and state oversight, but a generator who does not notify the regulatory authority gains the advantage of no government scrutiny, while merely running the risk – if discovered – of being cited for a RCRA violation. The cited violation and civil penalty assessment would likely be viewed as a cost of doing business, rather than as a necessary precondition to on-site recycling of hazardous secondary materials.

In addition to the notification, a simple recordkeeping condition is also necessary. 72 FR 14190 (request for comment on recordkeeping). In order to ensure that hazardous secondary materials are actually recycled, and to allow proper oversight by EPA and state agencies, the generator should maintain records that describe the type and quantity of materials, as well as confirmation that the materials were legitimately recycled. EPA need not prescribe any specific template for these records, or require that they be maintained in a particular format, such as paper or electronic. EPA's Good Practices Study shows that generators maintain these types of records as a routine business matter, so this recordkeeping condition would not impose any paperwork burden. In addition, generators who claim an exclusion must provide "appropriate documentation" pursuant to 40 CFR 261.2(f) in the event of a RCRA enforcement action, so this condition would clarify the type of records that are required. Without basic recordkeeping of this sort, EPA and state agencies will not have the records needed to oversee the proper implementation of this conditional exclusion.

We note that EPA has not specifically required that generators document their compliance with the legitimacy factors. The proposed regulation merely states that "[p]ersons who recycle" hazardous secondary materials "must be able to demonstrate that the recycling is legitimate" in accordance with the regulatory factors. Proposed 40 CFR 261.2(g), 72 FR 14216 col 1. The "ability" to demonstrate is quite different than actually demonstrating in records maintained at the facility, subject to oversight by EPA and states, that the generator's recycling is legitimate. In addition, interested members of the public, such as local citizens, cannot compel a company in their community to make such a demonstration. The company should be required to maintain the necessary documentation so that the public can request copies through the state freedom of information laws. While this demonstration should not be difficult or complex, EPA should specifically require in the final regulations that generators document their compliance with the legitimacy factors and maintain the documentation at the facility for inspection.

2. Container and Tank Management Standards

Proper storage of secondary materials is critically important. As the Damage Case Study notes: "Mismanagement of recyclable materials prior to their reclamation or reuse

was the most common cause of contamination at these sites (40%)” (page 8). EPA need not adopt the detailed tank and container standards that apply to RCRA-permitted hazardous waste facilities. Rather, we are convinced that performance-based standards will adequately ensure against discard of hazardous secondary materials during storage prior to recycling. These standards could be limited to the following:

Condition of containers and tanks. If the container or tank holding the hazardous secondary material is not in good condition (for example, it exhibits severe rusting or apparent structural defects) or it begins to leak, the generator should transfer the material to a container or tank that is in good condition, or manage the material in some other way that is protective.

Compatibility of materials. The generator must use a container or tank made of or lined with materials that are compatible and will not react with the hazardous secondary materials to be stored.

Secondary containment. The generator must design and operate a containment system for the storage of liquid materials, with a base that is sufficiently impervious to contain leaks, spills, and accumulated precipitation until the collected material is detected and removed; and with sufficient capacity to contain 10% of the volume of stored materials, or the volume of the largest container or tank, whichever is greater.

Inspections. At least weekly, the generator must inspect the storage areas looking for leaks and accumulated materials. The generator must remove any spilled or leaked materials and accumulated liquid from the containment system as promptly as is necessary to prevent overflow.

Air emission controls. The generator must manage the hazardous secondary materials placed in a container or tank according to the requirements of subparts AA, BB, and CC of 40 CFR part 264. The following control devices are permissible: thermal vapor incinerator, catalytic vapor incinerator, flame, boiler, process heater, condenser, and carbon absorption unit.

These minimal standards will not impose any significant burden on generators. The container and tank management controls, for example, are standard industry practice, including secondary containment for storage areas. The subpart AA-CC air emission controls only apply to hazardous materials with high VOC content, and new tank systems can be purchased with a manufacturer’s certification of compliance, while existing tanks can be certified by an engineering consulting firm.

3. Engineered Containment or Monitoring Systems for Land-Based Units

In a separate provision, 40 CFR 261.4(a)(23), EPA would extend the generator exclusion to secondary hazardous materials that are managed in land-based units such as

surface impoundments and waste piles. Even though EPA “recognize[s] that such management clearly presents a greater potential for releases to the environment than management in non-land-based units,” 72 FR 14186 col 3, the proposal would adopt only a vague and problematic performance standard that materials be “contained” in the unit. EPA states in the proposal:

We are not proposing that the units meet any particular design requirement or that the hazardous secondary materials in the unit be managed in a particular way. Rather, we are only proposing that the hazardous secondary material in the unit be “contained” and not released into the environment. [*Id.*]

EPA suggests that generators could use a number of methods, including inventory control and monitoring, to ensure that that hazardous secondary materials are contained in land-based units. This is an unrealistic suggestion. Inventory controls are unlikely to detect gradual but environmentally damaging leakage from these units. A larger concern is the release from the units of liquids such as contaminated rainwater that has percolated through the material. This contamination would not be accounted for by inventory controls. This is exactly what the design and operating criteria for land disposal and storage units is meant to prevent. Without a minimum set of technical standards designed to prevent rainwater or other liquids from coming in contact with the material (*e.g.*, a roof over the unit) or systems in place to detect and collect accumulated leach liquids, there are no assurances that undetected leaks from these units will not occur with the attendant damage to the environment.

In venturing to explain what “contain” means, EPA resorts to semantic gyrations that reveal how vague and unenforceable the standard will be in the real world. First, EPA admits that the standard “will necessarily be determined on a case-by-case basis.” *Id.* This means that generators will never be certain about their compliance, and state inspectors will have to make individual determinations at every generator site with a land-based unit. How will these inspectors be guided? EPA explains that hazardous secondary materials that leak from the unit will be considered hazardous wastes, “unless they are immediately cleaned up.” 72 FR 14187 col 1. EPA’s waffling leaves the inspector to figure out whether “immediately” means proximate in time to the release, or when discovered by the inspector, or within hours, days, or weeks, and whether “cleaned up” means separately from any contaminated media, or including all soil and groundwater contamination, and in a form that allows the intended recycling, or that requires disposal of some or all of the material. Rather than a bright line – material that is released into the environment from a land-based unit is discarded and a hazardous waste – EPA suggests an interpretation that can only lead to confusion and inconsistent enforcement.

Next, EPA explains that material in a land-based unit that is, in fact, leaking will still be covered by the exclusion, “unless the hazardous secondary material is not managed as a valuable product and as a result, a significant release from the unit occurs.” 72 FR 14186 col 3. So hazardous material in a leaky lagoon with a “significant” release

is a hazardous waste, but material in a leaky lagoon with a “non-significant” release is still excluded from RCRA, and presumably the very leaky lagoon is *per force* in violation of RCRA’s double-liner and groundwater monitoring requirements. Or if a “significant” release (whatever that is) is not enough, must the inspector also find that the hazardous material is not being “managed as a valuable product”? This judgment appears to call for knowledge of how valuable products are managed within the relevant industry sector, but it does beg the question why any self-respecting generator would keep valuable product in a leaking land-based unit. Moreover, this standard does not require any type of monitoring or detection of significant releases – a “don’t look, don’t tell” approach.⁵ The whole scheme strikes a reasonable person as absurdly unworkable.

For land-based units, EPA must adopt technology-based standards for containment and monitoring that are simple, clear, and enforceable as conditions to this exclusion. Again, the full panoply of RCRA standards is not necessary, but a condition that reflects good industry practice is greatly preferable to the vague “contain” performance standard, and is really the only reasonable approach. Flexibility to accommodate different industry sectors could be provided. For example, generators could meet a condition that allows either a liner containment system or a monitoring detection system. For most units, a single synthetic liner under a waste pile or lagoon would be a cost-effective and prudent control. For larger units such as impoundments in the mineral processing industry, or for units where the local geology and meteorology are suitable, a monitoring system at the unit boundary to detect releases would be an appropriate condition. EPA could leave the option to the generator, thus providing both the certainty of technology-based standards and flexibility.

As demonstrated above, ETC supports the use of performance standards where they are practical and effective, as well as technology standards where they are more appropriate. EPA should match the type of standard to the outcome desired, not force fit an ill-conceived performance standard into every situation. For containment of hazardous materials in land-based units, we have decades of pre-RCRA experience proving that unlined, unmonitored units are not adequate to prevent releases. We also have an irrefutable record post-RCRA that liners and monitoring systems are the minimum necessary technology. EPA should craft a conditional exclusion for land-based units that reflects this experience, and adopt a technology standard that reflects good industry practice.

