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40 CFR Parts 260 and 261
Revisions to the Definition of Solid Waste; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 260 and 261

[EPA–HQ–RCRA–2002–0031–FRL–8289–9]

RIN 2050–AG31

Revisions to the Definition of Solid Waste

AGENCY: Environmental Protection Agency.

ACTION: Supplemental Proposed Rule.

SUMMARY: The Environmental Protection Agency (EPA) is today publishing a supplemental proposal which would revise the definition of solid waste to exclude certain hazardous secondary materials from regulation under Subtitle C of the Resource Conservation and Recovery Act (RCRA). We are also soliciting comments on regulatory factors to be used to determine whether recycling of hazardous secondary materials is legitimate. The Agency first proposed changes to the definition of solid waste on October 28, 2003 (68 FR 61558). The purpose of this proposal is to encourage safe, environmentally sound recycling and resource conservation and to respond to several court decisions concerning the definition of solid waste.

DATES: Comments must be received on or before May 25, 2007. Under the Paperwork Reduction Act, comments on the information collection provisions must be received by OMB on or before April 25, 2007.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ –RCRA 2002–0031 by one of the following methods:

http://www.regulations.gov: Follow the on-line instructions for submitting comments.

E-mail: Comments may be sent by electronic mail (e-mail) to *RCRA-docket@epa.gov*, Attention Docket ID No. EPA–HQ–RCRA–2002–0031.

Fax: Fax comments to: 202–566–0270, Attention Docket ID No. EPA–HQ–RCRA 2002–0031.

Mail: Send comments to: OSWER Docket, EPA Docket Center, Mail Code 5305T, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, Attention Docket ID No. EPA–HQ–RCRA–2002–0031. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *Attn:* Desk Officer for EPA, 725 17th St., Washington, DC 20503.

Hand delivery: Deliver comments to: Environmental Protection Agency, EPA Docket Center, Room B102, 1301 Constitution Avenue, NW., Washington, DC, Attention Docket ID No. EPA–HQ–RCRA–2002–0031. Such deliveries are only accepted during the docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID Number EPA–HQ–RCRA–2002–0031. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, such as CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the OSWER Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m. Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OSWER Docket is 202–566–0270.

FOR FURTHER INFORMATION CONTACT: For more detailed information on specific aspects of this rulemaking, contact Marilyn Goode, Office of Solid Waste, Hazardous Waste Identification Division, MC 5304P, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460 (703) 308–8800, (*goode.marilyn@epa.gov*) or Tracy Atagi, Office of Solid Waste, Hazardous Waste Identification Division, MC 5304P, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460, at (703) 308–8672 (*atagi.tracy@epa.gov*).

SUPPLEMENTARY INFORMATION:

A. Regulated Entities

Entities potentially affected by this action include about 4600 facilities in 530 industries in 17 economic sectors that generate or recycle hazardous secondary materials which are currently regulated as RCRA Subtitle C hazardous wastes (e.g., industrial co-products, by-products, residues, unreacted feedstocks). About 80 percent of these affected facilities are classified in NAICS code economic sectors 31, 32, and 33 (manufacturing), and the remainder are in NAICS code economic sectors 21 (mining), 22 (utilities), 23 (construction), 42 (wholesale trade), 44 and 45 (retail trade), 48 and 49 (transportation), 51 (information), 54 (professional, scientific and technical services), 56 (administrative support, waste management and remediation), 61 (educational services), 62 (health care and social assistance, and 81 (other services). About 0.65 million tons per year of recyclable industrial materials handled by these entities may be affected, of which the most common types are metal-bearing hazardous secondary materials (e.g., sludges and spent catalysts) for commodity metals recovery, and organic chemical liquids for recycling as solvents. This proposed rule, if promulgated, is expected to result in regulatory and materials recovery cost savings to these industries of approximately $107 million per year. Taking into account impact estimation uncertainty factors, this rule, if promulgated, could affect between 0.3 to 1.7 million tons per year of industrial hazardous secondary materials handled by 3600 to 5400 entities in 460 to 570 industries, resulting in $93 million to $205 million per year of net cost savings. More detailed information on the potentially affected entities, industries, and industrial materials, as well as the economic impacts of this

rule (with impact uncertainty factors), is presented in section XVI.A of this preamble and in the ''Economics Background Document'' available in the docket for this rulemaking.

B. What To Consider When Preparing Comments for EPA

1. Submitting CBI. Do not submit this information to EPA through *http://www.regulations.gov* or e-mail. Clearly mark part of all information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed, except in accordance with procedures set forth in 40 CFR Part 2.

2. Tips for Preparing Your Comments. *When submitting comments, remember to:*

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions. The Agency may ask for commenters to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or Section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If estimating burden or costs, explain methods used to arrive at the estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate any concerns and suggest alternatives.
- Make sure to submit comments by the comment period deadline identified above.

Preamble Outline

I. Statutory Authority.
II. What Is the Scope of This Supplemental Proposal?
III. What Is the Intent of This Supplemental Proposal?
IV. How Does This Supplemental Proposal Relate to the October 2003 Proposal?
V. How Is Hazardous Waste Recycling Currently Regulated?
VI. What Is the History of Recent Court Decisions on the Definition of Solid Waste?
VII. How Does the Concept of Discard Relate to These Proposed Exclusions?
VIII. Recycling Studies.
IX. Exclusion for Hazardous Secondary Materials That Are Legitimately Reclaimed Under the Control of the Generator: Proposed 40 CFR 260.10, 261.2(a)(1), 261.2(a)(2), 261.2(c)(3), 261.4(a)(23).
X. Conditional Exclusion for Hazardous Secondary Materials That Are Transferred for the Purpose of Reclamation: Proposed 40 CFR 261.2(c)(3), 261.4(a)(24), 261.4(a)(25).
XI. Legitimacy: Proposed 40 CFR 261.2(g).
XII. Petitions for Non-waste Classification: Proposed 40 CFR 260.30(d), 260.30(e), 260.30(f), 260.34.
XIII. Effect of This Proposal on Other Programs.
XIV. Measurement of the Performance Outcomes of This Supplemental Proposal.
XV. How Would These Proposed Regulatory Changes Be Administered and Enforced in the States?
XVI. How Has EPA Fulfilled the Administrative Requirements for This Rulemaking?

I. Statutory Authority

These regulations are proposed under the authority of sections 2002, 3001, 3002, 3003, 3004, 3007, 3010, and 3017 of the Solid Waste Disposal Act of 1970, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), 42 U.S.C. 6921, 6922, 6923, and 6924.

II. What Is the Scope of This Supplemental Proposal?

In today's notice, EPA is proposing to revise the definition of solid waste in order to exclude from regulation under Subtitle C of RCRA certain hazardous secondary materials sent for recycling. We are also seeking comment on certain changes to the proposed regulatory factors for determining whether recycling is legitimate. The Agency first proposed changes to the definition of solid waste, as well as regulatory criteria for legitimacy, on October 28, 2003 (68 FR 61581–61588).

The scope of the regulatory changes proposed today are as follows:

A. Exclusion for Materials That Are Legitimately Reclaimed Under the Control of the Generator in Non-Land-Based Units

This provision, with regulatory language proposed in 40 CFR 261.2(a)(2)(ii), would exclude certain hazardous secondary materials (i.e., spent materials, listed sludges, and listed byproducts) that are generated and legitimately reclaimed[1] within the United States or its territories[2] and are only handled in non-land-based units (e.g., tanks, containers, containment buildings). The exclusion would apply to hazardous secondary material that is reclaimed under the control of the generator, if the materials are not speculatively accumulated. In addition, EPA is proposing to include in 40 CFR 260.42 a requirement that the generator would be required to submit a one-time notification to EPA or the authorized state. Hazardous secondary material would be considered ''under the control of the generator'' under the following circumstances:

(1) It is generated and then reclaimed at the generating facility; or

(2) It 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 has acknowledged responsibility for safe management of the hazardous secondary materials; or

(3) It is generated and reclaimed pursuant to a written agreement between a tolling contractor and batch manufacturer, if the tolling contractor retains ownership of, and responsibility for, the hazardous secondary materials that are generated during the course of the manufacture.

This proposed exclusion would not include recycling practices that involve discard of materials. These practices include recycling of inherently waste-like materials (40 CFR 261.2(d)), recycling of materials that are used in a manner constituting disposal or used to produce products that are applied to or placed on the land (40 CFR 261.2(c)(1)), and burning of materials for energy recovery or used to produce a fuel or otherwise contained in fuels (40 CFR 261.2(c)(2)). This proposed exclusion is further described in section IX of this

[1] In this context, the terms ''recycling'' and ''reclamation'' are not necessarily synonymous. ''Recycling typically involves a series of activities, including storage and other handling steps that culminate in the production of a valuable end product of some kind. Thus, if materials need to be reclaimed in order to produce a valuable end product, the reclamation activity can be thought of as one step in the overall recycling process. See proposed § 261.4(g). Further explanation of the term ''reclamation'' can be found in the preamble to the October 2003 proposal at 68 FR 61564.

[2] EPA has proposed to limit this exclusion to hazardous secondary materials reclaimed within the United States or its territories because it does not have sufficient information related to recycling activities outside of the United States or its territories to make the same general finding that it has made for materials legitimately recycled under the control of the generator. However, as noted below, EPA requests comment on whether the Agency should promulgate a conditional exclusion for exported hazardous secondary material otherwise meeting the criteria for this rule.

preamble. We note that the Agency is considering expanding its regulations for comparable fuels in a separate rulemaking.

B. Exclusion for Materials That Are Legitimately Reclaimed Under the Control of the Generator in Land-Based Units

This provision, with regulatory language proposed in 40 CFR 261.4(a)(23), would exclude certain hazardous secondary materials that are generated and legitimately reclaimed within the United States or its territories and handled in land-based units (*e.g.*, surface impoundments, waste piles). This provision requires that hazardous secondary materials managed in land-based units must be contained in such units.

C. Conditional Exclusion for Materials That Are Transferred for the Purpose of Reclamation

This conditional exclusion, with regulatory language proposed in 40 CFR 261.4(a)(24), (hereinafter referred to as the ''transfer-based exclusion'') would apply to hazardous secondary materials (i.e., spent materials, listed sludges, and listed byproducts) that are generated and subsequently transferred to a different person or company for the purpose of reclamation. As long as the conditions to the exclusion are satisfied, the hazardous secondary materials would not be subject to Subtitle C regulation. The conditions are intended to ensure that such materials are handled as commodities rather than wastes. They will also help guarantee that protection of human health and the environment will not be compromised in the absence of hazardous waste regulatory requirements for these materials. It is important to note that when hazardous secondary materials are generated and reclaimed within the United States pursuant to a written agreement between a tolling contractor and a batch manufacturer as defined in proposed 40 CFR 260.10, these materials would be subject to the requirements of proposed 40 CFR 261.2(a)(ii) or 261.4(a)(23) rather than the more extensive requirements of proposed 40 CFR 261.4(a)(24).

If any of the hazardous secondary materials under proposed 40 CFR 261.4(a)(24) are generated and then exported to another country for reclamation, we are also proposing that the exporter notify the receiving country of the export through EPA and obtain consent from that country before shipment of the material. This requirement is proposed to be codified in 40 CFR 261.4(a)(25). Like the previously discussed exclusion for hazardous secondary materials recycled under the control of the generator, this exclusion would not cover recycling of inherently waste-like materials, recycling of materials that are used in a manner constituting disposal, and burning of materials for energy recovery. The proposed exclusion is described in more detail in section X of this preamble.

D. Petition Process for Non-Waste Determinations

In addition to the exclusions discussed above, the Agency also is proposing a petition process, with regulatory language found in proposed 40 CFR 260.30(d), 260.30(e), 260.30(f), and 260.34, for obtaining a case-specific non-waste determination for certain hazardous secondary materials that are recycled. This process would allow a petitioner to receive a formal determination from the Agency that its hazardous secondary material is clearly not ''discarded'' and therefore is not a solid waste. The procedure would allow EPA or the authorized state to take into account the particular fact pattern of the recycling and to determine that the hazardous secondary material in question is not a solid waste without imposing additional requirements. The determination would be available to petitioners who could demonstrate that their hazardous secondary materials were recycled in a continuous industrial process, or that the materials were indistinguishable in all relevant aspects from a product or intermediate, or that the materials were under the control of the generator via a tolling arrangement or similar contractual arrangement. The petition process for the non-waste determinations would be the same as that for the variances from the definition of solid waste found in 40 CFR 261.31. This process and the criteria for making these determinations, are described in section XII of this preamble.

E. Legitimacy

On October 28, 2003 (68 FR 61581–61588), EPA extensively discussed our position on the relevance of legitimacy to hazardous waste recycling in general and to the redefinition of solid waste specifically. We proposed to codify in the RCRA regulations four general criteria to be used in determining whether recycling of hazardous secondary materials is legitimate. In today's action, we are proposing changes to the proposed legitimacy criteria and asking for public comment on these revisions. The changes consist of a restructuring of the proposed criteria, called factors in this proposal, by making two of these factors mandatory and two non-mandatory considerations, and providing further guidance and clarification on how the economics of recycling should be considered in making legitimacy determinations. The changes are described in section XI of this preamble.

III. What Is the Intent of This Supplemental Proposal?

Today's supplemental proposal would revise and clarify the RCRA definition of solid waste as it pertains to certain types of hazardous secondary materials that would not be considered wastes subject to regulation under RCRA Subtitle C. This notice builds on our October 28, 2003 proposal (68 FR 61558) which was initiated partially in response to decisions by the United States Court of Appeals for the DC Circuit, which, taken together, have provided the Agency with additional direction in this area.

This proposal represents an important restructuring of the RCRA regulations that distinguish wastes from non-waste materials for RCRA purposes, and that ensure environmental protections over hazardous secondary materials recycling practices. As such, it also is an opportunity for the Agency to clarify in a regulatory context the concept of ''legitimate recycling,'' which has been and is a key component of RCRA's regulatory program for recycling, but which to date has been implemented without regulatory criteria. Today's supplemental proposal thus includes specific regulatory provisions for determining when hazardous secondary materials are recycled legitimately.

Today's supplemental proposal is de-regulatory in nature because certain recyclable materials that have heretofore been subject to the hazardous waste regulations would no longer be regulated as hazardous waste. The factors to consider for legitimate recycling codify existing principles without increasing regulation. This proposal is not intended to bring new wastes into the RCRA regulatory system.

By removing unnecessary hazardous waste regulatory controls over certain recycling practices, and by providing more explicit criteria for determining the legitimacy of recycling practices in general, EPA expects that this proposal will encourage the safe, beneficial recycling of hazardous secondary materials. This regulatory initiative is thus consistent with the Agency's longstanding policy of encouraging the recovery and reuse of valuable resources as an alternative to land disposal, while at the same time maintaining protection of human health and the environment.