4. Contractor at Generator’s Facility

⁵ All of this “explanation” is contained in the preamble, of course, while the regulation itself provides only that the hazardous secondary material “must be contained” without further qualification or caveats. Since the preamble does not constitute binding regulation, this vague performance standard is potentially open to a wide range of interpretation by EPA regions, states, and the courts, further aggravating the compliance and enforcement concerns.

EPA also proposes that “under the control of the generator” will include situations where a generator contracts with a different company to reclaim hazardous secondary materials at the generator’s facility. 72 FR 14186 col 1. The ETC supports this approach. A contractor will often have special expertise in recycling that will better ensure against discard and result in legitimate recycling. For example, the contractor will have trained personnel who are experienced in handling hazardous materials and operating reclamation equipment, as well as proper disposal of residuals.

C. Materials Generated And Reclaimed By The Same Company

EPA also proposes to exclude hazardous secondary material that is generated and reclaimed by the same company, if the generator certifies that it is under the same ownership as the reclaimer and that the owner company acknowledges responsibility of safe management of the material. 72 FR 14173 col 3, 14186 col 1.

We support extending the conditional exclusion to intra-company recycling, provided the conditions discussed above are met. In addition, the transport of hazardous materials between company facilities creates an additional concern for potential discard that must be addressed. While an electronic manifest would be the ideal solution, until an e-manifest system is in place that can include hazardous secondary materials transported for recycling we believe that at least some minimal records of shipment and receipt should be maintained by the generator. The Department of Transportation regulations on shipments of hazardous materials should apply to all such transport, and the generator should then maintain the shipping papers and a confirmation of receipt as required records for this conditional exclusion.

D. Materials Generated Pursuant To A Tolling Contract

EPA also proposes a conditional exclusion for material that is generated and reclaimed pursuant to a written agreement between a tolling contractor and batch manufacturer. 72 FR 14173 col 3, 14186 col 1. Batch tolling typically occurs within the specialty chemical industry where a company enters into a contract with an independent chemical manufacturer to produce a specific product or chemical for the company to its exact specifications. There are economies for the original company, as it does not have to invest the capital for specialized equipment or incur operating expenses for what may be only a small amount of required chemical. This appears to be the arrangement EPA is discussing in its proposal; however, it is adding the additional step of returning not only the product to the tolling contractor, but also the waste residues that were generated by the batch manufacturer, purportedly for the purpose of reclamation.

Frankly, we do not see how the hazardous materials in this situation are “under the control” of the tolling contractor when a separate corporate entity at a different physical location operates the production process that generates the hazardous secondary materials. Even though the tolling contractor purports to “retain” ownership and responsibility for the materials in a written contract, the fact is that the hazardous material

is actually generated by the batch manufacturer. Under all relevant statutes and law, the batch manufacturer is the legal generator regardless of the contract agreement between the two parties. EPA seems to be stretching the concept beyond its logical limits, apparently to accommodate the Specialty Organic Chemical Manufacturers Association (SOCMA).⁶ In addition, since the proposed rule sets forth a scheme for recycling at third-party reclaimers with adequate safeguards, we do not see the need for this self-contradictory exclusion based on “generator control” which does not, in fact, satisfy that fundamental premise.

The description in the proposal of tolling agreements seems more consistent with a principle-agent relationship. The tolling contractor has a contract with the batch manufacturer who obtains the raw materials to make a product for the tolling contractor. After the product is manufactured, the batch manufacturer sends both the product and the residuals that it has generated to the tolling contractor. Apparently, both parties know in advance that these residuals are recyclable materials, not hazardous waste.

Despite the contract provisions, the batch manufacturer is the generator of the residuals under the law and is responsible to properly handle the material consistent with RCRA provisions. If the batch manufacturer spills or improperly disposes of residuals from its production, the manufacturer not the tolling contractor is liable under RCRA. The contract does not switch the legal liability to the tolling company, although the agreement could act as a type of indemnification. The fact that there is a contract that

⁶ SOCMA has published the following statement on their website:

“SOCMA Wins! Proposed DSW Rule Reflects SOCMA’s Input

Posted: 03/29/07 at 07:35AM

“Last week, the EPA issued revisions to the Definition of Solid Waste (DSW). These revisions are a real and actual help to SOCMA members, something they will see as a return in real dollars. In Washington, the old German saying that “failure is an orphan and success has many fathers”, is the rule by which everyone lives. But in this case, *SOCMA is the sole author of parts of this revision to DSW.*

“SOCMA’s tolling exclusion concept is in this re-proposal. The exclusion allows that hazardous waste for tolling contractors will be considered the same as onsite recycling, *with no financial assurances.* This means that waste from tolling contracting arrangements can go back to the tolling contractor for recycling or reuse. The two contracting entities do not have to be the same company.

“SOCMA asked for this exclusion and we got it. It is a great success story for the association. *SOCMA did it and we did it alone....*” [Emphasis added.]

indicates some agreement on responsibility does not alter legal liability under the statute. If a batch manufacturer does improperly dispose of waste, it is likely that the tolling company will argue that the manufacturer acted outside of their agreement and that the liability stays solely with the batch manufacturer.

Another problem with the tolling provision is the ease of manipulating the system to ship hazardous waste outside of RCRA. In the market place, the batch chemical company is in a subservient position to its customer. If the batch manufacturer believes that the residual from its production process is actually a hazardous waste that cannot be recycled and only has value to the tolling contractor for energy recovery, for example, the economic and business incentives are to acquiesce to the sham that the residuals are recyclable materials.⁷ To prevent this type of potential for abuse and misapplication of the generator exclusion, EPA should not extend this exclusion to tolling arrangements, but should instead rely on the conditional exclusion for third-party reclaimers with that exclusion's appropriate safeguards.

The specialty chemical industry does not really need their special exclusion. SOCMA objected to the 2003 proposal because it allegedly discouraged recycling by its member companies. SOCMA's comments included eight case studies, which can be classified into three categories of recycling that the current law and the 2003 proposal apparently discourage because a RCRA permit would be required. *Id.* These categories are the inability to:

- Transfer to companies outside their NAIC code;
- Reclaim hazardous secondary materials at the batch manufacturer's site; or
- Send back hazardous secondary materials to the customer without a manifest.

Even without the proposed tolling exclusion, however, all of these types of recycling could occur without the need for a RCRA permit, so the special exclusion for batch tolling is not necessary. The batch manufacturer will be able to transfer its production residuals to the tolling contractor under the conditional exclusion for off-site reclaimers, without regard to NAIC codes or the need for a RCRA manifest or permit. Importantly, the exclusion for off-site reclaimers would at least ensure that the batch manufacturer makes reasonable efforts to confirm the tolling contractor's ability to legitimately recycle the hazardous secondary materials. For these reasons, EPA should not promulgate the special exclusion for tolling arrangements.

⁷ *Meeting Record Regarding: Definition of Solid Waste Date: 10/ 4/2006.* Material submitted to OMB. <http://www.whitehouse.gov/omb/oira/2050/meetings/538.pdf>. "Example from Member D" Toller evaluated and found 4 options: send to a cement kiln for energy recovery, cost >\$758,000 per year; off-site Clean Fuels energy recovery, cost \$573,000; recycling, cost \$1.34 million per year; and recycle outside of RCRA, \$270,000 profit.

Most importantly, EPA has also provided an appropriate mechanism for allowing a conditional exclusion for tolling arrangements through the petition process for non-waste determinations in proposed 40 CFR 260.30(b) and 260.34. Tolling agreements can vary greatly in their terms and conditions, and neither SOCMA nor EPA has proposed a standard contract for this purpose. While one provision in the contract can purport to assign control of the production and residuals to the tolling contractor, other provisions can create warranties and indemnities, *force majeure* clauses, caveats and provisos, that effectively nullify the recitation of control. Since the batch manufacturer is the legal generator of the hazardous materials, regardless of the contract between the parties, these standard provisions in tolling contracts have the effect of nullifying the "control" that is fundamental to the conditional exclusion.

On the other hand, during the petition process EPA or a state would look closely at "whether the generator retains ownership and liability via a contract," whether the "hazardous constituents in the material are reclaimed rather than discarded to the air, water, and land," and "other relevant facts that demonstrate the material is not discarded." Proposed 40 CFR 260.34(d). These are the appropriate criteria to consider, and the only reasonable way for EPA to determine that generator control is maintained is by examining these criteria in each case using the petition process. We suggest that under this approach, SOCMA and its member companies could develop a standard contract and tolling arrangement in a petition to EPA for approval.

II. Conditional Exclusion For Hazardous Secondary Materials That Are Transferred To A Third-Party Reclaimer, 72 FR 14173-74, 14188-97

EPA also proposes an exclusion for hazardous secondary materials that are generated and subsequently transferred to another company for reclamation, provided certain conditions are met.

Again, the conditions to this exclusion are critical. The conditions must ensure recycling and prevent discard, as well as protect human health and the environment, for the exclusion to be consistent with RCRA.

For the generator, EPA has proposed three "restrictions" and two "conditions" as follows: (1) no speculative accumulation; (2) direct transfer from the generator to reclaimer; (3) a one-time notification; (4) reasonable efforts to ensure that the reclaimer will legitimately recycle the materials in a protective manner; and (5) record keeping.

For the reclaimer, EPA has proposed only four conditions: (1) records of received shipments; (2) hazardous secondary materials managed like analogous raw materials or otherwise contained; (3) residuals management in a protective manner; and (4) financial assurance for closure. We comment on each of these conditions in turn below.

A. Restrictions and Conditions Applicable To Generators

EPA's preamble to the proposed regulations makes a distinction between "restrictions" – which are also referred to as "pre-conditions" – and "conditions" for the exclusion. 72 FR 14188 col 3. The preamble does not explain what the difference means, and in fact indicates that both restrictions and conditions will be enforced in the same way. 72 FR 14197 col 1 ("If a generator fails to meet any of the above-described conditions or restrictions on the management of hazardous secondary materials that are applicable to the generator, then the materials would be considered discarded by the generator and would be subject to RCRA subtitle C regulations ..."). In the absence of any explanation in the preamble for this distinction, we are unable to effectively comment on whether the difference is significant. However, if EPA means basically the same thing, we urge for the sake of clarity that the preamble to the final rule simply refer to "conditions" that apply to the generator for this exclusion. We will do so in these comments.

1. No Speculative Accumulation

The first condition precludes hazardous secondary materials that are speculatively accumulated from being eligible for the exclusion. Since early in the RCRA program, materials that are speculatively accumulated have been considered discarded and subject to Subtitle C requirements. There is one key difference, however. Prior to this proposal, the generator has always been required to manage the hazardous secondary materials in compliance with the 90-day storage provisions in 40 CFR part 262 or in a RCRA-permitted storage facility.⁸ In a sense, the proposed rule adopts only half the speculative accumulation rule, ignoring the management standards for proper storage of materials prior to recycling.

Fifty-six percent of the damage cases studied by EPA involved releases to soil, groundwater and/or surface water. Storage units with well engineered containment systems would have protected against such damage. In our comments above, we outlined basic management standards for containers and tanks as well as containment and/or monitoring standards for land-based units for generator on-site recycling. The same standards should apply to generators who store their hazardous secondary materials prior to transfer to third-party reclaimers.

2. Direct Transfer From The Generator To Reclaimer

⁸ Under current regulations, a "solid waste" includes any "discarded material," which is defined to include "any material which is recycled, or accumulated, stored, or treated before recycling." 40 CFR 261.2(a)(2). Spent material, listed sludges, and listed byproducts – the hazardous secondary materials that are the subject of this proposed rule – are solid wastes when reclaimed. 40 CFR 261.2(c). Generators of these materials are subject to the requirements of part 262, including the 90-day storage provisions, or to the storage standards for permitted TSDFs in parts 264 and 265. 40 CFR 261.6(b) and (c).

EPA has proposed that hazardous secondary materials “would need to be transferred directly from the generator to the reclaimer, and not be handled by anyone else, other than a transporter.” 72 FR 14189 col 1. EPA intends to prevent a middleman or broker, who may be only a sales person with an office and a telephone, from determining whether and how the hazardous materials will be recycled or otherwise managed. EPA notes: “A generator who ships materials to a middleman such as a broker typically does not know who will ultimately manage and reclaim them, or how they will be reclaimed.” *Id.* It is critical to the conditional exclusion that the generator know who is reclaiming the materials and how they will be managed in order to avoid discard.

While the ETC agrees that brokers of this type should not be involved in the transaction, we are concerned that EPA may not appreciate the role of brokers in today’s marketplace. Today many “brokers” are in fact commercial TSDFs that handle hazardous and industrial wastes for customers at RCRA-permitted facilities, and then broker waste materials to other firms such as reclaimers. This brokering is done with the full knowledge and approval of the generator. Rather than diminishing the generator’s responsibility, the TSDF helps the generator find reputable reclaimers and ensures that the recyclable materials are properly managed. In addition, the TSDF can conduct bulking and repackaging of materials prior to reclamation. These types of arrangements will actually help EPA achieve the goal of increased recycling, without undercutting the premise of the conditional exclusion.

Indeed, we believe that the condition that requires the generator to make reasonable efforts to ensure that the reclaimer will legitimately recycle the hazardous secondary material largely obviates this problem. Particularly if the generator is required to document its reasonable efforts in facility records, as we recommend below, EPA need not be concerned that the use of a TSDF broker will undercut the generator’s responsibilities. However, to ensure that the hazardous secondary material is not physically “handled” by a broker who does not operate an adequate facility, the proviso on brokers in proposed 261.4.(a)(24)(ii) should be modified (new language in italics) as follows: “The material is not handled by any person or facility other than the generator, the transporter, *a facility operating under a RCRA Part B permit or interim status standards*, or a reclaimer.” This change would both prevent abuse and allow qualified brokers to assist generators in using appropriate reclaimers.

In addition, EPA recognizes that recycling may involve more than one reclamation step, and that the transfer-based exclusion should extend to sequential reclamation conducted by different companies. The generator would satisfy the reasonable efforts condition with respect to each reclamation facility. 72 FR 14189 col 1-2. However, EPA has not squarely addressed facilities that are used only for consolidation and bulking of similar materials prior to reclamation at a different facility. Some companies call these “branch facilities.” Because no actual reclamation processes are conducted, we do not believe the reasonable efforts condition would apply to these branch facilities.

We ask EPA to clarify this point. In the alternative, facilities that are used solely for consolidation and bulking of materials and that are operated as 10-day transfer stations or RCRA-permitted storage facilities should not require a reasonable efforts audit.

3. One-Time Notification

The one-time notification for generator on-site recycling is certainly not sufficient for generators who ship their hazardous secondary materials to third-party reclaimers. EPA has proposed new requirements for generator audits of reclaimers and financial assurance precisely because discard is a greater risk when materials leave the generator's physical control for reclamation by a different entity. Yet EPA proposes exactly the same one-time notification in both contrasting situations.

The notification for hazardous secondary materials transferred to reclaimers must include more information than simply identification of the generator, a contact person, the type of material subject to the exclusion, and the date when the material is first reclaimed. Not surprisingly, EPA has solicited comment on whether the notification should also include identification of the reclaimer, how the material will be stored at the generator's facility, and/or a detailed characterization of the material and the recycling process. 72 FR 14189 col 3.

Let's begin with the obvious – how can EPA justify *not* including the name, address, and ID number of the reclaimer? The notification is essentially useless if EPA and the states, as well as the interested public, cannot connect the generator's excluded materials with the reclamation facility. In particular, the results of the generator's due diligence audit of the reclaimer are kept secret if the generator is not required to identify the reclaimer in the only document actually filed with EPA and the state. We trust EPA does not need much convincing to include this essential information in the notice.

For proper oversight, information on how the hazardous secondary material is stored at the generator's facility is also important. The generator should identify the specific container and/or tank storage areas or the land-based units at its facility where the material is managed, the capacity of the storage units, and the volume of materials stored. EPA and state inspectors can then properly identify the relevant storage units when overseeing compliance with the conditional exclusion.

Information on the hazardous secondary material, the recycling process, and the recycled product must also be included in the notification. Under the proposal, the notification is the only document that is filed by the generator with EPA or the state, and that is available to the public. Including information on the material and recycling process is absolutely essential to adequately inform the public and to facilitate proper government oversight. Such information would also provide a cursory check on whether the generator conducted the required due diligence audit of the reclaimer, since the information should be readily available from that audit. If the notification appears to

have incomplete or suspect information on the recycling process, EPA and the state would have an early warning and could prioritize the generator for inspection in view of the importance of the due diligence audit to the entire scheme of this conditional exclusion.

This part of the notification need not rise to the level of a “detailed characterization” of the hazardous secondary material and the recycling process, as suggested by EPA. 72 FR 14189 col 3. A “detailed characterization” sounds like analytical test results for the materials and engineering diagrams for the recycling process, which we do not believe are necessary for a notification. Instead, the notice should simply request a narrative description of the hazardous secondary material, including the process by which it is generated, the DOT shipping description, and the hazardous waste number(s) that would apply to the material in the event of discard. Likewise, a basic description of the recycling process would include the thermal, chemical, and/or physical process steps and the type of equipment used for processing. Finally, some description of the recycled product (*e.g.*, solvent, degreaser, catalyst, etc.) should be stated.