It also is consistent with one of the primary goals of the Congress in enacting the RCRA statute (as evidenced by its name), and with the Agency's vision of how the RCRA program could evolve over the longer term to promote sustainability and more efficient use of resources.[3]

IV. How Does This Supplemental Proposal Relate to the October 2003 Proposal?

On October 28, 2003 (68 FR 61558), the Agency proposed to exclude from the definition of solid waste any material generated and reclaimed in a continuous process within the same industry, provided the reclamation was legitimate. ''Same industry'' was defined as industries sharing the same 4-digit North American Industry Classification System (NAICS) code. The basis for that exclusion was the holding in *American Mining Congress* v. *EPA* (''AMC I''), 824 F.2d 1177 (DC Cir. 1987)) that materials destined for beneficial reuse of recycling in a continuous process by the generating industry are not discarded. In order to be eligible for the exclusion, the hazardous secondary material could not be speculatively accumulated under 261.1(c)(8). In addition, the generator of such materials would be required to submit a one-time notification to EPA or the authorized State with contact information, the type of material that would be excluded, and the industry that generated the material. In the October 2003 proposal, the Agency also proposed to codify in the RCRA regulations four criteria to be used in determining whether recycling of hazardous secondary material was legitimate. We also solicited comment on a broader conditional exclusion from RCRA regulation for essentially all hazardous secondary materials that are legitimately recycled. For a discussion of public comments received on our proposed exclusion, see section IX of this preamble.

After evaluating comments received on the October 2003 proposal and conducting an independent analysis, EPA decided to restructure its approach. Following the decision of the DC Circuit Court in *Association of Battery Recyclers* v. *EPA* (''ABR'')(208 F.3d 1047 (DC Cir. 2000), EPA has decided to examine the principles behind the court's holdings on the definition of solid waste, rather than trying to fit materials into specific fact patterns addressed by the court. EPA is therefore proposing (1) an exclusion for hazardous secondary materials that are generated and then reclaimed under the control of the generator; (2) a conditional exclusion for hazardous secondary materials that are generated and then transferred to another person for the purpose of reclamation; and (3) a petition process for obtaining a case-specific non-waste determination for certain hazardous secondary materials that are recycled. Today's notice also proposes a restructuring of the previously proposed legitimacy criteria and further clarification and guidance on how the economics of the recycling transaction should be considered in making legitimacy determinations. A detailed description of today's proposed regulatory changes and the reasons for not finalizing the October 2003 proposal are discussed in sections IX, X, XI, and XII of this preamble.

V. How Is Hazardous Waste Recycling Currently Regulated?

The basic regulatory provisions for defining ''solid wastes'' and ''hazardous wastes'' under RCRA are found in part 261 of Title 40 of the Code of Federal Regulations (CFR). To be subject to RCRA's hazardous waste regulatory program, a material must be a solid waste that is also a hazardous waste. A solid waste is a hazardous waste if it is explicitly listed as such (in subpart D of part 261), or if it exhibits one or more of the hazardous characteristics (as specified in subpart C of part 261).

In general, hazardous wastes are subject to RCRA's full ''cradle to grave'' regulatory system from the time they are generated to the time that they are ultimately disposed. However, hazardous secondary materials often can be recycled instead of being disposed, which can change how those wastes are regulated. The ''definition of solid waste'' regulations in part 261 in effect separate recyclable hazardous secondary materials into two broad categories—those that are classified as solid wastes when recycled, and are therefore subject to regulation under Subtitle C of RCRA if they are listed or characteristic hazardous wastes, and those that are not considered solid wastes when they are recycled, and thus are not regulated. It should be understood that the term ''hazardous secondary material'' as it is used in today's rule and preamble therefore refers to both categories of recyclable materials; that is, materials that are regulated as hazardous wastes when recycled, and materials that are not considered wastes when recycled.

Hazardous secondary materials that are currently not regulated as wastes when they are recycled include, for example, those which are used or reused directly as effective substitutes for commercial products, and those which can be used as ingredients in an industrial process, provided the materials are not being reclaimed. See 40 CFR 261.2(e). In essence, EPA considers these types of recycling practices to be more akin to normal industrial production rather than waste management.

In contrast, in some recycling practices, the hazardous secondary material cannot be used as is and must be significantly processed before it can be reused in a manner similar to products in commerce. In these cases, EPA has found that the material may be more ''waste-like'' and the hazardous secondary materials therefore have been regulated as hazardous wastes. One type of recycling that falls within this category and that is especially relevant to this rule is reclamation of certain types of hazardous secondary materials. Reclamation involves the processing of hazardous secondary materials in some way in order so that they can be used or reused. See 40 CFR 261.1(c)(4) and 40 CFR 261.2(c)(3). An example of reclamation is processing of a spent solvent to restore its solvent properties before it is suitable for reuse as a solvent. As explained elsewhere in today's preamble, this supplemental proposal would reexamine the regulatory status of these hazardous secondary materials and de-regulate a specific subset of these materials that are recycled by being reclaimed.

In the existing Part 261 regulations, EPA identified other types of recycling practices that are fully regulated because, we concluded, they involve discard of materials. These practices include recycling of ''inherently waste-like'' materials (40 CFR 261.2(d)), recycling of materials that are ''used in a manner constituting disposal,'' or ''used to produce products that are applied to or placed on the land,''(40 CFR 261.2(c)(1)) and ''burning of materials for energy recovery'' or ''used to produce a fuel or otherwise contained in fuels'' (40 CFR 261.2(c)(2)). Today's supplemental proposal is not intended to affect how these recycling practices are regulated.

The current regulations also provide certain specific exemptions and exclusions from the definition of solid waste for particular recycling practices. For example, pulping liquors from paper manufacturing that are reclaimed in a pulping liquor recovery furnace and then reused in the pulping process are

[3] The Agency's long-term ''vision'' of the future of the RCRA program is discussed in the document ''Beyond RCRA: Prospects for Waste and Materials Management in the Year 2020,'' which is available on the Agency's Web site *http://www.epa.gov/epaoswer/osw/vision.htm.*

excluded from regulation under 40 CFR 261.4(a)(6). In some cases, these exclusions specify certain conditions that must be met in order to qualify for and maintain the excluded status of the recycled material. An example of such a ''conditional exclusion'' is the one provided in 40 CFR 261.4(a)(9) for spent wood preserving solutions that are reclaimed and reused. EPA is proposing that hazardous secondary materials that are currently excluded with specific requirements or conditions should be required to continue to meet those requirements (*e.g.*, the drip pad requirements for the wood preserving exclusion). In addition, recycling of such materials at new facilities, or at existing facilities that are not currently operating under the terms of an existing exclusion, would also be subject to the existing applicable regulatory exclusion, rather than today's proposed exclusions. For a fuller discussion of this issue, see section XIII of this preamble. In that section, we solicit comment on allowing regulated entities to choose which exclusion they would be subject to in cases where more than one exclusion could apply.

VI. What Is the History of Recent Court Decisions on the Definition of Solid Waste?

A. Background

RCRA gives EPA the authority to regulate the disposal of ''solid wastes'' under its non-hazardous waste program. See, *e.g.*, RCRA sections 1008(a), 4001 and 4004(a). RCRA also gives EPA authority to regulate hazardous wastes. See, *e.g.*, RCRA sections 3001–3004. ''Hazardous wastes'' are the subset of solid wastes that present threats to human health and the environment. See section 1004(5). EPA also may address solid and hazardous wastes under its endangerment authorities in section 7003. (Similar authorities are available for citizen suits under section 7002.) Materials that are not solid wastes are generally not subject to regulation under RCRA Subtitle C. Thus, the definition of ''solid waste'' plays a key role in defining the scope of EPA's authorities under RCRA.

The statute defines ''solid waste'' as ''* * * any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and *other discarded material* * * * resulting from industrial, commercial, mining, and agricultural operations, and from community activities * * *'' (RCRA Section 1004 (27) (emphasis added)). In its RCRA hazardous waste regulations, EPA has historically defined certain hazardous secondary materials destined for recycling as ''waste,'' while excluding others.

Since 1980, EPA has interpreted ''solid waste'' under its Subtitle C regulations to encompass both materials that are destined for final, permanent placement in disposal units, as well as some materials that are destined for recycling. 45 FR 33090–95 (May 19, 1980); 50 FR 604–656 (Jan. 4, 1985) (see especially pages 616–618). EPA has offered three arguments in support of this approach:

- The statute and the legislative history suggest that Congress expected EPA to regulate as solid and hazardous wastes certain materials that are destined for recycling (see 45 FR 33091, citing numerous sections of the statute and *U.S. Brewers' Association* v. *EPA,* 600 F.2d 974 (DC Cir. 1979); 48 FR 14502–04 (April 3, 1983); and 50 FR 616–618).
- Hazardous secondary materials stored or transported prior to recycling have the potential to present the same types of threats to human health and the environment as hazardous wastes stored or transported prior to disposal. In fact, EPA found that recycling operations have accounted for a number of significant damage incidents. For example, materials destined for recycling were involved in one-third of the first 60 filings under RCRA's imminent and substantial endangerment authority, and 20 of the initial sites listed under CERCLA. (48 FR 14474, April 4, 1983.) Congress also cited some damage cases which can be interpreted to involve recycling. (H.R. Rep. 94–1491, 94th Cong., 2d Sess., at 17, 18, 22). More recent data (i.e., information on damages occurring after 1982) included in the rulemaking docket for today's supplemental proposal corroborate the fact that recycling operations can result in significant damage incidents. (See section IV.B.2 of today's preamble.)
- Excluding all hazardous secondary materials destined for recycling would allow materials to move in and out of the hazardous waste management system depending on what any person handling the material intended to do with it. This seems inconsistent with the mandate to track hazardous wastes and control them from ''cradle to grave.''

EPA has interpreted the statute to confer jurisdiction over at least certain hazardous secondary materials destined for recycling. The Agency has therefore developed in Part 261 of 40 CFR a definition of ''solid waste'' for Subtitle C regulatory purposes. (**Note:** This definition is narrower than the definition of ''solid waste'' for RCRA endangerment and information-gathering authorities. See 40 CFR 261.1(b) and *Connecticut Coastal Fishermen's Association* v. *Remington Arms Co.,* 989 F.2d 1305, 1315 (2d Cir. 1993), holding that EPA's use of a narrower and more specific definition of solid waste for Subtitle C purposes is a reasonable interpretation of the statute. See also *Military Toxics Project* v. *EPA,* 146 F.3d 948 (DC Cir. 1998).)

Under its current Subtitle C regulations, EPA classifies as solid wastes some—but not all—hazardous secondary materials that are recycled by ''reclamation.'' The regulations define ''spent materials'' as being ''discarded'' if they are destined for reclamation. However, ''commercial chemical products'' are not defined as ''discarded'' when reclaimed. In addition, byproducts and sludges are defined as ''discarded'' when reclaimed on a case-by-case basis. That is, EPA considers these materials to be ''discarded'' when they are specifically listed as a hazardous waste at 40 CFR 261 Subpart D. See Table 1 to 40 CFR 261.2. EPA has also promulgated three exceptions from the Subtitle C definition for materials destined for reclamation. See 260.31(b) and (c); 40 CFR 261.4(a)(8).

Finally, EPA has always asserted that materials are not excluded from its jurisdiction simply because someone claims that they will be recycled. EPA has consistently considered hazardous secondary materials destined for ''sham recycling'' to be discarded and, hence, to be solid wastes for Subtitle C purposes. See 45 FR 33093 (May 19, 1980), 50 FR 638–39 (Jan. 4, 1985). The U.S. Court of Appeals for the DC Circuit has agreed that materials undergoing sham recycling are discarded and, consequently, are solid wastes under RCRA. See *American Petroleum Institute* v. *EPA,* 216 F.3d 50, 58–59 (DC Cir. 2000).

B. A Series of DC Circuit Court Decisions

Trade associations representing mining and oil refining interests challenged EPA's 1985 regulatory definition of solid waste. In 1987, the DC Circuit held that EPA exceeded its authority ''in seeking to bring materials that are not discarded or otherwise disposed of within the compass of 'waste.' '' *American Mining Congress* v. *EPA* (''*AMC I*''), 824 F.2d 1177, 1178 (DC Cir. 1987). Although the Court clearly articulated this concept, it did not specify which portions of the rules exceeded EPA's authority. It more

generally ''granted the petition for review.''

The Court held that certain of the materials EPA was seeking to regulate were not ''discarded materials'' under section 1004(27). After reviewing numerous statutory provisions and portions of the legislative history, the Court held that Congress used the term ''discarded'' in its ordinary sense, to mean ''disposed of'' or ''abandoned 824 F.2d at 1188–89. The Court further held that the term ''discarded materials'' could not include materials * * * destined for beneficial reuse or recycling in a continuous process by the generating industry itself (because they) are not yet part of the waste disposal problem. 824 F.2d at 1190. The Court held that Congress had directly spoken to this issue, so that EPA's use of a conflicting definition was not entitled to deference under *Chevron U.S.A., Inc.* v. *NRDC,* 467 U.S. 837 (1984). 824 F.2d at 1183, 1189–90, 1193.

At the same time, the Court did *not* hold that no recycled materials could be discarded. The Court mentioned at least two examples of recycled materials that EPA properly considered within its statutory jurisdiction, noting that used oil can be considered a solid waste. 824 F.3d at 1187 (fn 14). Also, the Court suggested that materials disposed of and recycled as part of a waste management program are within EPA's jurisdiction. 824 F.2d at 1179. Subsequent decisions by the DC Circuit also indicate that some materials destined for recycling are ''discarded'' and therefore within EPA's jurisdiction. In particular, the Court held that emission control dust from steelmaking operations listed as hazardous waste ''K061'' is a solid waste, even when sent to a metals reclamation facility, at least where that is the treatment method required under EPA's land disposal restrictions program. *American Petroleum Institute* v. *EPA* (''*API I*''), 906 F.2d 729 (DC Cir. 1990). The Court held that it is reasonable for EPA to consider as discarded (and solid wastes) listed wastes managed in units that are part of wastewater treatment units, especially where it is not clear that the industry actually reuses the materials. (''*AMC II*''), 907 F.2d 1179 (DC Cir. 1990). Also, the Court found that EPA potentially had jurisdiction over oil-bearing wastewaters recycled at petroleum refineries, although in the rule under review EPA failed to provide a rational basis for asserting jurisdiction. *American Petroleum Institute* v. *EPA* (''*API II*''), 216 F.3d 50, 57–58 (DC Cir. 2000).

It also is worth noting that two other Circuits also have held that EPA has authority over at least some materials destined for reclamation rather than final discard. The U.S. Court of Appeals for the 11th Circuit found that ''[i]t is unnecessary to read into the term 'discarded' a congressional intent that the waste in question must finally and forever be discarded.'' *U.S.* v. *ILCO,* 996 F.2d 1126, 1132 (11th Cir. 1993) (finding that used lead batteries sent to a reclaimer have been ''discarded once'' by the entity that sent the battery to the reclaimer). The Fourth Circuit found that slag held on the ground untouched for six months before sale for use as road bed could be a solid waste. *Owen Electric Steel Co.* v. *EPA,* 37 F.3d 146, 150 (4th Cir. 1994).