EPA also solicits comment on whether generators and reclaimers should submit periodic (*e.g.*, annual) reports detailing their recycling activities, and whether EPA Form 8700-12 should be used for this purpose. *Id.* EPA would revise the form to include a section for materials covered by the exclusion, with spaces for the appropriate data. We strongly endorse this concept. After all, the one-time notification is not really “one-time;” generators must file revised notices whenever there is a change to the required information. While this seems straight-forward, it actually creates some uncertainty when generators have to determine, for example, whether their hazardous secondary material has changed enough to warrant a revised notice, as well as problems with missed filings and outdated information. Generators would benefit from a clear requirement to file an annual report, and the government and public would benefit from accurate and current information. The reports could be filed electronically through the Central Data Exchange (CDX) that EPA has already established for such environmental reports, and states could pull the information from the CDX for their data management systems.

4. Reasonable Efforts To Ensure Legitimate And Safe Recycling

In an innovative and important section of the proposed rules, EPA would require generators using the conditional exclusion to make “reasonable efforts to ensure that the reclaimer intends to legitimately recycle the material and not discard it,” and that “the reclaimer will manage the material in a manner that is protective of human health and the environment.” Proposed 40 CFR 261.4(a)(iv)(A), 72 FR 14217 col 1.

EPA found in the Good Practices Study that companies routinely conduct such due diligence audits of recycling facilities, and therefore this condition would reflect good business practice. EPA explained:

[T]he study of current good recycling practices indicates that many generators examine the recycler's technical capabilities, business viability, environmental track record, and other relevant questions before sending hazardous secondary materials for recycling. These recycler audits, which can be thought of as a form of environmental "due diligence," are in essence a precaution to minimize the prospect of incurring CERCLA liability in the event that the recycling, or lack thereof, results in discard of the material.

72 FR 14188 col 2. Most importantly, the audit is directed at the two essential prerequisites to a lawful exclusion from the definition of solid waste that have evolved from the court cases: legitimate recycling that is not discard, and protection of human health and the environment. *See, e.g., Safe Food and Fertilizer v. EPA*, 350 F.3d 1263 (D.C. Cir. 2003).

(a) Questions To Guide The Reasonable Efforts

EPA solicits comment on whether more specific provisions to define reasonable efforts should be included in the final rule. 72 FR 14192 col 1. We strongly agree. While a general standard of "reasonable efforts" is certainly the right approach, generators and reclaimers would greatly benefit from a series of questions in the final rule that would satisfy this standard. One of the persistent criticisms of RCRA is the amount of guidance, letter rulings, and preambles that are cited as authoritative but are not easily accessed and many times are not consistent with a reading of the regulation itself. The regulations should, as much as possible, be complete and useful. Reliance on a soon-to-be-forgotten preamble to a proposal or final rule is not adequate. We do not believe that relevant questions in the final rule would unduly limit a generator's flexibility, but rather would help guide the inquiry.

The questions listed as (A) through (F) in the preamble are appropriate, although incomplete. Questions (A), (B) and (C) request available information on the technical capability and regulatory compliance of the reclaimer; *i.e.*, notification, financial assurance, equipment and personnel, and compliance history. Questions (D) and (E) address the two mandatory legitimacy factors, but these questions are incomplete because the other two legitimacy considerations are ignored. If EPA intends the omitted factors to actually be "considered," as the regulation itself provides, then the questions must address these factors as well. For this purpose, the following questions identified as (F) and (G) should be added (current F would become H):

(F) Does the reclaimer manage the hazardous secondary material as a valuable commodity? Where there is an analogous raw material, does the reclaimer manage the hazardous secondary material in a manner consistent with the management of the raw material? Where there is no analogous raw material, is the hazardous secondary material contained?

(G) Does the product of the recycling process contain significant concentrations of any hazardous constituents in Appendix VIII of 40 CFR part 261 that are not found in analogous products? Does the product contain concentrations of any Appendix VIII hazardous constituent at levels that are significantly elevated from those found in analogous products? Does the product exhibit a hazardous characteristic that analogous products do not exhibit?

The ETC cannot stress strongly enough the importance of including the legitimacy factors in the questions for generators that define the “reasonable efforts” standard. For two decades, the legitimacy criteria in the Sylvia Lowrance memorandum have been widely misunderstood, ignored, and unenforced. As an example, recent efforts to determine whether Pollution Control Industries (PCI), a commercial recycler located in East Chicago, Indiana, satisfies the legitimacy criteria have been totally unavailing. A detailed review of public records on PCI at the Indiana Department of Environmental Management (IDEM) found no information on the legitimacy criteria. Correspondence with IDEM, which is partially in the administrative record of this rulemaking, provided no useful information or analysis by either IDEM or PCI on the application of the legitimacy criteria to the recycling operations. EPA-HQ-RCRA-2002-0031-0426 and further correspondence submitted with these comments.

Lacking specific enforceable standards, EPA and state regulators have all but abandoned enforcing the current legitimacy criteria. Therefore, if the conditional exclusion is to effectively ensure legitimate recycling, generators must use their reasonable efforts to determine that reclaimers will satisfy the regulatory factors. Without this generator focus, the legitimacy factors in the regulation will continue to be a dead letter in most states, and EPA will have failed to ensure that excluded materials are not discarded through sham recycling.

Finally, EPA should add a question that addresses the financial condition of the reclaimer. As EPA found in the Good Practices Study, generator audits of recycling facilities usually include the “financial soundness of the recycler; and ... possession of adequate pollution liability and general insurance.” 72 FR 14180 col. 1. It is a simple matter for the generator to purchase a Dunn & Bradstreet report or similar financial data report on the company that operates the recycling facility. The generator should also ascertain that the company has pollution liability insurance for bodily injury and property damage to third parties caused by accidental occurrences arising from operations of the reclaimer.

(b) Documentation and Certification

EPA solicits comment on whether the generator should document the reasonable efforts made before transferring its hazardous secondary materials to the recycling facility. 72 FR 14191 col 3. A certification statement, signed and dated by an authorized

representative, would be part of the documentation, and an example of the certification statement is provided in the preamble. 72 FR 14191-92.

The ETC strongly believes that the generator must document its reasonable efforts in its facility records, and that the documentation must be certified by a responsible corporate official. Frankly, what good is an audit if it is not documented? Put differently, what responsible generator would not document its audit of the recycling facility? Without such documentation EPA and states will have no way of ascertaining whether the generator did, in fact, make reasonable efforts to assure that the reclaimer will legitimately and safely recycle the generator's hazardous secondary material. Ironically, the audit could be a sham if not documented in facility records. We believe generators should also want the protection that is afforded by documentation of the audit in facility records. Certification by a corporate official is necessary to ensure that the audit was properly conducted and that the documentation is a business record.

(c) Application to RCRA-Permitted TSD Facilities

The proposed rule would require the generator to make reasonable efforts to ensure legitimate and safe recycling “[p]rior to arranging for transport of excluded material to a reclamation facility *that is not operating under a RCRA Part B permit or interim status standards.*” Proposed 40 CFR 261.4(a)(24)(iv)(A), 72 FR 14217 col 1 (emphasis added). The effect of this wording is to provide a “safe harbor” for RCRA-permitted facilities.

The ETC, the largest association of companies that operate RCRA-permitted facilities, *cannot* support this provision as written. We certainly agree that TSDFs are the most extensively regulated and rigorously inspected industrial facilities in the United States, and generators ought to be able to rely on their RCRA-permitted status as assurance of safe management. However, this is true only when the RCRA permit actually covers the management of the hazardous secondary materials to be recycled. In some cases, the RCRA permit may address an unrelated unit elsewhere on the property, and the reclamation facility itself is not in any way covered by the permit. Then the reclamation facility is no different than any other third-party reclaimer, and the safe harbor is not appropriate.

In addition, RCRA permits do not address the legitimacy factors, which are an equally important element of the reasonable efforts inquiry. A reclamation facility that has a RCRA permit for storage of recyclable materials may still be engaged in sham recycling, and may never have demonstrated that the legitimacy factors are satisfied.

Therefore, EPA must amend the regulation as proposed to more carefully define the safe harbor for RCRA-permitted facilities. We recommend the following amended wording (new language in italics, deleted language in strike through):

(A) Prior to arranging for transport of excluded material to a reclamation facility that is ~~not operating under a RCRA Part B permit or interim status standards~~, the generator must make reasonable effort to ensure that the reclaimer intends to legitimately recycle the material and not discard it pursuant to the criteria in § 261.2(g), and that the reclaimer will manage the material in a manner that is protective of human health and the environment. In making these reasonable efforts, the generator may:

- (1) *rely on a RCRA Part B permit or interim status standards that will apply to the management of the excluded material by the reclamation facility to determine that the material will be managed in a manner that is protective; and*
- (2) use any credible evidence available, including information gathered by the generator, provided by the reclaimer, and/or provided by a third party.

This provision would have the added benefit of encouraging reclamation facilities with RCRA permits to extend the permit terms, such as financial assurance for closure, to the management of hazardous secondary materials as well as hazardous wastes.

4. Enforcement

EPA's approach to enforcement of the conditional exclusion is at best confusing, and at worst wrong. 72 FR 14197 col 1. In the preamble, EPA explains that if a generator fails to meet any of the conditions of an exclusion, then the material would be considered discarded by the generator, and would be subject to RCRA subtitle C from the point at which the material required reclamation. We agree. If a generator does not satisfy the conditional exclusion, the material is discarded and a hazardous waste. In particular, if the generator does not make a thorough and independent evaluation of whether the reclaimer will legitimately recycle its secondary material, and the reclaimer is later determined to be engaged in sham recycling, the generator should be liable for violating the conditions of the exclusion.

EPA further explains that if a reclaimer fails to meet any of the conditions, then the material would be considered discarded by the reclaimer, and would be subject to RCRA subtitle C from the point at which the reclaimer thereby discarded the material.

However, EPA goes on to state that "the failure of the reclaimer to meet conditions or restrictions does not mean the material was considered waste when handled by the generator," as long as the generator can demonstrate that he met his obligations to conduct a reasonable efforts inquiry. *Id.* If this statement by EPA relates only to the point in time at which the material is considered discarded and therefore a hazardous waste, it is accurate enough. But once the material becomes a hazardous waste, the generator also becomes liable for any harm to human health or the environment under the liability schemes of RCRA and Superfund, even if the damage results from actions by a third-party reclaimer. Of course, the reclaimer would also be liable and would be the party with primary liability for cleanup costs and civil penalties for violations. But under

the strict liability schemes of RCRA and Superfund, the generator is liable for its hazardous waste from “cradle to grave,” and EPA should not subvert that statutory liability scheme in preamble statements.

We are not sure EPA meant to go this far. The preamble concludes: “A generator who met his reasonable efforts obligations could in good faith ship his excluded materials to a reclamation facility where, due to circumstances beyond his control, they were released and caused environmental problems at that facility. In such situations . . . , the generator *would not have violated the terms of the exclusion.*” 72 FR 14197 col 1-2 (emphasis added). That statement, read narrowly, means only that the generator himself did not commit a violation of RCRA regulations. If that is all EPA meant, so be it. But if EPA meant that the generator would then have no liability under RCRA, Superfund, or state laws for response and remedial costs related to the generator’s material – which was a hazardous waste at the time of improper disposal – then this preamble is wrong. The generator’s “good faith” and “circumstances beyond his control” may mitigate culpability, but are not relevant to the strict liability schemes of the environmental statutes. EPA needs to clarify these statements in the final rule, consistent with the positions taken in compliance cases by the Office of Enforcement and state enforcement agencies.

In addition, EPA’s preamble mis-statements would severely undercut the effectiveness of the reasonable efforts inquiry. The fundamental reason that a generator conducts a due diligence audit of a reclamation facility is to minimize future liability. That potential liability is what motivates the generator to conduct a careful and thorough audit. If EPA by preamble fiat declares that a generator has no future liability, then that incentive is lost. The generator will conduct an audit to satisfy the regulatory condition for the exclusion, but the true incentive to minimize potential liability will be vitiated. In business, this is called “shooting yourself in the foot.”

EPA should be clear in the final rule. A generator who satisfies the reasonable efforts condition may transfer hazardous secondary materials to a third-party reclaimer, exempt from the regulatory requirements that would otherwise apply to hazardous waste. However, if the material later becomes a hazardous waste as a result of improper management and discard, the final regulations cannot overrule the statutory liability schemes enacted by Congress in RCRA and Superfund. EPA should specifically address the situation where the reclaimer is conducting sham recycling causing environmental damage, and the generator fails to correctly determine during the reasonable efforts inquiry that the reclaimer was not a legitimate recycler.

5. Record Keeping and Tracking

The last condition to the exclusion is that generators maintain records for at least three years of all off-site shipments of hazardous secondary materials, including the name of the transporter, date of each shipment, name and address of the reclamation facility,

and the type and quantity of excluded material in each shipment. Proposed 40 CFR 261.4(a)(24)(iv)(B), 72 FR 14217 cols 1-2.

These required records almost serve the purpose of a manifest to track shipments of hazardous secondary materials to the reclaimer, but not quite. In order to confirm that materials were actually received at the reclamation facility and not discarded, the generator should retain some form of confirmation of receipt. EPA need not specify a particular type of record. The record could take the form of a telephone log entry, email message, invoice payment, or other document indicating a communication from the reclaimer that the shipment was delivered. The final rule should simply add item (4) Confirmation of receipt of excluded material from the reclamation facility.

EPA has long recognized under RCRA that tracking shipments of hazardous waste from "cradle to grave" is an essential feature of proper management. Without such tracking, materials that leave the generator's facility can be re-directed en route to any manner of disposal with resulting environmental damage. EPA cannot assure recycling and preclude discard, nor protect human health and the environment from potential mismanagement, unless receipt of each shipment is confirmed by the reclaimer. The record keeping as proposed would fall short. EPA and state inspectors would never be able to confirm from the generator's records that any shipment of excluded material was actually received by the reclaimer in conformance with the exclusion. A confirmation of receipt is a necessary record.

6. Storage Conditions

EPA has not proposed, but has requested comment on, whether to include conditions addressing storage of accumulated recyclable materials by the generator prior to shipping them to a reclamation facility. 72 FR 14194 col 3. For all of the reasons given above in these comments on generator on-site recycling regarding the need for tank and container standards, as well as technology standards for containment and/or monitoring of land-based units, the same standards should be adopted.

B. Conditions Applicable to Reclaimers

EPA proposes that reclaimers of conditionally excluded materials will have to satisfy four conditions which pertain to record keeping, storage, management of residuals, and financial assurance. Proposed 40 CFR 261.4(a)(24)(v), 72 FR 14217.

1. Record Keeping

EPA has proposed similar record keeping for reclaimers as for generators, with the same defect. For the reasons given above, the reclaimer should also retain a copy of the confirmation of receipt transmitted to the generator.

In addition, the reclaimer should maintain an operating record that more thoroughly documents the excluded recycling activities, as EPA is considering. 72 FR 14194 col 3. For example, the reclaimer should have a Secondary Materials Analysis Plan for properly characterizing the hazardous materials that are received for recycling. The reclaimer should confirm through inspection or sampling in accordance with the plan that the material received conforms to the expected specifications. Compliance with the management standards discussed below should also be documented.

The best way to ensure that reclamation facilities maintain an adequate record of compliance with the conditions for exclusion is for EPA to require that a "Documentation of Compliance" be maintained at the facility. The Documentation of Compliance would address each of the conditions discussed below, and would be signed by the owner and operator of the reclamation facility. Compliance with the management standards for container and tank storage, and for land-based units, should be certified by a professional engineer. In this way, there would be a comprehensive facility record that would document how the reclaimer is meeting the performance standards of the rule.

2. Storage of Hazardous Secondary Materials

The proposed rule would require reclaimers to manage hazardous secondary materials "in a manner that is at least as protective as that employed for analogous raw material or is otherwise contained." 72 FR 14217 col 2. Again, for all the reasons given above, more specific standards for containers, tanks and land-based units should be provided for reclamation facilities.

As EPA is aware, the great majority of recent incidents in the Damage Case Study occurred at commercial reclamation facilities, and improper management of the hazardous secondary materials was the cause in a high percentage of incidents. 72 FR 14195 col 1. A "contain" standard based on analogous raw materials just does not provide sufficient specificity – for generators who must assess the adequacy of the reclaimer's storage, for reclaimers who must comply with the condition, and for EPA and state inspectors who must determine that the storage is safe and protective. We agree with EPA that "an elaborate set of conditions for storage" is not necessary. 72 FR 14195 col 2. By the same token, a vague and confusing standard does not adequately guard against discard through mismanagement. A basic set of standards as outlined in these comments would strike the right balance between specificity and flexibility.

EPA's reliance on the generator's audit inquiry to make an assessment of storage at the reclamation facility is misplaced. *Id.* The generator needs a basic set of management standards to assess the reclaimer's storage practices and equipment. EPA's proposed standard would require generators to know whether there are analogous raw materials, and if so how those raw materials are typically stored, in order to assess compliance with this condition – knowledge that generators are unlikely to possess, since they are not engaged in the business of recycling the secondary materials, which is why they are sending the materials to a commercial reclamation facility. The proper approach

is to put the onus on the reclamation facility to meet basic storage standards, as demonstrated through a certification by a professional engineer.