Considering all of these decisions (except the *API* case decided in 2000), in 1998, EPA promulgated a rule in which EPA claimed Subtitle C jurisdiction over hazardous secondary materials recycled by reclamation within the mineral processing industry (the ''LDR Phase IV rule'') (63 FR 28556 (May 26, 1998)). In that rule, EPA promulgated a conditional exclusion for all types of mineral processing hazardous secondary materials destined for reclamation. EPA imposed a condition prohibiting land-based storage prior to reclamation because it considered hazardous secondary materials from the mineral processing industry that were stored on the land to be part of the waste disposal problem (63 FR at 28581). The conditional exclusion decreased regulation over spent materials stored prior to reclamation, but increased regulation over by-products and sludges that exhibit a hazardous characteristic, and that are stored prior to reclamation. EPA noted that the statute does not authorize it to regulate ''materials that are destined for immediate reuse in another phase of the industry's ongoing production process.'' EPA, however, took the position that materials that are removed from a production process for storage are not ''immediately reused,'' and therefore are ''discarded'' (63 FR at 28580).

The mining industry challenged the rule, and the DC Circuit vacated the provisions that expanded jurisdiction over characteristic by-products and sludges destined for reclamation. *Association of Battery Recyclers* v. *EPA* (''*ABR*''), 208 F.3d 1047 (DC Cir. 2000). The Court held that it had already resolved the issue presented here in its opinion in *AMC I,* where it found that ''* * * Congress unambiguously expressed its intent that 'solid waste' (and therefore EPA's regulatory authority) be limited to materials that are 'discarded' by virtue of being disposed of, abandoned, or thrown away.'' 208 F.2d at 1051. It repeated that materials reused within an ongoing industrial process are neither disposed of nor abandoned. 208 F.3d at 1051–52. It explained that the intervening API I and AMC II decisions had not narrowed the holding in AMC I. 208 F.3d at 1054–1056.

At the same time, the Court did not hold that storage before reclamation automatically makes materials ''discarded.'' Rather, it held that ''* * * at least some of the secondary material EPA seeks to regulate as solid waste (in the mineral processing rule) is destined for reuse as part of a continuous industrial process and thus is not abandoned or thrown away.'' 208 F.3d at 1056.

In its most recent opinion dealing with the definition of solid waste, *Safe Food and Fertilizer* v. *EPA,* 350 F.3d 1263 (DC Cir. 2003), the Court upheld an EPA rule that excludes from the definition of solid waste hazardous secondary materials used to make zinc fertilizers, and the fertilizers themselves, so long as the recycled materials meet certain handling, storage and reporting conditions and the resulting fertilizers have concentration levels for lead, arsenic, mercury, cadmium, chromium, and dioxins that fall below specified thresholds. Final Rule, ''Zinc Fertilizers Made From Recycled Hazardous Secondary Materials'' (''Fertilizer Rule''), (67 FR 48393 (2002)). EPA determined that if these conditions are met, the recycled materials have not been discarded. The conditions apply to a number of recycled materials not produced in the fertilizer production industry, including certain zinc-bearing hazardous secondary materials such as brass foundry dusts.

EPA's reasoning was that market participants, consistent with the EPA-required conditions in the rule, would treat the exempted materials more like valuable products than like negatively-valued wastes and, thus, would manage them in ways inconsistent with discard. In addition, the fertilizers derived from these recycled feedstocks are chemically indistinguishable from analogous commercial products made from raw materials. 350 F.3d at 1269. The court upheld the rule based on EPA's explanation that market participants manage materials in ways inconsistent with discard, and the fact that the levels of contaminants in the recycled fertilizers were ''identical'' to the fertilizers made with raw materials. The court held that this interpretation of ''discard'' was reasonable and consistent with the statutory purpose. The court

noted that the identity principle was defensible because the differences in health and environmental risks between the two types of fertilizers are so slight as to be substantively meaningless.

However, the Court specifically stated that it ''need not consider whether a material could be classified as a non-discarded exclusively on the basis of the market-participation theory.'' 350 F.3d at 1269. The court only determined that the combination of market participants' treatment of the materials, EPA required management standards and the ''identity principle'' are a reasonable set of tools to establish that the recycled secondary materials and fertilizers are not discarded.

C. 2003 Proposed Revisions to the Definition of Solid Waste

As a result of the court decision in ABR to vacate the provisions in the May 1998 final rule that increased regulation of characteristic by-products and sludges from mineral processing, EPA promulgated a final rule removing from the Code of Federal Regulations the byproduct and sludge provisions (67 FR 11251 (Mar. 13, 2002)). Later, prompted by concerns articulated in the various Court opinions up to the ABR decision, EPA issued the October 2003 notice, which proposed that material generated and reclaimed in a continuous process within the same industry is not discarded for purposes of Subtitle C, provided that the recycling process is legitimate. However, for the reasons described elsewhere in today's notice, we are proposing different types of exclusions from the definition of solid waste in this supplemental proposal that we believe more directly consider whether particular materials are not considered ''discarded'', and are not solid and hazardous wastes subject to regulation under Subtitle C of RCRA. The October 2003 proposal and how it relates to today's supplemental proposal is further discussed elsewhere in today's preamble.

VII. How Does the Concept of Discard Relate to These Proposed Exclusions?

The concept of ''discard'' is the central organizing idea behind today's supplemental proposal, which reflects the fundamental logic of the RCRA statute. As stated in RCRA Section 1004(27), ''solid waste'' is defined as ''* * * any garbage, refuse, sludge from a waste treatment plant, or air pollution control facility and other discarded material * * * resulting from industrial, commercial, mining and agricultural activities* * *'' Therefore, in the context of this supplemental proposal, a key issue is the circumstances under which a material that is recycled by reclamation is or is not discarded.

In the series of decisions discussed above relating to the RCRA definition of solid waste, the Court of Appeals for the DC Circuit has consistently cited a plain language definition of discard, as meaning ''disposing, abandoning or throwing away.'' EPA believes that this is a workable and logical definition of the term, and the underlying logic of today's proposed exclusions is consistent with this definition.

The basic rationale that EPA is applying in this case differentiates between recycled hazardous secondary materials over which the generator maintains control and recycled hazardous secondary materials over which the generator relinquishes control. If the generator maintains control over the recycled hazardous secondary material and it is legitimately recycled under the standards established in this proposal and the material is not speculatively accumulated within the meaning of EPA's regulations, the hazardous secondary material is not discarded. This is because the material is being treated as a valuable commodity rather than as a waste. By maintaining control over, and potential liability for, the recycling process, the generator ensures that the materials are not discarded. See *ABR* 208 F.3d at 1051 (''Rather than throwing these materials [destined for recycling] away, the producers saves them; rather than abandoning them, the producer reuses them.''). However, when the hazardous secondary materials are managed in land-based units (e.g., waste piles, surface impoundments, etc), the hazardous secondary materials must be contained, or they may be considered discarded, even if they remain under the control of the generator. While placement on the land would not in itself constitute discard, when hazardous secondary materials are not being managed as a valuable product and, as a result, a significant release occurs, such materials would be considered discarded. Further discussion of these concepts appears in section IX of this preamble.

In those cases, however, where generators of hazardous secondary materials do not re-use or recycle the materials themselves, it often may be a sound business decision to ship the material to be recycled to a commercial facility or another manufacturer in order to avoid the costs of disposing of the material. In such situations, the generator has relinquished control of the hazardous secondary material and the entity receiving such materials may not have the same incentives to manage the hazardous secondary material as a useful product. Accordingly, the Agency believes that conditions are needed for the Agency to determine that this material is not discarded. However, if the recycler legitimately recycles the hazardous secondary material, it is not regulated as a solid waste, provided certain additional conditions are met. Further discussion of the Agency's rationale for this concept appears in section X.A. of this preamble.

This is the general logic we have used in developing the exclusions in today's supplemental proposal. The proposed exclusion for hazardous secondary materials that are recycled under the control of the generator is based on the notion that as long as the generator has control over the recycling process, has chosen to legitimately reclaim it within the United States or its territories, retains liability in the event that the hazardous secondary materials (be they the materials that were generated, residuals from a reclamation process, or both) are somehow released into the environment, these materials are not discarded. In addition, if the materials are managed in a land-based unit, the generator must ensure that the materials are contained. Of course, if such hazardous secondary materials are released into the environment and are not recovered in a timely manner, these materials have been discarded and the generator is subject to all applicable federal and state regulations, and applicable cleanup authorities. The ''broader'' exclusion for materials that are transferred by the generator to another person or company for reclamation is based on the idea subsequent activities are more likely to involve discard, given that the generator has relinquished control of the hazardous secondary material, and additional conditions are needed for the Agency to determine that these materials are not discarded.

VIII. Recycling Studies

A. Purpose of Studies

In response to the October, 2003 proposal, a number of commenters criticized the Agency specifically for not having conducted a thorough study of the potential impact of the proposed regulatory changes. These commenters expressed the general concern that deregulating hazardous secondary materials that are reclaimed in the manner proposed could result in mismanagement of these materials, and thus could create new cases of environmental damage that would require remedial action under federal or

state authorities. Some of the commenters further cited a number of examples of environmental damage that were attributed to hazardous material recycling, including a number of sites listed on the Superfund National Priorities List (NPL).

However, a number of other commenters expressed the view that the great majority of these cases of recycling-related environmental problems occurred before RCRA, CERCLA or other environmental programs were established in the early 1980s. These commenters further argued that these environmental programs—most notably, RCRA's hazardous waste regulations, and the liability provisions of CERCLA—have created strong incentives for proper management of recyclable materials and recycling residuals. Several commenters further noted that because of these developments, industrial recycling practices have changed substantially since the early 1980s, and present day generators and recyclers are much better environmental stewards than in the pre-RCRA/CERCLA era. Thus, they argued, cases of ''historical'' recycling-related environmental damage are not particularly relevant or instructive with regard to modifying the current RCRA hazardous waste regulations for hazardous material recycling.

In light of these comments and in deliberating on how to proceed with this rulemaking effort, the Agency decided that additional information on hazardous material recycling would benefit the regulatory decision-making process, and would provide stakeholders with a clearer picture of the hazardous material recycling industry in this country. Accordingly, the Agency examined three basic issues that we believed were of particular importance to informing this rulemaking effort:

- How do responsible generators and recyclers of hazardous secondary materials ensure that recycling is done in an environmentally safe manner?
- To what extent have hazardous secondary material recycling practices resulted in environmental problems in recent years, and why?
- Are there certain economic forces or incentives specific to hazardous secondary material recycling that can explain why environmental problems can sometimes originate from such recycling activities?

Reports documenting these studies are in the administrative record for this rulemaking, under the following titles:

- ''An Assessment of Current Good Practices for Recycling of Hazardous Secondary Materials''
- ''An Assessment of Environmental Problems Associated With Recycling of Hazardous Secondary Materials''
- ''Potential Effects of Market Forces on the Management of Hazardous Recyclable Materials''

The findings of these background studies have informed many of the Agency's policy decisions in developing this regulatory proposal. However, it should be understood that these three reports are not definitive, peer-reviewed documents of a technical nature. We fully acknowledge that in some respects they may not paint a complete picture, or capture every detail of the subject matter that was examined. However, we believe that the information in the studies provides an important perspective on current recycling practices, and that it supports our policy direction in developing today's supplemental proposal. EPA solicits comment on the policy and regulatory implications of the information in these studies.

B. Results

1. Successful Recycling Practices

One of the studies that EPA has completed is an examination of what practices many generators and recyclers currently use to ensure that their hazardous secondary materials are recycled safely and responsibly. One purpose of this study was to provide the Agency and the rulemaking record with another angle from which to view the hazardous secondary material recycling industry. In addition, the results of this study suggest what kinds of regulatory controls might be appropriate for these hazardous secondary materials to determine that they are handled as commodities rather than wastes. The practices have helped the Agency develop elements of the supplemental proposal presented today.

The Agency has long heard from various representatives of industry and other stakeholders that management of hazardous secondary materials has changed and improved since the inception of the RCRA hazardous waste regulations in the early 1980s and that these hazardous secondary materials are being managed much more carefully than they were historically. The successful recycling study examines which improved practices are used by many companies in the industry and the reasons the practices are implemented.

To complete this study, EPA spoke with representatives from multiple organizations that regularly manage hazardous secondary materials, both for recycling and for treatment followed by disposal, and examined literature and publicly available information on the Internet focused on the subject of recycling of hazardous secondary materials. The study uses these sources to assemble an overall picture of the good practices that are currently in use by a number of companies. The full study can be found in the docket for today's supplemental proposal, available at *http://www.regulations.gov*.

The successful recycling study found two main drivers behind companies adopting responsible recycling practices in the management of their hazardous secondary materials. The first is concern of liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as Superfund. Under CERCLA, a company can be held liable as an arranger for disposal for contamination caused by its materials sent for recycling at another facility's site. Therefore, it is in that company's best interest to ensure that the facility to which it sends its waste is not likely to become a Superfund site or to fall under CERCLA in the future either because of financial failure or because of bad materials management practices. The threat of Superfund liability was cited by many of the sources for the responsible recycling study as the main reason for the development of their audit programs in this area.

The other reason for adoption of responsible recycling practices cited falls into a broad category of concerns about corporate responsibility and public relations. Many companies now have very public environmental policies and have implemented environmental management systems that are part of their programs for corporate responsibility. Although the real effects of these corporate policies are hard to gauge, EPA observed during this study that audit programs that were developed in response to CERCLA, now are maintained as part of a philosophy of corporate responsibility, which is part of the image a corporation sells to its customers.

EPA found that responsible recycling practices used by generators and recyclers to manage hazardous secondary materials fall into two general categories. The first category includes the audit activities and inquiries performed by a generator of a material to determine whether the entity to which it is sending the hazardous secondary material is equipped to responsibly manage those materials without the risk of releases or other environmental damage. These recycling and waste audits of other companies' facilities form a backbone of many of the transactions in the hazardous secondary

materials market. The second category of responsible recycling practices consists of the control practices that ensure responsible management of any given shipment of hazardous secondary material, such as the contracts under which the transaction takes place and the tracking systems in place that can inform a generator that its hazardous secondary material has been properly managed.

In this study, EPA found that certain generators of hazardous secondary materials perform facility audits—a kind of environmental due diligence—on the facilities to which they send their materials. These audits can take many forms and can be of varying degrees of complexity, depending on the secondary material or, in some cases, on the size and sophistication of the generator. Although large companies are more likely to perform in-depth facility audits, possibly because they more frequently have environmental health and safety divisions coordinating audits or because they may have greater amounts of hazardous secondary materials they are sending off-site, some smaller companies are also performing some kind of audit on the recycling facility receiving the hazardous secondary material.

The exact nature of each generator's audit process will vary, but there are some common elements. Often the audit has two parts: (1) A remote screening audit during which the auditor examines the recycler's compliance history and financial records and the recycler may fill out a questionnaire about its operations and facility and (2) a visit to the recycler's facility, which can take anywhere from several hours to several days. Some common elements examined in both phases of an audit include: (1) Site history; (2) history of compliance with environmental requirements and permits; (3) general appearance and housekeeping at the facility; (4) description of process design and capability; (5) residuals management; (6) financial soundness of the recycler; and (7) possession of adequate pollution liability and general insurance.

In addition to generators auditing recycling facilities, another example of a practice that EPA believes helps to ensure responsible management is the design of hazardous secondary materials recycling contracts and tracking systems to manage information about the location of a particular container and to document its eventual recycling.

Recycling contracts are normal business practice and minimize the potential for recyclers to receive shipments of hazardous secondary materials that they are not equipped to recycle. In these contracts, the two parties can lay out specifications for the make-up of materials being shipped to the recycler and describe the protocol for actions taken if a material not meeting these specifications arrives at the recycling facility. In some cases, the recycler can still handle the material, but may charge the generator an additional fee for having to alter the material to meet specifications. In other cases, the recycler may not be able to accept the material at all. Through the contract mechanism, both parties then agree on whether that hazardous secondary material should be returned to the generator or sent to a different recycler or waste disposal facility.

EPA also found that knowing whether materials conform to the contract specifications necessitated sampling of the hazardous secondary material arriving at a recycler. Several recyclers told EPA that they sample each rail car, truck, and drum arriving at their facilities before accepting them. Legitimate recycling practices operate as a manufacturing process might and there is tight control over the nature of the materials being recycled. Recyclers who are seeking to make a salable product will make sure that the inputs meet specifications.

Due to time and resource limitations, EPA's examination of successful recycling practices was not exhaustive, as we were able to gather information from a limited number of sources. We believe that the practices and situations outlined in the study are representative of industry practices performed by many companies, but ask today for comments on the results of the study and for relevant information not represented therein.

2. Environmental Problems Associated With Recycling of Hazardous Secondary Materials

a. *Scope and objectives of the study.* The general goal of this study was to identify and characterize environmental problems that have been attributed to some type of hazardous secondary material recycling activity, and that are relevant for the purpose of this rulemaking effort. The Agency believes that discarding is more likely to occur if environmental problems exist. Specifically, we sought to identify the following types of cases:

- Cases where environmental damage clearly can be attributed to some type of recycling activity. In conducting this study, we limited our search to those environmental problems in which environmental damages were clearly caused by some type of recycling-related activity. In this context, ''recycling-related activities'' included—
- accumulation or storage of hazardous secondary materials by the generator, the recycler or an intermediary;
- illegal disposal or abandonment of recyclable hazardous secondary materials or recycling residuals;
- transportation of recyclable hazardous secondary materials;
- ''sham'' recycling operations (i.e., illegal disposal or treatment disguised as recycling);
- production and/or use of contaminated products from recycled hazardous secondary materials, reclamation and/or production processes;
- management of residuals from reclamation or production processes, or
- other activities associated with the management of recyclable hazardous secondary materials, recycling residuals, or the products of recycling processes.

The study identified a number of cleanup sites at which a recycling process had operated, but where other sources of contamination made it extremely difficult to determine with any certainty that the recycling activity contributed to the environmental problems at the site. These cases were not included in this study.

- Relatively recent cases. Many of the environmental problems that were examined in the course of this study occurred before RCRA, CERCLA or other environmental programs were established in the early 1980s. The Agency believes that, for the purpose of this rulemaking effort, these ''historical'' recycling-related damage cases are much less relevant and instructive than cases which have occurred within the current regulatory and liability ''landscape.'' This belief is based in large part on the findings of our companion study of current good hazardous secondary material recycling practices, which indicate that in today's era (though there are exceptions), most generators and recyclers are aware of their environmental responsibilities, and generally make considerable efforts to ensure that materials are recycled and otherwise managed responsibly. Therefore, all the cases included in the data for this study occurred after 1982.
- Cases involving recycling of regulated hazardous secondary materials that are specifically excluded from RCRA regulation. The study was intended to identify environmental problems associated with recycling of regulated hazardous secondary materials, as well as those involving the recycling of hazardous secondary materials that are not regulated because

they are subject to a specific regulatory exemption or exclusion (see, for example, the exclusions in 40 CFR 261.4). The Agency was interested in these types of problems because they may indicate the extent to which environmental damages can occur even when recycling is conducted under a stringent regulatory regime, and whether such environmental problems may be more or less prevalent for materials that are not regulated as hazardous wastes. The study was not designed to identify cases involving recycling of non-hazardous materials such as paper, glass, rubber, or plastics.

b. *Methodology.* The initial task of this study was to identify as many recycling-related environmental problems that were relevant to the scope and purpose of the study as possible (the preceding section of this preamble describes the types of cases that were considered relevant to the study). Potential cases were identified from a variety of sources, including:

- Comments on the October 28, 2003, proposed rule
- The Superfund National Priorities List
- National EPA data bases maintained for the CERCLA, RCRA, and enforcement programs
- Contacts with staff in state environmental agencies
- Contacts with staff in EPA Regional Offices
- State agency data bases maintained for state Superfund programs and other environmental programs
- Internet searches
- News media reports

For those environmental problems found at recycling facilities or resulting in the mismanagement of hazardous secondary materials to be recycled that were relevant to the study, we gathered available information to identify certain key facts relating to when the problem occurred, the type of recycling practice involved, the types of materials recycled, how and why the environmental damage occurred, and other key data (these data are summarized in tabular form in Appendix 1 of the report entitled The Assessment of Environmental Problems Associated With Recycling of Hazardous Secondary Materials). A written description of each case was then prepared—these are in Appendix 2 of the same report.

Many of the cases that were investigated, including many of the Superfund sites, were well-documented, and we were able to assemble relatively complete profiles for those cases. For many other cases, however, much less complete information was available, while at some of the sites, we were able to collect only very basic information.

In addition, because of time and resource limitations, the search for potentially relevant cases was not exhaustive. For example, we did not systematically survey all state environmental agencies for relevant cases, nor did we search paper files in EPA Regional Offices. Because of this relatively limited scope, we believe that the cases we have identified and described in this report in effect represent those that were relatively easy to find, and that there are likely to be additional cases that we did not identify. However, we have no reason to think that additional cases would substantially change the overall picture. Nevertheless, the Agency requests information on relevant cases of environmental problems that we did not identify, as well as comments or supplemental information on those that were characterized in the report. If you provide data on additional cases of environmental problems from recycling, Appendix 2 of the study is a good resource for the types of information most useful to the Agency, particularly when the problem occurred; the type of recycling practice involved; whether recycling occurred at an on-site or off-site recycling facility; the types of hazardous secondary materials being recycled; and how and why the problem occurred.

c. Summary of findings. The study identified 208 cases in which environmental damages of some kind occurred from some type of recycling activity and that fit the scope of the study. Such damages included leaks, spills, dumps, or other types of releases that were serious enough to require some type of cleanup action. They also included instances where materials were abandoned (e.g., in warehouses) and which required removal overseen by a government agency and expenditure of public funds. However, the study did not include situations in which environmental regulatory violations occurred, but did not result in actual damage to the environment or human health.

With regard to the types of materials associated with the cases that were documented in the study, most common were scrap metals, solvents, used oil, non-ferrous metals, lead-acid batteries, and used drums sent for cleaning and reconditioning. Less common were cases involving mercury, precious metals, and hazardous foundry sands.

The types of environmental damage that occurred varied widely; many were relatively small incidents involving contaminated soils and/or residuals, such as battery casings, while a number were much more substantial and expensive, with large-scale soil and ground water contamination, and remediation costs in the tens of millions of dollars. A surprising number of cases (sixty-nine) involved materials that were abandoned in one way or another.

The study also tried to identify the cause of the environmental problems for each case that was investigated. In large part, we were able to identify, or at least infer, how the problems occurred, although for four percent of the cases examined, we were unable to determine the primary cause of damage. However, in only a few cases were we able to identify with any certainty why they occurred. For example, in approximately one-third of the cases, we were able to conclude that mismanagement of recycling residuals was at least partly the cause of contamination problems. We were unable, however, to identify why the residuals were managed improperly.

Mismanagement of the hazardous secondary materials prior to their reclamation or reuse caused contamination at forty percent of sites, whereas mismanagement of recycling residuals was the primary cause at thirty-four percent of the sites. Often, at the latter category of sites, reclamation processes generated residuals in which the toxic components of the recycled materials became concentrated, and these wastes were then mismanaged. Examples of this include a number of drum reconditioning facilities, where large numbers of used drums were cleaned out to remove small amounts of remaining product such as solvent, and these wastes were then improperly stored or disposed of.

As already noted, sixty-nine of the cases examined in the study involved abandonment of recyclable hazardous secondary materials as the primary cause of damage. In most of these cases, business failure appears to have been the main reason the hazardous secondary materials were abandoned. Seven of the cases that were examined appear to have been outright ''sham'' recyclers. In most of these cases, companies advertised themselves to local generators as recyclers and accumulated considerable quantities of waste materials, but did not actually recycle them. These sites were also then abandoned.

Since a considerable number of commenters to the October 2003 proposal supported the idea of a regulatory exclusion for on-site recycling (i.e., at the generating facility), the study also distinguished between environmental problems from recycling

that occurred at off-site, commercial recycling facilities, and those from recycling on-site. Thirteen (6%) of the 208 cases were determined to be from recycling that occurred on-site. This relatively small proportion of cases may signify that on-site recycling is inherently less likely to result in environmental problems, for various reasons. However, it may also be that recycling conducted at facilities generating hazardous secondary materials occurs at fewer facilities than recycling by commercial facilities or that these types of environmental problems are not as well documented, or for other reasons are more difficult to identify, given the scope and methodology of the study. The Agency solicits comment and additional data on the issue of environmental problems from on-site recycling that occurred since 1982 and where the problems are clearly attributable to the recycling activity. We are particularly seeking facts about any instances that are not captured in the study, particularly answering the questions of when the recycling took place, what type of recycling practices were involved, what the environmental problem was, and what caused the problem.

The study also addressed whether or not instances of environmental damage occurred at hazardous waste recycling facilities with RCRA permits (**Note:** RCRA does not require Part B permits for the recycling processes themselves; typically, permits are issued to such facilities when hazardous secondary materials are stored prior to recycling.) RCRA permitted hazardous waste management facilities are subject to relatively stringent, facility-specific requirements, and in general are given more oversight by regulatory agencies than facilities without permits. For these reasons, these cases are of particular interest to the Agency with regard to this rulemaking.

Twenty-four of the cases identified were, at one time or another, operating under RCRA hazardous waste permits. However, only nine clearly appear to have been operating under RCRA permits at the time the damage occurred. Two of these cases involved fires and/or explosions.

The study also looked at some of the financial circumstances regarding clean up of environmental problems. At thirteen of the twenty-four hazardous waste permitted facilities, all or part of the funds used to clean up environmental damages were contributed by the owner/operator of the facility, either voluntarily or under some form of consent agreement. In at least two of these cases, it appears that cleanup funds became available by means of a RCRA-required financial assurance mechanism, such as a surety bond. Thirteen of the facilities appear to have been cited for serious permit violations, either before or as a result of the damage incident. In four cases, the facility permits were revoked because of compliance issues. Eleven of the twenty-four facilities were found to be no longer in business, because of bankruptcy or for other reasons.

Of the 208 cases that were documented in the study, fifty-one were or are listed on the CERCLA National Priorities List (NPL). Fifty-five additional cases were addressed under CERCLA authorities, but the sites were not listed on the NPL. State cleanup authorities were used to address sixty-five of the cases, while thirty were addressed using RCRA corrective action authorities. For nineteen of the cases, we were unable to identify what remedial program, if any, was used to clean up the sites. (In some cases, there was more than one type of cleanup action at a site).

For eighty-nine of the cases, we were able to identify the costs, or at least cost estimates, associated with addressing the environmental problems caused by recycling activities. Thirty-seven of these cases required less than one million dollars to clean up; forty-four cost between one and ten million dollars; and eight cost more than ten million dollars to remediate.

It is possible that these cost data are incomplete and are not an accurate representation of actual cleanup costs for the entire sample of 208 cases. For one thing, cost data were much easier to find for CERCLA-lead cleanups than cleanups done under other programs. Another uncertainty with regard to these cost data is that in some cases, it was not possible to distinguish between cleanup costs that were incurred specifically to address recycling-related contamination, and costs for other cleanup activities at the site. The Agency solicits additional information from commenters regarding cleanup costs (actual or estimated) incurred in remediating these recycling-related environmental problems.

C. Potential Effects of Market Forces on the Management of Recyclable Hazardous Secondary Materials

EPA also has completed a study of how market forces can affect the management of recyclable hazardous secondary materials. This study uses economic theory to describe how various market incentives can influence a firm's decision making process when the recycling of hazardous secondary material is involved. Because the study is largely theoretical, the results should be interpreted with caution, but it does provide insights that can explain some of the possible fundamental economic drivers of both the successful and unsuccessful recycling practices, which in turn help us to design the exclusions that we are proposing today.

The October 2003 proposal was based in part on the premise that some types of recycling are more akin to manufacturing than waste management and therefore are not appropriate for regulation as waste management. [''In EPA's view, a recycler will value secondary materials that provide an important contribution to his process or product and will manage them in a manner consistent with a valuable feedstock material (i.e., will manage them to minimize their loss)''; 68 FR 61583].

However, as pointed out by some commenters to the proposed rule, the economic forces shaping the behavior of firms that recycle hazardous secondary materials can be different from those at play in manufacturing processes using virgin materials. For example, the inherent value of hazardous secondary materials can be much lower than virgin materials used in manufacturing, resulting in a different set of economic incentives. Additionally, different economic incentives between the recycling of hazardous secondary materials and manufacturing may arise due to differences in these two business models. As opposed to manufacturing, where the cost of raw materials or intermediates (or inputs) is greater than zero and revenue is generated primarily from the sale of the output, some models of hazardous materials recycling involve generating revenue primarily from receipt of the hazardous secondary materials. Recyclers of hazardous secondary materials in this situation may thus respond differently from traditional manufacturers to economic forces and incentives.

An increased understanding of these aspects of hazardous secondary material recycling can help to craft a rule that takes advantage of the positive economic forces, and compensates for the negative ones, in order to produce an optimal amount of recycling. An optimal amount of recycling is one that maximizes the net benefits (private and social benefits minus private and social costs). One sub-optimal outcome of not providing a proper balance could be too little recycling, resulting in inefficiencies. In this case, increasing the rate of recycling (for example, via today's proposed changes) would realize additional net benefits. However, sub-

optimal outcomes can also result from too much of an activity. For hazardous secondary material recycling, this situation occurs when firms accumulate more hazardous secondary material than can be recycled in a reasonable timeframe, or operate their recycling process in a way that imposes excessive costs on society (such as excess pollution or mishandling of hazardous secondary material) and that can result in the material being discarded.

The market incentive study uses economic theory to provide information on how certain characteristics can influence three different recycling models to encourage or discourage an optimal outcome. The three recycling models examined are: (1) Commercial recycling, where the primary business of the firms is recycling hazardous secondary materials, which are accepted for recycling from offsite industrial sources (which usually pay a fee); (2) industrial intra-company recycling, where firms generate hazardous secondary materials as byproducts of their main production processes and recycle the hazardous secondary materials for sale or for their own reuse in production; and (3) industrial inter-company recycling, where firms whose primary business is not recycling, but use or recycle hazardous secondary materials obtained from other firms with the objective of reducing the cost of their production inputs.