EPA has issued basic storage standards for universal wastes that are reclaimed, such as batteries, thermostats, and lamps, and for used oil that is recycled. 40 CFR Part 266. Surely hazardous secondary materials that include organic solvents and toxic metal-bearing sludges warrant storage standards that are at least as specific and clear.

3. Management of Waste Residuals

We agree with EPA that a specific condition on proper management of residuals generated from reclamation processes is necessary. As EPA notes, one-third of the damage cases in the study of post-RCRA incidents resulted from improper management of residuals, such as “acids and casings from processing of lead-acid batteries, solvents and other liquids generated from cleaning drums at drum reconditioning facilities, and PCBs and other oils generated from disassembled transformers.” 72 FR 14195 col 3. The proposed condition requires that residuals be managed “in a manner that is protective of human health and the environment.”

We further agree that the derived-from principle need not apply to the residues, but not for the reasons cited by EPA. We understand the argument that recyclable secondary materials are not wastes, provided they meet the conditions of the exclusion, but it does not follow that “therefore the derived-from concept ... should not be applied.” *Id.* The critical question is whether as a condition of the exclusion, the residuals should be managed in accordance with the derived-from principle.

The derived-from rule is critical to the RCRA program for hazardous wastes. The fundamental rationale is that treatment of listed hazardous wastes, even the “best demonstrated available treatment” (BDAT) required by the LDR program, may not destroy or remove the hazardous constituents in listed wastes as necessary to fully protect human health and the environment. EPA recently confirmed the important role played by the derived-from rule in the hazardous waste program when the Agency repromulgated the rule after an extensive rulemaking process. The argument suggested by EPA that residuals often do not resemble the hazardous wastes that are treated is not relevant. The critical point is not whether the residues resemble the listed hazardous waste, but the presence in the residues of the same hazardous constituents that caused the waste to be listed in the first place, often in more concentrated form.

Nonetheless, we do not believe that this rationale applies with the same force to residues from recycling of secondary materials. Often the reclamation process is intended to recover the hazardous constituent(s), such as solvents or metals, that are of concern in a listed hazardous waste. Rather than transferring the hazardous constituents to the residue for disposal, the constituents are recovered and concentrated into a useful product, such as an industrial solvent, intermediate, or metal dust or concentrate. Moreover, some reclamation processes for inorganic materials will alter the oxidation state or complex of

the inorganic material and physically/chemically change the residue. The constituents are fixed or stabilized and are less available for release. Finally, we believe that the RCRA hazardous characteristics will identify those residuals that should be managed as hazardous wastes. For these reasons, we agree with EPA that the derived-from principle need not be apply to the residues from recycling of hazardous secondary materials under the proposed rule.

4. Financial Assurance

The ETC applauds EPA for finally proposing that recycling facilities must demonstrate financial assurance for closure and, if applicable, post-closure care of land-based units, as well as liability insurance coverage. This is a critical and essential element of the conditions for exclusion of materials transferred to reclamation facilities. The Damage Case Study revealed that the primary cause of damage incidents has been the business failure of recycling facilities. Without financial assurance for proper closure, states and taxpayers are stuck with the bill for cleaning up these abandoned sites. We believe that no other aspect of the proposed rule will do as much to prevent discard and protect public health and the environment as financial assurance.

Financial assurance need not be expensive. Despite contrary statements in some quarters, the truth is that the cost of proper closure can be reasonably estimated and assured through a variety of financial instruments. ETC member companies, representing most of the commercial hazardous waste industry, have routinely obtained financial assurance for their TSDFs that are similar to recycling facilities at reasonable cost. Our member companies have over 25 years of experience with financial assurance, and we understand that the insurance companies and financial institutions that provide financial assurance instruments for our hazardous waste facilities will offer the same services to qualified commercial recycling facilities.

All of the financial instruments in subpart H of 40 CFR Part 265 will be readily available to recycling facilities. It would be disingenuous to argue, for example, that insurance policies for recycling facilities are not available today since there has been no demand for such policies to date. Since a number of reputable national insurance companies are writing insurance for commercial hazardous waste facilities, which pose the same or similar risks, there is no reason to doubt that they will extend their products to recycling facilities. In addition, subpart H provides measures that essentially allow facilities to self-insure through trust funds, letters of credit, and captive insurance. A recycling facility that cannot obtain an insurance policy or other financial instrument, or that does not have the resources to establish a trust fund or other mechanism, probably should not be handling hazardous secondary materials under the conditional exclusion.

We note that EPA, in its Economic Impact Analysis required by Executive Order 12866, did not consider the cost of increased remediation sites under this rule. This may have been because the Agency assumed financial assurance would pay for any economic damages. If EPA modifies this proposal to weaken the financial assurance requirement,

the Agency would be obligated under EO 12688 to estimate the amount of taxpayer paid clean up this deregulatory proposal would generate as well as the likely environmental harm.

In the Damage Case Study, EPA identified 208 post-RCRA damage incidents since 1982 at recycling facilities. The cost impacts of the resulting environmental damage are estimated at between \$420 million to \$640 million. On an annual basis this amounts to about \$30 million per year. EPA acknowledges in the study that the search for damage cases was not “exhaustive,” and in particular did not include records at state or EPA regional offices. Therefore, the clean-up costs cited above are also likely to be greatly underestimated.

The cost savings that EPA has projected for this rule are in the range of \$93 to \$205 million. 72 FR 14172 col 3. Of these cost savings, a range of \$45 million to \$147 million is associated with the deregulation of on-site recycling. Regulatory Impact Analysis at 16. Therefore, the net cost savings associated with the deregulation of off-site recycling are \$48 million to \$58 million per year. Comparing this costs savings to the average cost of environmental damage at recycling facilities of \$30 million, which is likely underestimated, reveals the importance of financial assurance. The potential savings of \$18 million to \$28 million would be completely consumed by just a few new contaminated sites. Of the 208 damage cases in EPA’ study, 18 recycling facilities had cleanup costs beyond \$5 million and 8 sites had cleanup costs in excess of \$10 million.

Imposing the continuing high costs of future damage cases on states and taxpayers would be unconscionable. While financial assurance is not fool proof – there will likely be some future sites that require additional cleanup – the arguments against financial assurance are a fool’s paradise.

5. Hazardous Wastes From Generators Who Do Not Use The Exclusion

EPA solicits comment on a provision that would allow reclamation facilities to claim the exclusion even though the generator has chosen to manage its material as a hazardous waste. 72 FR 14197 col 1. The ETC strongly objects to this provision which essentially states that a reclamation facility could manage a RCRA hazardous waste, in any type of unit, without meeting any of the technical standards and without a permit. This provision would entirely circumvent the safeguards for the exclusion, most especially the generator’s duty to satisfy the reasonable efforts condition. It has been well documented that the improper management of hazardous waste at commercial reclamation facilities has caused the great majority of historic and recent damage cases. We do not understand why EPA would even consider such a provision. If the generator ships a hazardous waste, then the reclamation facility must comply with the RCRA requirements for recycling of hazardous wastes.

6. Exports To Reclamation Facilities in Foreign Countries

EPA requests comment on extending the conditional exclusion to material that is exported for recycling while still under the control of the generator. The ETC generally supports the ability to move hazardous waste across international boundaries especially in North America. We support this because the environmental regulations, while not exactly the same, are generally equivalent to those in the U.S. and provide an equivalent level of protection.

The same cannot be said of requirements in other countries such as India and China. In the race to grow economically, environmental stewardship and protection is ignored by many industries or is not enforced by the respective governments. We are concerned that by extending the conditional exclusion to exported hazardous secondary materials, the floodgates would be opened for the movement of these materials to countries that do not have adequate environmental management protections. The fact remains that once the material is outside of EPA jurisdiction, the ability of the Agency to enforce proper management and recycling of the material is severely limited or non-existent. While this may help solve the "waste management" problem domestically, from a global perspective, it is a step backward.

While we cannot support a blanket extension of the exclusion for hazardous secondary materials that are exported for recycling, we could support a provision that requires generators to use "reasonable efforts" to ensure and demonstrate that the processes used to manage (store, ship, etc.) and process the material are at least as stringent as required in the U.S. The generator would have to document and certify to this demonstration.

III. Legitimate Recycling, 72 FR 14197-201, 14216

A. Codification of the Legitimacy Factors

The ETC strongly supports EPA's proposal to codify the legitimacy factors in the regulations. Without codification, the critical distinction between legitimate recycling and treatment or disposal under the guise of recycling (*i.e.*, sham) will remain largely unenforceable.