For each of these recycling models, the report looks at how they are potentially affected by three market characteristics: (1) Value of the recycled product; (2) price stability of recycling output or inputs; and (3) net worth of the firm.

For all three models of hazardous secondary material recycling, a recycled product with a high value appears to contribute to an optimal outcome for hazardous secondary material recycling. For commercial and industrial inter-company firms, the value of the product can serve as a strong incentive for the firm to recycle the product with care and bring it to the market. Recycling by these firms would thus be driven primarily by the potential revenues from the recycled product, and not by other factors such as an acceptance fee. For industrial intra-company recyclers, the value of the recycled product would contribute to optimal recycling behavior even if the firm is reusing the product in its own production process instead of selling it to outside firms. Conversely, for all three models of hazardous secondary material recycling, a recycled product with a low value could be a potential indicator of sub-optimal recycling outcomes. For commercial firms in particular, the acceptance fee is likely to be a much more prevalent factor in the firm's revenue structure when the recycled product has a low value. If the value of the recycled product is low, the firm may have more of an incentive to focus on accepting hazardous secondary material than properly recycling it and selling a low-value recycled product.

Price stability is another potential indicator of hazardous secondary material recycling markets that produce optimal outcomes, particularly for commercial recyclers. When prices are stable, firms can more easily adjust their production in response to the price signals they receive from the market. They are thus less subject to sudden upsets to their revenue streams or costs which could force them to operate at a short or long-term loss. Unstable markets can contribute to sub-optimal outcomes, due to an unexpected fall in revenues or rise in costs, such that the firm is no longer able to cover the costs incurred to make the product. This could encourage the stockpiling of hazardous secondary material by the firm in order to continue collecting the acceptance fee. A commercial firm's choice to shut down can also contribute to sub-optimal recycling outcomes if this involves the abandonment of hazardous secondary material that the firm was stockpiling on-site. Since industrial intra- and inter-company recyclers are also recycling to produce a marketable product, they are subject to similar forces as commercial firms. They are less constrained in their responses to these forces, however, since recycling is not their primary business operation, and are able to switch from recycling to disposal, or from using recycled materials to raw materials, if market conditions shift.

For all three recycling models, firms that have a higher net worth have more to lose from liability issues and thus have a greater incentive to invest in safe hazardous secondary material management and recycling practices. These firms would have more incentive to practice recycling in an environmentally safe manner and also to insure against possible liability risks that would jeopardize their investments. Firms that have a relatively low worth and do not have an established history in the market could be potentially more likely to face incentives that could cause them to engage in recycling practices that impose few controls or cut corners in order to boost revenues. While we recognize that it should not be assumed that all low-value firms would engage in such practices, this can be viewed as one potential indicator of risky behavior.

As mentioned earlier, using economic theory to interpret recycling behavior should be done with extreme caution. An individual firm's decision-making process is based on many factors, and attempting to extrapolate a firm's likely behavior from a few factors, particularly based on theoretical considerations, could lead to erroneous conclusions. However, when used in conjunction with other pieces of information, the economic theory can be quite illuminating. For example, because the industrial intra- and inter-company recyclers have more flexibility (e.g., during price fluctuations, these companies can more easily switch from recycling to disposal or from recycled inputs to virgin inputs), they would be less likely to have environmental problems from over-accumulated materials. This outcome appears to be supported by the results of the assessment of environmental problems study (see section VIII.B.2 of today's supplemental proposal).

On the other hand, certain specific types of commercial recycling, where the product has low value, the prices are unstable, and/or the firm has a low net worth, could indicate that it is more likely for environmental problems to occur from over-accumulation of recycled materials, compared to recycling by a well-capitalized firm that yields a product with high value. Again, this outcome appears to be supported by the results of the assessment of environmental problems study (see section VIII.B.2 of today's supplemental proposal).

However, as shown by the study of successful recycling practices, generators who might otherwise bear a large liability from poorly managed recycling at other companies have addressed this issue by carefully examining the recyclers to which they send their hazardous secondary materials to ensure the recyclers are technically and financially capable of performing the recycling (see section VIII.B.1 of today's supplemental proposal). In addition, we have seen that successful recyclers (both commercial and industrial) have often taken advantage of mechanisms such as tolling contracts to help stabilize price fluctuations, allowing recyclers to plan their operations better.

For further discussion of this study, please see *A Study of Potential Effects of Market Forces on the Management of Hazardous Secondary Materials* in the docket for today's supplemental proposal.

IX. Exclusion for Hazardous Secondary Materials That Are Legitimately Reclaimed Under the Control of the Generator: Proposed 40 CFR 260.0, 261.2(a)(1), 261.2(a)(2), 261.2(c)(3), 261.4(a)(23)

A. Purpose of the Exclusion

In the October 2003 proposal, EPA proposed to exclude from the definition of solid waste hazardous secondary materials generated and reclaimed in a continuous industrial process within the same industry. ''Same industry'' was defined as industries sharing the same four-digit North American Industry Classification System (NAICS) code. We also co-proposed a second option, under which such materials would not be eligible for the exclusion if the reclamation took place at a facility that also recycled regulated hazardous wastes generated in a different industry. EPA chose the NAICS system as a way to define ''same industry'' because the system is already widely used to classify different industries. We recognized that the system was developed for statistical rather than regulatory purposes. However, the NAICS scheme employs a production-oriented concept, grouping together industries that have similar or identical production processes. In addition, the regulated community is generally familiar with the NAICS system. For these reasons, the Agency proposed this system to define ''same industry''.

EPA chose the four-digit NAICS level (rather than the three or five-digit level) because that level appeared to be an appropriate compromise between being too broad or too restrictive. The Agency evaluated the potential recycling opportunities available through defining ''same industry'' at the three, four, and five-digit levels. We performed the analysis for the chemical manufacturing sector, which contains many RCRA hazardous waste generators and served as a surrogate for other manufacturing sectors. In general, we found that classification at the three-digit level led to grouping facilities that did not have similar production processes. Classification at the five-digit level, on the other hand, led to grouping similar processes, but greatly reduced opportunities for recycling.

In the same notice, EPA also solicited comment on several different alternatives to the proposed exclusion. The first alternative was whether to exclude from the definition of solid waste those hazardous secondary materials that are generated and reclaimed in a continuous process on-site (as defined in 40 CFR 260.10), even if different industries were involved. This option would also have required the same notification and speculative accumulation provisions proposed for the proposed option. This exclusion would be based on the premise that materials recycled on-site in a continuous process are unlikely to be discarded because they would be closely managed and monitored by a single entity who is intimately familiar with both the generation and reclamation of the material. In addition, no off-site transport of the hazardous secondary material (with its attendant risks) would occur, and there would be few questions about potential liability in the event of mismanagement or mishap. An example of such recycling given in the proposal was a facility that produces petrochemicals, as well as pharmaceuticals. Under the four-digit NAICS-based proposal, such reclamation would not have been excluded even if both establishments were located at the same site and operated by the same company. Another example might be a situation where a generator contracts with a different company to reclaim material at the generator's facility, possibly through a mobile treatment unit.

The second alternative was an exclusion for certain situations within the chemical manufacturing industry that might present unique recycling situations. Specifically, within the chemical manufacturing industry, the first manufacturer will contract out production of certain chemicals to another manufacturer (referred to as batch or tolling operations). The second manufacturer may generate hazardous secondary materials that could be returned to the larger chemical manufacturer for reclamation. In the proposal, we inquired whether some recycling could be precluded as a result of uncertain application of the NAICS classification approach due to frequently changing product slates, or different products being produced from the same equipment at different times.

The third alternative would have provided a broader conditional regulatory exclusion from RCRA regulation for essentially all hazardous secondary materials that are legitimately recycled by reclamation. The purpose of this broader exclusion would be to encourage recycling and lower costs, while still protecting human health and the environment. The Agency suggested that additional requirements or conditions might be appropriate to protect human health and the environment for this exclusion, compared to the same-industry exclusion that we proposed. Examples of such additional conditions could include record-keeping and reporting requirements, along with safeguards on storage or handling. Although the Agency solicited comment on additional conditions, the discussion in the preamble of this approach was brief and may not have provided sufficient information to commenters. Like the other exclusions discussed in the October 28, 2003 proposal, hazardous secondary materials used in a manner constituting disposal, burned for energy recovery, or materials that were inherently waste-like would not be eligible. The Agency solicited comment on the increased recycling and reuse that would result from broadening the rule in this way, as well as comment on the potential effects to human health and the environment.

EPA received many comments on the NAICS ''same industry'' scheme from various stakeholders. Many commenters did not agree that NAICS was an appropriate way to define ''same industry''; more importantly, most commenters did not agree that excluding recycling within the same industry was justified on legal or pragmatic grounds. These commenters generally stated that EPA's proposed exclusion did not accurately reflect Congressional intent or court mandates concerning EPA's authority over legitimate recycling. They reiterated that EPA's RCRA authority extends only to materials that are truly discarded (i.e., disposed of, thrown away, or abandoned) and that have not yet become part of the waste disposal problem. Many of these commenters interpreted the relevant court decisions to mean that any legitimately reclaimed material (whether recycled within the same industry or between industries) is not ''discarded'' and thus cannot be regulated as a solid waste. Some of these commenters cited the ''*Safe Foods*'' decision (*Safe Food and Fertilizer, et al.,* v. *EPA*, 350 F.3d 1263, DC Cir. 2003) as support for their contention that materials recycled in different industries were not discarded.

Other commenters said that they would not benefit from the proposed exclusion because so many recycling opportunities occur among different industries. These commenters included companies in the metals recycling industry, mining and mineral processors, specialty batch chemical manufacturers, some solvent recyclers, the paint and coatings industry, spent pickle liquor generators, and small businesses.

Still other commenters argued that the Agency had read the court decisions too broadly rather than too narrowly, but some of these commenters also said that

EPA had failed to present a reasoned analysis of the indicia of discard. One commenter stated that EPA did not analyze potential environmental harm from the proposed rule.

Many commenters, on the other hand, responded positively to the Agency's solicitation of comment about excluding on-site recycling from the definition of solid waste. These commenters agreed with EPA's suggestion that generators who recycle materials on-site (even if the reclamation takes place in a different NAICS code) are likely to be familiar with the material and more likely to maintain responsibility for the materials. Some commenters wanted any exclusion confined to on-site recycling, but other commenters suggested that EPA expand any on-site exclusion to include recycling (including off-site recycling) conducted within the same company. These commenters believed that the principal reasoning applied to on-site recycling would also apply to same-company recycling—i.e., that the same entity would be familiar with the material and would remain responsible for it.

Concerning our solicitation of comments on tolling arrangements, some stakeholders commented that the specialty batch chemical industry, in particular, might present unique situations regarding appropriate exclusions, principally due to the varying nature of production and hence of potential hazardous secondary materials available for recycling. Because of these circumstances, stakeholders believed that exclusions targeted to the types of tolling arrangements common in this industry would be easier to implement.

After evaluating the comments, the Agency has concluded that its proposed approach to ''same industry recycling'' does not accurately delineate EPA's RCRA jurisdiction over hazardous secondary materials. We agree with the many commenters who said that whether materials are recycled within the same NAICS code is not an appropriate indication of whether they are discarded. NAICS designations are designed to be consistent only with product lines, so that the effect of our October 2003 proposal would be that materials generated and reclaimed under the control of the generator would not be excluded, even though the generator has not abandoned the material and has every opportunity and incentive to maintain oversight of, and responsibility for, the material that is reclaimed (see *ABR*, 208 F.2d at 1051 (noting that discard has not taken place where the producer saves and reuses secondary materials)). Under these circumstances, we believe that discard has generally not occurred. For example, of the 208 recycling cases that caused environmental damage, only thirteen (approximately six percent) occurred as a result of on-site recycling. We also agree with those commenters who said that most of this rationale would apply just as reasonably to reclamation taking place within the same company. In the case of same-company recycling, both the generating facility and the reclamation facility (if they are different) would be familiar with the hazardous secondary materials and the parent company would be ultimately liable for any mismanagement of the hazardous secondary materials. Under these circumstances, the incentive to avoid such mismanagement would be so strong that mismanagement also would be very unlikely.

Concerning tolling arrangements, we also believe that the type of tolling contract common in the specialty batch chemical industry does not constitute discard as long as the recycling is legitimate and the hazardous secondary material is not speculatively accumulated. Under a typical type of arrangement, one company (the tolling contractor) contracts with a second (often smaller) company (the batch manufacturer) to produce a specialty chemical (sometimes because of a temporary lack of capacity, or because the batch manufacturer has specialized equipment or expertise). The batch manufacturer produces the chemical and the production process generates a hazardous secondary material (such as a solvent) which is routinely reclaimed at the tolling contractor's facility through an exempt closed-loop recycling process when it has the capacity to manufacture the chemical in question at its own facility. However, if the batch manufacturer transports the hazardous secondary material back to the tolling contractor for reclamation, the tolling contractor would be deemed under existing regulations to be reclaiming a spent material, and an RCRA storage permit would generally be required. The typical contract in the specialty batch chemical industry contains detailed specifications about the product to be manufactured, including management of any hazardous secondary materials that are produced and returned to the tolling contractor for reclamation. Under this scenario, the hazardous secondary material continues to be managed as a valuable product, so discard has not occurred. Moreover, if hazardous secondary materials are generated and reclaimed pursuant to a written contract between a tolling contractor and a batch manufacturer, and if the contract specifies that the tolling contractor retains ownership of, and responsibility for, the hazardous secondary materials, there is a strong incentive to avoid any mismanagement or release.

In today's supplemental notice, EPA has described three general situations where we believe that discard has not taken place and where the potential for environmental releases is therefore low. The three situations involve circumstances under which hazardous secondary materials are generated and reclaimed within the United States or its territories. They are either generated and reclaimed at the generating facility, at a different facility, but within the same company, or through a tolling arrangement. Because the facility owner in these situations still finds value in the hazardous secondary materials, has retained control over them, and intends to use them, EPA is proposing to exclude these materials from being a solid waste and thus from regulation under Subtitle C of RCRA, if the recycling is legitimate (see 40 CFR 261.4(g)), and if the hazardous secondary materials are not speculatively accumulated. We are proposing slightly different exclusions, depending on whether or not the excluded hazardous secondary materials are stored in land-based units prior to reclamation or as part of the reclamation process. The scope and applicability of the exclusions are described below.

B. Scope and Applicability

1. Hazardous Secondary Materials Managed Under the Control of the Generator in Non-Land-Based Units

As stated above, the Agency generally believes that discard has not occurred if hazardous secondary materials are legitimately recycled under the control of the generator, provided they are not speculatively accumulated, and provided they are reclaimed within the United States or its territories. We are therefore proposing an exclusion for these hazardous secondary materials under § 261.2(a)(2)(ii), except if such materials are managed in a land-based unit prior to reclamation or as part of the reclamation process. See section B.2 below for discussion of management in land-based units. Examples of non-land-based units include, but are not limited to, tanks, containers, and containment buildings.

The definition of ''hazardous secondary material generated and reclaimed under the control of the generator'' is proposed in 40 CFR 260.10 and consists of three parts. The first part

of the definition would apply to hazardous secondary materials generated and reclaimed at the generating facility. This definition would include situations where a generator contracts with a different company to reclaim hazardous secondary materials at the generator's facility, either temporarily or permanently. For purposes of this exclusion, ''generating facility'' means all contiguous property owned by the generator. We are proposing to exclude hazardous secondary material that is reclaimed ''at the generating facility'' rather than ''on-site'' as defined in 40 CFR 260.10 (as we proposed in October 2003) because the latter definition may encompass facilities not under the control of the generator. For example, an industrial park meets the definition of ''on-site,'' even though facilities operating at an industrial park may be completely separate and under separate ownership. However, EPA solicits comment on whether facilities under separate ownership, but located at the same site, should be included within this proposed exclusion. Additionally, EPA solicits comment on other definitions which might be equally compatible with generator control as the definition proposed in today's notice.

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

The third part of the definition of hazardous secondary materials generated and reclaimed under the control of the generator would apply to hazardous secondary materials that are generated pursuant to a written contract between a tolling contractor and batch manufacturer and reclaimed by the tolling contractor. Under today's proposal, the tolling contractor must retain ownership of, and responsibility for, the hazardous secondary materials that are generated during the course of the manufacture. For purposes of this exclusion, tolling contractor means a person who arranges for the production of a product made from raw materials through a written contract with the batch manufacturer. Batch manufacturer means a person who produces a product made from raw materials pursuant to a written contract with a tolling contractor. As stated above, this type of contract appears to be common within the specialty batch chemical manufacturing industry.

EPA notes that in order to be eligible for this exclusion, it is not a requirement that the contractual arrangement in question refer specifically to ''tolling'' or ''batch manufacturing,'' as long as the person commissioning the manufacture of the product retains ownership of, and responsibility for, the hazardous secondary materials that are generated during the course of the manufacture. The Agency also solicits comment on other types of contractual arrangements under which discard is unlikely to happen and which could appropriately be covered by an exclusion for ''generator-controlled'' hazardous secondary material. For example, one company may enter into a contractual arrangement for a second company to reclaim and reuse (or return for reuse) the first company's hazardous secondary material. The first company could create a contractual instrument that exhibits the same degree of control over how the second company manages the hazardous secondary material as is found in a tolling agreement. EPA solicits comment on whether hazardous secondary materials recycled under such contracts also should be included within the scope of the exclusion.

2. Hazardous Secondary Materials Managed Under the Control of the Generator in Land-Based Units

As stated above in section B.1 of this preamble, the exclusion proposed today at 40 CFR 261.2(a)(2)(ii) would apply to materials generated and reclaimed within the United States or its territories that are under the control of the generator and that are stored in non-land-based units. However, some hazardous secondary materials that are generated and reclaimed within the United States or its territories under the control of the generator (i.e., at the generating facility, within the same company, or through a tolling arrangement) are managed in units that are land-based. For these materials, we are proposing a slightly different exclusion at 40 CFR 261.4(a)(23).

The Agency is proposing to place this exclusion in 40 CFR 261.4(a)(23) because while we recognize that raw materials and hazardous secondary materials can be and are stored in land-based units (such as mineral processing residues or pulping liquors), we also recognize that such management clearly presents a greater potential for releases to the environment than management in non-land-based units. Therefore, we are proposing an additional requirement which provides that if hazardous secondary materials are managed in land-based units, such materials must be contained in the units. 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. The definition of land-based unit is proposed in § 260.10, and is taken from section 3004(k) of RCRA (i.e., landfill, surface impoundment, waste pile, injection well, land treatment facility, salt dome formation, salt bed formation, or underground mine or cave). Examples of surface impoundments include ditches and sumps.

Whether the hazardous secondary material is ''contained'' in the land-based unit will necessarily be determined on a case-by-case basis. Generally, however, recyclable material is ''contained'' if it is placed in a unit that controls the movement of the hazardous secondary material out of the unit. Hazardous secondary material that remains contained in a land-based unit that experiences a release would still meet the terms of the exclusion in 261.4(a)(23), unless the hazardous secondary material is not managed as a valuable product and as a result, a significant release from the unit occurs. In this situation, the hazardous secondary material in the land-based unit would be considered discarded. In determining whether hazardous secondary materials in a land-based unit are contained, a facility should consider the circumstances under which the materials are stored. For example, materials that are stored in direct contact with the soil in a natural or man-made impoundment may be more likely to leak. However, the local geological and meteorological conditions can greatly influence whether such materials would be contained. These local conditions, along with specific measures that a facility employs, such as liners, leak detection

measures, inventory control and tracking, control of releases, or monitoring and inspection during construction and operation of the unit, may be used in determining whether the hazardous secondary material is contained in the land-based unit.

3. Hazardous Secondary Materials Managed Under the Control of the Generator: General Provisions

Hazardous secondary materials released from any storage unit, whether land-based or non-land based, are discarded and if such materials upon discard would be either a listed hazardous waste or exhibit a hazardous waste characteristic, the hazardous secondary materials would be part of the waste disposal problem and would be subject to the hazardous waste regulations, unless they are immediately cleaned up.

We also note that hazardous secondary materials excluded from the definition of solid waste generally become wastes when they are speculatively accumulated, because at that point they are considered to be discarded. For this reason, all hazardous secondary materials excluded under proposed 40 CFR 261.2(a)(2)(ii) or 261.4(a)(23) would be subject to the speculative accumulation provisions of 40 CFR 261.1(c)(8). In addition, as with other excluded recycling operations, residuals from the recycling process are considered to be newly generated solid wastes, which can also be hazardous wastes if they exhibit a hazardous characteristic under Subpart C of Part 261 or if they are specifically listed under Subpart D of Part 261.

The Agency is soliciting comment on whether additional requirements might be necessary to demonstrate absence of discard when hazardous secondary materials are recycled under proposed 40 CFR 261.2(a)(2)(ii) or 261.4(a)(23). Our analysis has led us to conclude that discard has not occurred and releases are highly unlikely when hazardous secondary materials are generated and reclaimed under these circumstances, except possibly when such materials are managed in land-based units. Nevertheless, we are requesting comment on other points of view. An example of such conditions would be recordkeeping requirements, such as those proposed today in 40 CFR 261.4(a)(24)). Another example would be appropriate limitations on storage, such as performance-based standards designed to address releases to the environment. The Agency solicits comment on whether additional management requirements are appropriate for hazardous secondary materials that are generated and reclaimed under the control of the generator. If commenters believe such additional requirements are appropriate, they should specify the technical rationale for each requirement suggested, and why the requirement is necessary if the hazardous secondary material remains under the control of the generator.

We are also proposing that generators (and reclaimers, where the generator and reclaimer are located at different facilities) of hazardous secondary materials recycled under the control of the generator, whether managed in a land-based or non-land based unit, would be required to submit a one-time notice to the EPA Regional Administrator or, in an authorized state, to the state Director. The notice would need to identify the name, address, and EPA ID number (if it has one) of the generator or reclaimer, the name and phone number of a contact person, the type of hazardous secondary material that would be managed according to the exclusion, and when the hazardous secondary materials would begin to be managed in accordance with the exclusion. A revised notice would be required to be submitted in the event of a change to the name, address, or EPA ID number of the generator or reclaimer or a change in the type of hazardous secondary material being recycled.

The intent of this proposed notification requirement is to provide basic information to regulatory agencies about who will be managing hazardous secondary materials under the exclusion, and the types of hazardous secondary materials that would be recycled. For hazardous secondary materials that would be excluded under 40 CFR 261.2(a)(2)(ii), this proposed notification requirement would be specified in 40 CFR 260.42 (i.e., separate from 40 CFR 261.2). For hazardous secondary materials that would be excluded under 40 CFR 261.4(a)(23), this proposed notification requirement is included in the exclusion. We note that in both cases, the requirement to provide this 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.

We believe our authority to request such information is inherent in our authority to determine whether a material is discarded, and we consider this to be the minimum information needed to enable credible evaluation of the status of a hazardous secondary material under section 3007 of RCRA. EPA further believes that RCRA section 3007 allows it to gather information with regard to any material when the Agency has reason to believe that the material may be a solid waste and possibly a hazardous waste within the meaning of RCRA section 1004(5). Section 2002 also gives EPA authority to issue regulations necessary to carry out the purposes of RCRA.

We also note that after EPA promulgates regulations listing a material as a hazardous waste or identifying it by its characteristics, section 3010 of RCRA requires generators of such materials to submit a notification to EPA within 90 days. Since the changes proposed today could substantially affect this universe of facilities in the Subtitle C system, we believe the notifications are appropriate and useful.

EPA notes that the information discussed above can be difficult for regulatory authorities to retrieve and use if it is not placed into a data management system. Similarly, using different notification procedures and data management systems for different regulated materials can be confusing and time-consuming for the regulated community. For these reasons, the Agency requests comment on whether the Subtitle C Site Identification Form (EPA Form 8700–12) or the comparable state form should be used to provide the information required in this supplemental proposal. This form is used to enter data into the RCRAInfo data management system managed by the states and EPA. To implement use of this form for the notification requirements proposed today, we would revise the form to include a section for materials covered by this exclusion, with spaces for the appropriate data elements.

In addition, we are considering including additional information in the notification in order to measure the impact of the proposed rulemaking. More data would assist EPA in targeting future resources and activities to further increase recycling and to report to the public the impacts of the proposed rulemaking. The additional data elements for which we are requesting comment are discussed in section XIV of today's notice.

We note that this exclusion applies only to hazardous secondary materials generated and reclaimed within the United States or its territories, because most of our information about recycling comes from these geographical areas. We do not have sufficient information about most recycling activities outside of the United States to decide whether discard is likely or unlikely. However, we are soliciting comment on whether

EPA should promulgate a conditional exclusion for exported material otherwise meeting the criteria for this exclusion.

C. Enforcement

Under today's proposal, hazardous secondary materials generated and reclaimed within the United States under the control of the generator would be excluded from RCRA Subtitle C regulation, but would be subject to certain restrictions, principally speculative accumulation. Persons that handle these hazardous secondary materials would be responsible for maintaining the exclusion by ensuring that these restrictions are met. If the hazardous secondary materials were not managed pursuant to these restrictions, they would not be excluded. They would then be considered solid and hazardous wastes if they were listed or they exhibited a hazardous waste characteristic for Subtitle C purposes from the time they were generated. Persons operating under the exclusion would also be required to notify EPA or the authorized state.

Persons taking advantage of today's proposed exclusion that fail to meet the requirements may be subject to enforcement action and the materials could be considered hazardous waste from the point of their generation. EPA could choose to bring an enforcement action under RCRA section 3008(a) for all violations of the hazardous waste requirements occurring from the time they are generated through the time they are ultimately disposed or reclaimed. The Agency believes that this approach provides generators with an incentive to handle (or in the case of tolling or other contractual arrangements, ensure that their contractors handle) the hazardous secondary materials pursuant to the requirements. It also encourages each person to take appropriate steps to ensure that such materials are safely handled and legitimately recycled by others in the management chain. If there is a release of the hazardous secondary materials into the environment, they are considered discarded and subject to all applicable hazardous waste regulations.

X. Conditional Exclusion for Hazardous Secondary Materials That Are Transferred for the Purpose of Reclamation: Proposed 40 CFR 261.2(c)(3), 261.4(a)(24), 261.4(a)(25)

EPA is today proposing an exclusion from the definition of solid waste for hazardous secondary materials that are generated and subsequently transferred to another company or person for the purpose of reclamation, provided that certain conditions are met. Recycling that conforms to these conditions would not involve discard and therefore the recyclable materials would not be regulated as solid waste. Such excluded hazardous secondary materials would also need to be recycled legitimately, as determined according to the provisions of 40 CFR 261.2(g), which also are being proposed today, and could not be speculatively accumulated, as defined in 40 CFR 261.1(c)(8).

The conditions that EPA is proposing today are based on our understanding of how successful third-party recycling currently operates (and, conversely, how unsuccessful recycling practices can result in recyclable hazardous secondary materials being discarded), and are supported by the information included in the recycling studies that are described in section VIII of this preamble. For example, the 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. The fact that these companies are willing to incur the expense of auditing recyclers as a business practice is of itself a marketplace affirmation that sending hazardous secondary materials to other companies for recycling involves some degree of risk. Although these risks may be small when the recycler is a well established, successful enterprise with a good record of environmental stewardship, it also is apparent that not all recyclers fit this profile, as evidenced in the study of environmental problems associated with hazardous secondary material recycling. Thus, we believe that there is sufficient reason for the Agency to place certain conditions on this proposed exclusion for the generator to determine that the material is not discarded, particularly since we expect that this rulemaking, if implemented, could encourage some number of companies that may be unfamiliar with recycling to enter the hazardous secondary material recycling business.

A. What Is the Intent of Today's Proposed Conditional Exclusion?

In proposing this conditional exclusion, EPA's objectives are to encourage recycling of hazardous secondary materials, and reduce unnecessary regulatory compliance costs to industry, while maintaining protection of human health and the environment. We believe that this proposed conditional exclusion is a workable, common sense approach to meeting these objectives, is well supported by the record for this rulemaking, including the recent recycling studies that EPA has conducted, and in important ways reflects current good industry practices that are used by certain generators for recycling of hazardous secondary materials.

B. Scope and Applicability

The conditional exclusion for transferred materials would potentially apply to materials that are currently regulated as hazardous wastes because their recycling involves reclamation—specifically, spent materials, and listed sludges and listed by-products.

This is the same universe of materials that would have potentially been eligible for the exclusion proposed in October, 2003, except that that proposed exclusion would have applied only to these types of hazardous secondary materials that were recycled within the ''same industry.'' It would not be available for recycled materials that are regulated as hazardous wastes for other reasons, such as ''inherently waste-like materials,'' materials that are ''used in a manner constituting disposal,'' or ''materials burned for energy recovery.''

The exclusion proposed today also would not address materials that are currently excluded from the definition of solid waste according to other, existing provisions of 40 CFR part 261. For example, the wood preserving exclusion in 40 CFR 261.4(a)(9) includes conditions for managing materials on drip pads. Today's proposed exclusion, if finalized, would not supersede or otherwise affect this conditional exclusion; such hazardous secondary materials would need to continue being managed in accordance with that existing exclusion.

Today's proposed exclusion specifies three restrictions, in addition to conditions for both generators and the reclaimers to whom excluded materials would be transferred. One restriction is that materials that are speculatively accumulated would not be eligible for the exclusion. Restrictions on speculative accumulation (see 40 CFR 261.1(c)(8)) have been an important element of the RCRA recycling regulations since they were promulgated on January 4, 1985. According to this regulatory provision, a hazardous secondary material is accumulated speculatively if the person accumulating it cannot show that the material is

potentially recyclable; further, the person accumulating the hazardous secondary material must show that during a calendar year (beginning January 1) the amount of such material that is recycled, or transferred to a different site for recycling, must equal at least 75% by weight or volume of the amount of that material at the beginning of the period. This provision already applies to hazardous secondary materials that are not otherwise considered to be wastes when recycled, such as materials used as ingredients or commercial product substitutes, materials that are recycled in a closed-loop production process, or unlisted sludges and byproducts being reclaimed.