Since 1985, the Lowrance memorandum and the guidance on legitimate recycling in Federal Register preambles, *e.g.*, 50 FR 638, have existed. However, we searched EPA's database on RCRA memoranda and letter determinations, and we could not find one instance when the legitimacy criteria have ever been applied to any particular recycler. Likewise there appear to be no enforcement cases. We searched the entire database of Federal and state court cases, and could not find any cases enforcing the legitimacy criteria. Even in the infamous Marine Shale Processors case, the Department of Justice had to abandon counts based on the legitimacy criteria, and ultimately prevailed in shutting down this notorious sham recycler by enforcing the incineration standards.

While EPA notes that some commenters have expressed concern that codification will “eliminate the flexibility in the existing guidance,” 72 FR 14198 col 2, the real world evidence shows that uncodified legitimacy guidance is so “flexible” that it is ignored and unenforced.

Recently, the ETC’s own efforts to request a legitimacy determination have demonstrated this point clearly. On March 13, 2006, we requested information from U.S. EPA Region 5 and the Indiana Department of Environmental Management (IDEM) regarding whether Pollution Control Industries (PCI) in East Chicago, Indiana, is operating a recycling facility in accordance with the legitimacy criteria. PCI operates a thermal desorption unit that processes a wide range of hazardous wastes, including paint waste, solvent soaked rags, resins, polymers, refinery waste, production debris, and discarded commercial chemicals, to thermally recover a degreaser product. U.S. EPA Region 5 did not respond to our request. On March 31, 2006, IDEM replied by providing minimal information, indicating that neither PCI nor IDEM had made any analysis of whether the thermal desorption unit satisfied the legitimacy criteria.

On July 2006, we wrote to IDEM again asking for answers to five specific questions to determine whether hazardous wastes provided a useful contribution to the degreaser product, and whether the degreaser contained significant amounts of hazardous constituents not found in normal degreasers or whether the degreaser exhibited a hazardous characteristic. IDEM replied that it had no information relevant to our questions. A subsequent review of all IDEM records on PCI in its public file room revealed no documents that considered the legitimacy criteria as applied to the thermal desorption unit, although IDEM did advise PCI by letter that the unit was exempt from RCRA permitting.⁹

The uncodified legitimacy guidance can only be called a sham. Frankly, it is not fair to legitimate recyclers that such a critical determination is uncodified and unenforceable. Codification of the legitimacy factors is essential.

B. The New Regulatory Structure Of The Legitimacy Factors

EPA has proposed four condensed factors to determine legitimate recycling:

- The hazardous secondary material must provide a useful contribution to the recycling process or to a product of the recycling process;
- The recycling process must produce a valuable product or intermediate;

⁹ The ETC makes no allegation regarding whether PCI is operating a legitimate or sham recycling unit. The purpose of the ETC inquiry was to seek information relevant to that determination.

- The hazardous secondary material should be managed as a valuable commodity; and
- The product should not contain significant concentrations of hazardous constituents that are not found in analogous products, or exhibit a hazardous characteristic that analogous products do not exhibit.

Under EPA's new structure, the first two factors would be mandatory requirements. The other two factors, however, would be "considerations" to be taken into account in making legitimacy determinations.

As a threshold matter, we urge EPA to revise the regulatory language so that persons who recycle hazardous secondary material must actually demonstrate that the recycling is legitimate in documentation maintained at the facility. The proposed rule merely states that such persons "must be able to demonstrate" that their recycling is legitimate, without actually requiring such a demonstration to anyone at any time. With the new conditional exclusions in the proposal, generators through their reasonable efforts inquiry need to evaluate whether their hazardous secondary materials will be legitimately recycled by the reclaimer. This inquiry will be frustrated if persons engaged in recycling are not required by the final rule to make an actual written demonstration applying the four legitimacy factors. Likewise, EPA and states must readily ascertain if this core aspect of the conditional exclusion is being met, and they should be able to do so by reviewing the documentation at the facility.

EPA states in the preamble: "The Agency believes that it has always been the responsibility of the regulated entity to ensure, *and if requested*, to show that its recycling is legitimate." 72 FR 14198 col 2 (emphasis added). The question is: requested by whom? To date EPA regions and states have simply not requested such demonstrations, likely because there is no clear legal authority in the current regulations to do so. Certainly customers, other companies, local citizens, and the interested public have no ability to obtain a response to such a request. We are unclear why a recycler should be allowed to await a "request," and likely ignore requests from anyone other than an enforcement official, rather than making the demonstration as a matter of course.

Therefore, the regulation on legitimate recycling, 40 CFR 261.2(g), should be amended as follows (new language underscored):

"Hazardous secondary material that is not legitimately recycled is discarded material and is a solid waste. Persons who recycle such materials ... must be able to demonstrate that the recycling is legitimate in documentation maintained at the facility."

In addition, the ETC is convinced that all four legitimacy factors should be mandatory, with some modifications. We find EPA's reasons for not doing so unconvincing. EPA has proposed that two factors would be merely advisory because

"EPA and commenters were able to identify situations in which a recycling scenario appears to be legitimate, but one of these factors was not met in the way EPA described [in the 2003 proposal] because that factor is not applicable or relevant to the materials being recycled or to the particulars of the recycling process." 72 FR 14199 col 2.

In the first scenario, a powdery secondary material is shipped to the recycler in woven supersack containers, whereas the analogous raw material is received in steel drums. EPA is concerned that someone might conclude that the hazardous secondary material was not managed "in a manner consistent with the analogous raw material." *Id.* First of all, the word "consistent" does not mean "identical." It seems clear that a hazardous secondary material shipped in an appropriate container and stored in a secure manner is being managed "consistent" with the analogous raw material. The "someone" who might conclude otherwise is just wrong.

Secondly, we suggest that to placate this troublesome person the regulation should be revised to follow the format of the other two mandatory factors, which have subsections that are worded as guidance. That is to say, this legitimacy factor should state: "The generator and the recycler must manage the hazardous secondary material as a valuable commodity." The regulation should then provide guidance in two subsections: "(A) Where there is an analogous raw material, the hazardous secondary material would be managed as a valuable commodity if it is managed in a manner consistent with the raw material;" and "(B) Where there is no analogous raw material, or where management in a manner consistent with the analogous raw material is not feasible, the hazardous secondary material should be contained." EPA's first scenario would easily meet this revised legitimacy factor, which should be mandatory.

EPA also proposes that the legitimacy factor on toxics along for the ride should be merely a consideration. We believe this factor is the most important one of all because toxics improperly transferred from hazardous secondary materials to the recycled products are discarded, and not recycled. In order to prevent discard, the *sine quo non* of the conditional exclusions, this legitimacy factor – correctly worded as explained below – must be mandatory.

In the scenario that EPA gives as an example, a paint manufacturer might not be able to use a spent solvent (Solvent Y) because the resulting paint product would contain a hazardous constituent (*i.e.*, Solvent Y) not found in analogous paint products made with virgin Solvent X, even though both solvents have essentially the same toxicity and solvent properties. EPA is concerned that this recycling practice might not meet the legitimacy factor on toxics along for the ride. However, the problem that concerns EPA arises not from the mandatory or advisory nature of this factor, but from its inaccurate wording. A careful reading of the Lowrance memo and 1985 preamble makes clear that the concept of "toxics along for the ride" means hazardous constituents that are not necessary for the product; hence, they are just along for the ride. To quote from the Lowrance memo: "Are the toxic constituents actually necessary (or of sufficient use) to the product or are they just along for the ride."

Thus, the fact that the recycled product contains a hazardous constituent not found in the analogous product was never sufficient; in addition, the hazardous constituent must not be necessary or of sufficient use to the product. Solvent Y is necessary because it performs the same function in the paint product as Solvent X, so this legitimacy factor would be met.

A revised legitimacy factor on toxics along for the ride should be mandatory as follows:

“The product of the recycling process must not:

“(A) Contain significant concentrations of any hazardous constituents in Appendix VIII of Part 261 that are not found in analogous products and that are not necessary or of sufficient use to the product;

“(B) Contain concentrations of any hazardous constituents in Appendix VIII of Part 261 at levels that are significantly elevated from those found in analogous products and that are not necessary or of sufficient use to the product; or

“(C) Exhibit a hazardous characteristic (as defined in Part 261 subpart C) that analogous products do not exhibit.”

We strongly urge EPA to revise this important legitimacy factor as suggested, and to make it mandatory as well.