A second restriction or pre-condition specified in the proposed exclusion is that excluded 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. Thus, a generator who wished to maintain the excluded status of his hazardous secondary materials would not be able to ship those materials to a ''middleman,'' such as a broker. This restriction is consistent with a premise underlying this proposed exclusion—that is, in order to ensure that unregulated materials will not be discarded, generators should have a reasonable understanding of who will be reclaiming the materials and how they will be managed and reclaimed, and a reasonable assurance that the recycling practice is safe and legitimate (see the following discussion of the proposed condition for ''reasonable efforts''). 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. Thus, we believe that this restriction helps ensure that materials that become unregulated under the terms of this conditional exclusion will not be discarded by the generator. The Agency requests comment on this aspect of the proposed exclusion.

The Agency recognizes that, in some cases, recycling of an excluded hazardous secondary material may involve more than one reclamation step. For example, a recyclable hazardous secondary material such as an electroplating waste might have a relatively high moisture content, and a somewhat variable chemical composition. Such materials might thus need to be dried and blended to a suitable, consistent specification before they are amenable to a ''final'' reclamation process (e.g., metals smelting). In this example, the two different reclamation processes might be conducted by different companies and/or at different facilities. The Agency sees no reason to discourage this kind of recycling, and we are thus proposing that today's transfer-based exclusion would be available for materials that are recycled by means of one or more reclamation processes. Note, however, that the condition for generators to make ''reasonable efforts'' under the terms of this exclusion would apply in the same way, regardless of how many reclamation steps were involved with recycling of an excluded material. In other words, if the excluded hazardous secondary material were reclaimed by more than one facility or company, the generator of such material would need to make ''reasonable efforts'' to examine each facility or company in order to ensure that the hazardous secondary materials will be safely and legitimately recycled. We believe that this is a consistent application of the idea of requiring ''reasonable efforts'' as a condition of this proposed exclusion; where recycling of a hazardous secondary material involves more than one reclamation step at more than one facility, generators should nevertheless be well informed as to how the materials will be reclaimed, and by whom, throughout the recycling process.

The third specified pre-condition is that, for all hazardous secondary materials that would be excluded under 40 CFR 261.4(a)(24), generators and reclaimers that are currently subject to the hazardous waste regulations would need to submit a one-time notice to EPA or the authorized state. The notice would need to identify the name, address, and EPA ID number (if applicable) of the generator or reclaimer, the name and phone number of a contact person, the type of hazardous secondary material that would be managed according to the exclusion, and when the hazardous secondary materials would begin to be managed in accordance with the exclusion. A revised notice would be required to be submitted in the event of a change to the name, address, or EPA ID number of the generator or reclaimer or a change in the type of material recycled.

The intent of this proposed notification requirement is to provide basic information to regulatory agencies about who would be managing hazardous secondary materials under the exclusion, and the types of materials that would be recycled. We believe our authority to request such information is inherent in our authority to determine whether a material is discarded, and we consider this to be the minimum information needed to enable credible evaluation of the status of a material under section 3007 of RCRA. We also note after EPA promulgates regulations listing a material as a hazardous waste or identifying it by its characteristics, section 3010 of RCRA requires generators of such materials to submit a notification to EPA within 90 days. Since the changes proposed today could substantially affect this universe of facilities in the Subtitle C system, we believe the notifications are appropriate and useful.

The Agency requests comment on alternative notification requirements for this exclusion. One such alternative would be to require that more detailed information be provided in the notice, such as identification of the reclamation facility to which it will be shipped, how it will be stored at the generator's facility, and/or a detailed characterization of the hazardous secondary material and of the recycling process.

Another option being considered with regard to notification would be a requirement that it be signed by an authorized representative. In addition, we are considering the option of requiring persons using this exclusion to submit periodic (e.g., annual) reports detailing their recycling activities, to provide information on the types of volumes of hazardous secondary materials recycled, to whom the materials were sent for reclamation, the types of products that were produced from the reclamation processes, or other relevant information. We are also considering (and soliciting comment on) the option of requiring the information to be submitted in a particular format, or submitted electronically, and whether, in lieu of sending it to the implementing agency, it should be maintained at the facility.

EPA notes that the information discussed above can be difficult for regulatory authorities to retrieve and use if it is not placed into a data management system. Similarly, using different notification procedures and data management systems for different regulated materials can be confusing and time-consuming for the regulated community. For these reasons, the Agency requests comment on whether the Subtitle C Site Identification Form (EPA Form 8700–12) or the comparable state form should be used to provide the information required in this supplemental proposal. This form is used to enter data into the RCRAInfo data management system managed by the states and EPA. To implement use of this form for the notification

requirements proposed today, we would revise the form to include a section for materials covered by this exclusion, with spaces for the appropriate data elements.

C. Conditions

Today's proposed conditional exclusion for transferred materials specifies conditions for generators, as well as the reclaimers to whom generators transfer their hazardous secondary materials.

1. Conditions for Generators

In addition to the three pre-conditions described above, EPA is proposing that generators who wish to avail themselves of the exclusion for transferred materials must satisfy two basic conditions: record keeping, which includes export notification, and ''reasonable efforts,'' which in effect would require the generator to make an assessment of the reclaimer so as to ensure that the hazardous secondary materials he or she generates will be recycled legitimately and would allow the Agency to determine that the materials are not discarded.

Recordkeeping. In order to allow for adequate oversight of generators who manage hazardous secondary materials in accordance with this exclusion, we are proposing that such generators maintain for a period of three years certain records that document shipments (i.e., transfers) of excluded hazardous secondary materials to reclamation facilities. Specifically, the generator would need to maintain, for each shipment of excluded material, documentation of when the shipment occurred, who the transporter was, the name and address of the destination reclamation facility, and the type and quantity of the hazardous secondary material in the shipment. We are not proposing to prescribe any specific template for these records, or require that they be maintained in a particular format (e.g., paper vs. electronic records).

It is our understanding, supported by the information in the study of current good recycling practices, that generators who are concerned about potential environmental liability maintain these types of records as a routine business matter. Thus, we expect that this record-keeping condition will impose a minimal additional paperwork burden for those facilities. We also believe that this recordkeeping condition will help to clarify what ''appropriate documentation'' the generator would need to provide in the event of some type of RCRA enforcement action (see 40 CFR 261.2(f)). This proposed condition is also very similar to the recordkeeping condition that currently applies to excluded hazardous secondary materials used to make zinc fertilizer (see 40 CFR 261.4(a)(20)(ii)(D)). We are also requesting comment on whether to require the generator to maintain a copy of a confirmation of the receipt of the hazardous secondary material by the reclaimer. Based on our conversations with commercial recycling facilities, they routinely issue receipt confirmations or ''recycling certificates'' as a way of helping the generator verify that the hazardous secondary material reached its intended destination. The Agency solicits comment on this proposed condition for recordkeeping, including whether retention of confirmation of receipt is a normal business practice.

We considered additional record keeping conditions for generators who would operate under this proposed exclusion, but are not proposing them today, primarily because we are committed to limiting such conditions to those we believe are essential to allowing proper oversight of hazardous secondary materials that are managed outside of the existing RCRA hazardous waste regulatory system. Examples of such additional conditions would include more thorough characterization of the materials that are transferred for reclamation, the types of units in which they were accumulated at the generating facility, how they were transported (e.g., by truck), whether or not the hazardous secondary materials were transported as a DOT hazardous material, the date the hazardous secondary materials were generated, the quantity of hazardous secondary materials generated, and other similar conditions. We request comment on whether such additional record keeping conditions or others not mentioned here are warranted for generators who would manage materials under this proposed exclusion.

Similarly, under today's supplemental proposal, exporters of hazardous secondary materials that are excluded under 40 CFR 261.4(a)(24) would be required to notify the receiving country through EPA and obtain consent from that country before shipment of the hazardous secondary materials could take place (see 40 CFR 261.4(a)(25)). This requirement would serve as a notification to the receiving country so that it can ensure that the hazardous secondary materials are recycled rather than disposed. As an additional benefit, the receiving country has the opportunity to consent or not based on its analysis of whether the recycling facility can properly recycle the hazardous secondary materials and manage process residuals in an environmentally sound manner within its borders. EPA believes that sections 2002, 3002, 3007, and 3017 of RCRA provide authority to impose this condition because such notice and consent help determine that the materials are not discarded.

Under today's supplemental proposal, hazardous secondary materials that are exported from the United States and recycled at a reclamation facility located in a foreign country are not solid wastes, provided that the exporter complies with the requirements of 40 CFR 261.4(a)(24)(i)–(iv) and notifies EPA and obtains a subsequent written consent forwarded by EPA from the receiving country. The provisions that we are proposing today in 40 CFR 261.4(a)(25) require exporters to notify EPA of an intended export 60 days before the initial shipment is intended to be shipped off-site. The notification may cover export activities extending over a 12 month or shorter period. The notification must include contact information about the exporter and the recycler, including any alternate recycler. The notification must include a description of the manner in which the hazardous secondary materials will be recycled. It must also include the frequency and rate at which they will be exported, the period of time over which they will be exported, the means of transport, the estimated total quantity of hazardous secondary materials to be exported, and information about transit countries through which such materials will pass. Notifications must be sent to EPA's Office of Enforcement and Compliance Assurance, which will notify the receiving country and any transit countries. When the receiving country consents in writing to the receipt of the hazardous secondary materials, EPA will forward the written consent to the exporter. The exporter may proceed with shipment only after it has received a copy of the written consent from EPA. If the receiving country does not consent to receipt of the hazardous secondary materials or withdraws a prior consent, EPA will notify the exporter in writing. EPA also will notify the exporter of any responses from transit countries. Exporters must keep copies of notifications and consents for a period of three years following receipt of the consent. These procedures are similar to those required for exports of hazardous waste under 40 CFR Subpart E, except for the use of the hazardous waste manifest.

Reasonable Efforts. Today's supplemental proposal would require generators to make ''reasonable efforts'' to ensure that their materials are safely

and legitimately recycled, before shipping or otherwise transferring them to a reclamation facility. In effect, this would require the generator to perform a type of ''environmental due diligence'' of the reclaimer in advance of transferring the hazardous secondary materials. We believe that today's proposed condition for reasonable efforts reflects, and would perhaps reinforce, the methods, such as audits, that many generators of hazardous secondary materials now use to maintain their commitment to sound environmental stewardship, and to minimize their potential regulatory and liability exposures.

Some generators, particularly those who generate relatively large volumes of hazardous secondary materials, audit recyclers before shipping such materials to them. EPA's study of good practices for recycling quotes one large recycling and disposal vendor as stating that of its new customers, sixty percent of the large customers and thirty to fifty percent of the smaller customers now perform audits on them. Under current practices, such audits can involve a site visit to the recycling facility, and an examination of the company's finances, technical capability, environmental compliance record, and housekeeping practices. (**Note:** Audits that are currently conducted may or may not cover all of these areas.) According to those interviewed as part of our recycling study, auditing a recycler typically costs the generator from two to five thousand dollars, and in some cases more, depending on how thorough the audit is, and whether it is conducted by the generator's own personnel, or by an outside consultant. The study also identified at least one organization which conducts audits at several hundred recycling and other waste handling facilities per year. This organization audits overseas facilities, as well as domestic recyclers, and re-audits facilities on a more or less ongoing basis. Membership in this and similar organizations, by spreading the expense of conducting audits among a number of companies, gives a generator a means of reducing the cost of this type of ''environmental due diligence'' even further. Such auditing ''consortiums'' also reduce costs for the facilities that are audited, since fewer audits need to be conducted by individual generators. Note, however, that third-party auditors do not generally draw any conclusions based on their audits or provide a ''certification'' with respect to reclaimer operations, so the generator would still be expected to decide if the reclaimer is acceptable.

Today's proposed condition that addresses ''reasonable efforts'' is intended to reflect and capture in a regulatory context how many generators currently inquire and make decisions about whom they should do business with, and how they manage their potential liability and regulatory non-compliance risks.

Currently, under 40 CFR 262, a generator must make a hazardous waste determination and thus, already has an obligation to determine whether the waste is subject to regulation. EPA believes that to make a parallel determination that hazardous secondary materials are not solid wastes because they are destined for reclamation and are not discarded, the generator must make a reasonable effort to ensure that the reclaimer intends to legitimately recycle the material pursuant to 40 CFR 261.2(g) and not discard it, and that the reclaimer will manage the material in a manner that is protective of human health and the environment.

EPA is also proposing that the generator can use any credible evidence available in making his reasonable efforts, including information gathered by the generator, provided by the reclaimer, and/or provided by a third party, in lieu of personally performing an environmental audit. (In fact, in some cases, the generator may not be an expert in different aspects of recycling, and reliable third-party information or judgment would play an important part in the generator's conclusion.) For example, the generator might hire an independent auditor to review the operations of a recycler. Also, the generator might rely on third-party certifying bodies to provide a reasonable level of confidence that a recycler would safely manage his materials. Trade associations might make available to their members information on specific facilities that could be used to determine that the facility is safely and legitimately recycling the hazardous secondary material. Likewise, a parent corporation might perform an environmental audit of a recycler, and the audit could then be used by several of the company's facilities. In fact, EPA believes that many reputable third party auditors, and trade associations that might make available to their members information on specific facilities, already assemble the types of information that would be needed for a generator to determine, based on credible evidence, that the hazardous secondary material is being legitimately recycled. EPA would encourage this type of pooling of information in order to reduce the burden and take advantage of specialized technical expertise.

This proposed provision requiring reasonable efforts by generators would only apply to generators who send hazardous secondary materials to recyclers that are not operating under RCRA Part B permits or interim status standards. RCRA permitted facilities and interim status facilities are already subject to stringent design and operating standards, must demonstrate financial assurance, are subject to corrective action requirements in the event of environmental problems, and are typically given more thorough oversight than facilities without RCRA Part B permits. Thus, the Agency believes that permitted and interim status recycling facilities provide generators with environmental assurances that would ensure the hazardous secondary materials sent to such a facility are not discarded. Not requiring reasonable efforts for generators who ship hazardous secondary materials to RCRA permitted or interim status recycling facilities would likely be of particular benefit to relatively smaller volume generators who may not have the resources required to undertake ''reasonable efforts.''

EPA requests comment on whether to require generators to maintain at the generating facility documentation showing the reasonable efforts made before transferring the hazardous secondary materials to the reclamation facility. Such records would presumably include copies of audit reports, and/or other relevant information that was used as the basis for the generator's determination that the reclamation facilities to which the hazardous secondary materials were sent would legitimately recycle the hazardous secondary material in a protective manner. Requiring specific documentation would help EPA or the authorized state to determine whether the generator did make reasonable efforts to ensure that his hazardous secondary material was not discarded.