IV. Petitions For Non-Waste Determinations, 72 FR 14201-205, 14214

EPA has proposed a petition process for making case-by-case determinations that hazardous secondary materials will be recycled and not discarded. The ETC agrees that a formal administrative process is desirable for EPA and the states to make defensible non-waste determinations, provided the process is transparent and allows for adequate notice and opportunity for public comment. This petition process should then replace the informal, private letters that have been issued by EPA and states in the past, usually without any public notice.

In addition, the petition process will allow this new regulatory scheme for recycling to evolve and improve under EPA’s supervision. As EPA is well aware, this supplemental proposal is a major departure from the current RCRA program for recycling of hazardous wastes. The conditional exclusions in the proposal may be too broad or too narrow, easily subject to abuse or too restrictive – only time and experience will tell. The petition process will serve as a “relief valve” to take corrosive pressure off the new regulatory system while EPA and the states, the regulated community, and other

interested parties gain some experience with it. The petitions will also provide EPA with example situations that may call for modifications and improvements to the rules.

The Agency has proposed three types of non-waste determinations for hazardous secondary materials that are: (1) recycled in a "continuous industrial process;" (2) deemed "indistinguishable" from a product or intermediate; or (3) recycled "under the control of the generator" through contracts similar to tolling agreements. For each type of determination, EPA has also proposed standards and criteria that are very useful for evaluating petitions. We believe the three types of non-waste determinations are broadly encompassing and should be workable. Our primary concern, however, is with the truncated and inadequate procedure that EPA has proposed for processing the petitions.

A. Procedures For Public Notice And Comment

The procedures in 40 CFR 260.33 are clearly not sufficient for non-waste determinations. Section 260.33(b) only calls for notice of a draft decision by "newspaper advertisement or radio broadcast in the locality where the recycler is located." This minimal local notice is currently used to make very limited determinations to allow a recycled material to be (1) accumulated longer than the speculative accumulation time frame; (2) reclaimed prior to reuse within the original production process; and (3) reclaimed further to be completely recovered. *See* 40 CFR 260.30 & 260.31.¹⁰ These determinations have only a local impact, and are unlikely to significantly impact human health and the environment beyond the particular facility. Just because § 260.33 is conveniently available in the current regulations does not make local newspaper or radio notice adequate for nationally-applicable non-waste determinations.

A non-waste determination means that the hazardous secondary material could be transported and recycled anywhere in the United States, without a RCRA manifest for tracking or compliance with Subtitle C management standards. Indeed, the apparent purpose for the "continuous industrial process" determination is to allow excluded materials to be recycled at facilities and locations other than the actual generator. 72 FR 14202 col 2 (*e.g.*, sequential extraction in the mineral processing industry and "far larger and more diverse processes" which can apply "across industries"). The excluded material could be shipped to numerous facilities at various locations that EPA may consider part of a "continuous industrial process." Section 260.33 is inherently ambiguous about which "locality" would receive public notice of this type of non-waste determination. Similarly, materials that are recycled pursuant to contracts could extend to many third-party reclaimers at wide-spread locations across the U.S. The significance of these non-waste determinations and the potential health and environmental impacts are far greater than contemplated by the local notice procedures in § 260.33. Although these are case-by-case determinations, the precedents set are likely to have national importance, and

¹⁰ In a non-recycling context, the procedures are also available to classify certain types of combustion devices as boilers. 40 CFR 260.32.

therefore a broader range of the public, including environmental groups, state agencies, and corporations, will have a substantial interest.

An advertisement in a local newspaper or a radio broadcast just does not meet the standard of adequate public notice and opportunity for comment in these circumstances. In effect, a non-waste determination amends the regulations on the definition of solid waste on a case-by-case basis, with national implications and impacts. Therefore, EPA should follow the public notice procedures found throughout subpart C of 40 CFR Part 260. For other petitions of this nature, EPA publishes a notice in the Federal Register which is the official publication of notices and rules for Federal agencies. In that way, members of the interested public will be given adequate notice through review of the Federal Register or by the many publications, organizational alerts, trade group notices, and similar reports that disseminate information from the Federal Register. Because of the broad scope of the proposed rule, we do not anticipate that a large number of case-by-case petitions will be submitted. Publication of a draft notice on non-waste determinations should not pose an undue burden (we suspect that draft notices to deny petitions will be rare, since the petitioner will likely withdraw the petition before notice publication).

In addition, the petition and supporting documentation should be made available to the public for comment. The procedures in § 260.33 are so cursory that they do not even address this important concern. EPA should make the documents available to the public through the electronic docket and EPA Docket Center, and the Federal Register notice should provide instructions for obtaining the records. States should follow similar procedures for public access to records in state files.

B. Standards And Criteria For Non-Waste Determinations

The ETC agrees that production processes and recycling practices vary widely among industries, and that a regulatory mechanism is needed to make case-by-case determinations based on health and environmental risk. In our comments on the 2003 proposal, we recommended that EPA adopt a petition process for this purpose, and we endorse this aspect of the supplemental proposal – provided our several suggestions for improvement are adopted.

First, non-waste determinations for hazardous secondary materials that are reclaimed pursuant to tolling agreements or similar contracts should *only* be made under this petition process, for the reasons discussed above in these comments. Basically, the conditional exclusion is premised on generator control of the materials, and that control becomes too attenuated and problematic when it is based on a contractual arrangement rather than actual physical control. While the contract may stipulate that the tolling contractor is assigned “ownership” of the hazardous secondary residuals that are actually generated by the batch manufacturer, the tolling contract may contain various warranty and indemnity provisions that also must be considered. If the batch manufacturer allegedly breaches the tolling contract, the specialty chemical manufacturer may legally

be exonerated and the basic premise of the conditional exclusion would be vitiated. EPA needs to review the tolling arrangement and liability provisions in order to determine that the hazardous residuals will not be discarded.

Second, the criteria for all three types of non-waste determinations include “whether the hazardous constituents in the material are reclaimed rather than discarded to the air, water or land at significantly higher levels from either a statistical or from a health and environmental risk perspective than would otherwise be released by the production process.” The ETC very much supports this criterion as exactly the right inquiry to be conducted. This criterion correctly reflects the guidance of the court in *Safe Foods v. EPA* and related cases. Whether hazardous constituents are released at “significant” levels is invariably more a qualitative than quantitative determination, but we agree with EPA’s approach of considering statistical or risk-based measurements.

Nonetheless, we recommend that EPA include guidance in the final rule on statistical measures that would provide a bright line. Possibilities include the following:

- Specify that any hazardous constituent cannot be present in the recycled product at levels greater than the analogous product to a 95% level of confidence based on a statistical “t” test. Such a statistical test is used under Appendix IV of 40 CFR Part 264 as a basis to tell if a down gradient groundwater monitoring well has been impacted. This application is meant to be an indicator of a groundwater release, so it is relevant to determine if a given hazardous constituent would be released from a recycled secondary material.
- Adopt the approach used for cement kiln dust in 40 CFR § 266.112 to distinguish “normal residues” from “waste-derived residues.” The health based levels specified in Appendix VII of 40 CFR Part 266 could then be applied to make bright-line decisions regarding the level of hazardous constituents in recycled products. EPA could even use similar language as used for residues in 40 CFR § 266.112, defining such terms as “normal products” and “waste-derived products.” This provides a clear standard for significance, and has been proven to be achievable in the several years that it has been applied by cement kilns burning hazardous waste.
- Since one of the concerns is releases to land, use the 40 CFR § 268.48 universal treatment standards as a bright line. Even though these standards reflect treatment, they also represent what EPA deemed an acceptable level for land disposal. The question is whether the hazardous constituents are being discarded, so this would provide a relevant bench mark.
- The last option is to define acceptable level of hazardous constituents based on the risk model used in the delisting process. This would allow case-by-

case determinations based on volume and would also provide some flexibility in setting these levels.

In addition, EPA needs to ensure that the criteria for the non-waste determination are met on a routine basis. Simply requiring one-time testing in the petition process is not sufficient. In the delisting provisions, EPA requires that waste be tested on some regular frequency, usually quarterly, to confirm that the delisted waste is still meeting the exclusion limits. The same type of regular confirmation test should apply to a hazardous secondary material given a non-waste determination.

Furthermore, the regulations need to require an amendment of the petition and re-testing if the process changes, or a new product or intermediate use is proposed. For each unique process use, it is important to retest and re-petition to insure that any new product or intermediate continues to satisfy all of the criteria. The terms of the non-waste determination must be specific to the process, product and/or intermediate demonstrated by the original petition.

It is also important that the petition contain some certification by the generator. This will ensure that the generator is taking responsibility and certifying the terms and conditions of the petition.

Conclusion

For the foregoing reasons, the ETC urges EPA to promulgate a final rule on the definition of solid waste with the revisions and improvements presented in these comments.

Respectfully submitted,



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