In addition, EPA requests comment on whether, as part of the documentation, the generator should also be required to maintain at the generating facility a certification statement, signed and dated by an authorized representative of the generator company, that for each reclamation facility to which the generator transferred excluded hazardous secondary materials, that the generator made reasonable efforts that the hazardous secondary material was legitimately recycled. Such certification statement could, for example, be worded as follows:

''I hereby certify in good faith and to the best of my knowledge that, prior to arranging for transport of excluded hazardous secondary materials to [insert name of reclamation facility], reasonable efforts were made to ensure that the hazardous secondary materials would be recycled legitimately, and otherwise managed in a manner that is protective of human health and the environment, and that such efforts were based on current and accurate information.''

Today's proposed condition for reasonable efforts is in effect a general standard; we are not proposing specific questions that generators would need to assess in satisfying this condition of the exclusion. However, we acknowledge that specifying in more explicit terms the questions that should be examined in making such reasonable efforts could provide more certainty to generators, as well as overseeing agencies. On the other hand, more explicit provisions for defining reasonable efforts in this context could also limit a generator's flexibility. The Agency requests comment on whether more specific provisions to define reasonable efforts for the purpose of this exclusion should be specified in the final rule.

If EPA were to specify in more explicit terms how generators should perform reasonable efforts with respect to this regulatory exclusion, one approach could be to identify specific questions that generators would need to address in satisfying this condition. Such questions would be focused on ensuring that the hazardous secondary material will not be discarded. The following are examples of possible questions that EPA could specify in the final regulatory condition for determining reasonable efforts, with an explanation of how each question could potentially assist in determining that the hazardous secondary material is not discarded. EPA then outlines two options for how to determine ''reasonable efforts;'' the first option would use the broader list of questions (A through F) and the second option would use a subset of questions (A and F) that some believe have a more bright-line nature. EPA requests comment on whether any or all of these questions should be included in the regulation (including the advantages and disadvantages of the various questions, as well as of the two options outlined below), and if there are other questions that should be also be considered.

(A) Has the reclaimer notified the appropriate authorities pursuant to § 261.4(a)(24)(iii) and does he have financial assurance as required under § 261.4(a)(24)(v)(D)?

(B) Does the reclamation facility have the equipment and trained personnel to safely recycle the hazardous secondary material?

(C) Are there any unresolved significant violations of environmental regulations at the reclamation facility, or any formal enforcement actions taken against the facility in the previous three years for violations of environmental regulations? If yes, then the generator must have credible evidence that the reclaimer will manage the materials safely.

(D) Does the material being recycled provide a useful component that will be reused in the product of the recycling process or aid in the recycling process itself?

(E) Is the product (or intermediate) of recycling at the reclamation facility a generally traded commodity meeting applicable specifications? If not, is there other available information, such as sales records or long-term contracts, demonstrating that there is a reliable market for the product (or intermediate)? If not, then the generator must have credible evidence that the recycling at the reclamation facility will produce a valuable product or intermediate.

(F) Does the reclamation facility have the permits required (if any) to manage the residuals (if any) generated from reclamation of the excluded hazardous secondary material? If not, does the reclaimer have a contract with an appropriately permitted facility to dispose of the residuals (if any) generated from the reclamation of the excluded hazardous secondary material? If not, then the generator must have credible evidence that the residuals generated from the recycling of the excluded secondary hazardous material will be managed in a manner that is protective of human health and the environment.

The first possible question (A) focuses on whether the recycler has met two of the requirements he must fulfill before accepting excluded hazardous secondary materials for reclamation: notification of the appropriate regulatory authority that he plans to reclaim excluded hazardous secondary material (see Section X.B of today's proposal), and establishment of financial assurance to cover the costs of managing any hazardous secondary materials that remain if the facility closes (see Section X.C.2 of today's proposal). If a recycler were found to have failed to meet these requirements then he will have also failed to show a good faith effort towards demonstrating that he intends to recycle the material and not discard it, and will manage the material in a manner that is not protective of human health and the environment.

The second possible question (B) focuses on the technical capability of the recycler, the most basic of requirements for ensuring safe recycling of hazardous secondary material. If a reclamation facility were found to not have adequate equipment or trained personnel, it raises serious questions as to whether the facility would be engaged in safe recycling.

The third set of possible questions (C) focuses on the compliance history of the recycler. Although compliance data are an imperfect tool for determining whether a recycler would safely manage the hazardous secondary material, EPA believes that they are a reasonable starting point. Facility-specific enforcement data on unresolved alleged significant violations and on formal enforcement actions (by both EPA and states) and specific case information for the formal enforcement actions are readily available on EPA's public Web site at *http://www.epa.gov/echo/*. While the presence of a violation does not automatically mean that the facility would not recycle the hazardous secondary material safely, it would raise questions and would likely require additional information from the facility. If the generator provides reasonable documentation that the enforcement data are unrelated to the facility's commitment to manage the hazardous secondary material safely or that the violation has been corrected and the facility is back in compliance, then that would satisfy this aspect of the reasonable efforts determination.

The fourth possible question (D) focuses on the usefulness of the secondary material to the recycling process. EPA's study of the potential effect of market forces on the recycling of hazardous secondary materials shows that there is a particular incentive for materials to be recycled when it can be done at a lower cost than disposing of the material. In some cases, however, a hazardous secondary material with little value can be put into a ''recycling'' process, but not add anything of value either to the end product or to the process itself. In such cases, the hazardous secondary material is effectively being discarded rather than recycled. A material being legitimately recycled can contribute value to the process in two ways. The recycled material can contain a constituent that is being reused and which also appears in the final product. Alternatively, the material being recycled can aid in the process itself, such as by replacing a raw material that would otherwise be needed. For example, a hazardous

secondary material may act as an important catalyst or a carrier in a process, but not end up in the final product. To ensure that its hazardous secondary material is being properly recycled, a generator would need to ensure that his material contributes to the process in one of these ways.

The fifth set of possible questions (E) focuses on the products of recycling. According to EPA's study of the potential effect of market forces on the management of recyclable hazardous secondary materials, there is a relationship between the value of the product from recycling and the likelihood of successful recycling. Products with little or no value can result in recyclable materials being over-accumulated and mismanaged. Mismanagement of recyclable materials was a major cause of environmental damage in forty percent of the cases that EPA has studied. To provide assurance that the products created from the hazardous secondary materials are in fact valuable, the generator would need to determine if the products are general commodities that meet applicable standards, or that there is a reliable market based on sales records or long-term contracts.

For most recycled products, this determination would be straightforward and the product specifications are well known. Metals reclamation and solvents, for example, results in the production of valuable products that are readily traded on the open market. Other products, however, may be unique or recycled in a different manner and may require a closer look to determine if they meet minimum standards. For example, in one of the damage cases, the reclamation facility used spent plastic blast media to make certain construction materials, which are a generally traded commodity with rigorous standards. However, in this case, the ''recycling'' process resulted in cinder blocks that would crumble on contact, and concrete slabs that would not support the weight of a person. In some cases, there may be no formal standard for a product, but a commonsense informal standard would still apply, particularly in regards to toxic constituents. For example, in another of the damage cases, children's play sand was made from foundry sands highly contaminated with lead, which, in this situation would not meet such a commonsense standard. There are also other instances in the damage cases of recyclers marketing their product as appropriate for ''fill'' despite high levels of toxic constituents. In one case, a battery recycler distributed material from old battery casings to a community to be used as fill and driveway paving material, resulting in elevated levels of lead at 96 of the 109 properties. In order to determine whether a reclamation facility is legitimately recycling, the generator will need to check to make sure that the recycling results in a valuable product or intermediate.

Although a typical audit of a recycling facility would include an examination of the facility's finances, EPA does not have information on whether this financial evaluation would include an investigation as to whether the recycling process results in a valuable product. EPA requests comment on how including such a question might affect the scope of a typical audit.

The sixth set of possible questions (F) focuses on another major cause of environmental problems from hazardous secondary material recycling: the management of the residuals. Roughly one-third of the damage cases that EPA documented were caused by mismanagement of the residuals from recycling. Because the residuals from recycling can contain the hazardous constituents that originated with the hazardous secondary materials, it is important that the generator understands how those residuals will be disposed. These residuals may or may not be regulated hazardous wastes, but in either case, the generator would need to determine that they are managed in units that have the necessary permits (either solid waste permits or hazardous waste permits) or otherwise comply with applicable environmental standards (whether federal or state), such that the material is being managed in a manner that is protective of human health and the environment.

In drafting these possible questions to establish reasonable efforts, we have attempted to write them in as an objective a manner as possible, but we recognize that answering these questions still requires a certain amount of judgment. We understand that generators might prefer more definitive criteria. Therefore, we ask for suggestions on how the possible reasonable efforts questions (if they are included in the regulation) could be more objective, yet provide the necessary information, or any other information that should be required for making a reasonable efforts determination.

In particular, as noted at the beginning of this discussion, EPA requests comment on the alternative option of focusing ''reasonable efforts'' only on questions A and F above. This second of the two options would limit the generator's reasonable efforts requirement to determining whether the reclaimer has notified EPA or the authorized state that he is engaged in recycling excluded hazardous secondary material; whether the recycler complies with the financial requirements of this part; and whether the reclaimer has obtained the appropriate permits for managing residuals onsite or, alternatively, ships the material offsite under a contract with an appropriately permitted facility. These requirements would assure the generator that the reclaimer's operations are known to the regulatory authority and therefore can be inspected for compliance, that residuals would be properly managed (thus addressing the second most common environmental problem in the recycling case studies EPA has analyzed), and that financial assurance would cover the cost of facility closure and other potential environmental liabilities. While this list would not be as comprehensive, this option of focusing on a set of criteria that some believe is of a more bright-line nature could make it easier for the generator to determine whether the criteria have been met and thereby make, in good faith, a certification that would demonstrate ''reasonable efforts.''

In addition, EPA requests comment on how difficult it would be for a generator to address and certify in good faith the responses to questions B through E. In this regard, EPA requests comment on whether generators already possess, or would be able to acquire through reasonable efforts, the information and ability necessary to evaluate the relevant aspects of the recycling industry, especially in situations where the generator does not work in that industry or otherwise have a reason to be familiar with it. For example, under question (B), to what extent do generators already posses, or would be able to acquire readily, the information and ability needed to evaluate the adequacy of ''the equipment and trained personnel'' in a different industry than the one in which the generator operates? Similarly, under question (E), to what extent do generators already possess, or would be able to acquire readily, the required knowledge of markets (in which they might not participate) for purposes of determining whether something constitutes a ''valuable product or intermediate''?

EPA also requests comment on whether, if the final regulation does include specific questions for the generator to consider when making reasonable efforts, (1) should all generators be required to answer those questions and document their responses to each of them—that is, this

documentation would be a condition of the exclusion, or (2) should generators have the option of choosing to answer and document their response to these sets of questions or not. Under the latter approach, if a generator chooses to meet his burden of an objectively reasonable belief that his materials would not be discarded and would be managed in a manner that is protective of human health and the environment by answering these sets of questions, then the generator would have met his obligation under the regulations. Alternatively, the generator under the latter approach could meet his burden of proof based on other considerations, but without any assurance that a court, if the Agency were to undertake an enforcement action, would not later decide that the information he relied on did not support an objectively reasonable belief that his materials would not be discarded or would be managed in a manner that is protective of human health and the environment. However, under both approaches, if a generator meets the burden of proof that his decision to send his materials to a reclaimer was based on an objectively reasonable belief that the hazardous secondary materials would not be discarded and would be managed in a manner that is protective of human health and the environment, then the Agency would consider that the generator met his obligation under the regulations.

Note that codifying ''reasonable efforts'' standards that the generator would certify have been met would have the effect of placing on the generator the responsibility of assessing the recycler and ensuring that the hazardous secondary materials would not be discarded. EPA is seeking comment on this aspect of the proposal. Further, the Agency seeks comment on whether any or all of the questions are appropriate for the generator to answer in making reasonable efforts to ensure that the reclaimer intends to legitimately recycle the material and will 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.

Of course, regardless of the type of information/questions EPA may include in the final rule, if any, the generator could choose to seek additional information or ask additional questions, and as shown in EPA's study of good recycling practices, many generators already do so. EPA anticipates generators may seek additional information in determining that their hazardous secondary materials will not be discarded due to concerns about CERCLA liability (which is unaffected by today's proposal, see Section XIII.D. of today's proposal).

EPA also requests comment on the relationship between the reasonable efforts questions and legitimacy (discussed in more detail in section XI of today's preamble). Two of the questions identified above, questions D and E, are related to the two factors that EPA is proposing today to be the ''core'' considerations for determining whether a recycling operation is legitimate, rather than sham recycling (i.e., whether the hazardous secondary material makes a useful contribution, and whether the recycling process results in a valuable product). EPA believes that it is appropriate to include these concepts in ''reasonable efforts,'' thus allowing the generator to make only one determination before sending hazardous secondary material for recycling. In other words, if these reasonable efforts questions are codified in the regulations, EPA is proposing that by satisfying reasonable efforts, the generator would have also satisfied the obligation to determine his hazardous secondary material would be legitimately recycled per proposed 40 CFR 261.2(g). However, because EPA is also requesting comment on recordkeeping and certification requirements related to reasonable efforts, incorporating questions D and E could alter the implementation of the legitimacy determination for materials excluded under this provision. EPA requests comment on whether to keep the legitimacy determination an independent requirement for generators who would claim today's proposed exclusion and not directly link it to ''reasonable efforts.''

Finally, EPA also solicits comment on whether the frequency of periodic updates of the ''reasonable efforts'' should be identified in the regulations, or whether that question should be left to individual situations applying an objectively reasonable belief standard. Information on industry standards for facility audits of off-site activities, including how frequently they are conducted, would be especially helpful.

Storage conditions. As with the proposed exclusion for hazardous secondary materials reclaimed under the control of the generator, if the generator manages the hazardous secondary material in a land-based unit under the transfer-based exclusion, the material must be contained. For further discussion of how to determine if a material in a land-based unit is contained, see section IX of today's preamble.

However, the Agency is also considering several other conditions for generators under this exclusion. One option would be a condition addressing storage of accumulated recyclable hazardous secondary materials by the generator prior to shipping them to a reclamation facility. For example, we are proposing today a condition that specifies a general performance standard for storage of excluded hazardous secondary materials at reclamation facilities. Arguably, the same or a similar standard could be required for generators who take advantage of the exclusion. The Agency requests comment as to whether a storage condition (beyond the requirement that material in land-based units be contained) should be imposed on generators as part of this exclusion, and if so, what type of condition(s) it should be.

2. Conditions for Reclaimers

EPA is proposing that reclaimers of conditionally excluded materials will have to satisfy four general conditions, which pertain to record keeping, storage of recyclable hazardous secondary materials, management of the residuals from reclamation processes, and financial assurance.

Recordkeeping. Today's supplemental proposal would require reclaimers who operate under this conditional exclusion for transferred materials to maintain certain records, similar to the records we are proposing to require for generators. Specifically, such reclaimers would need to maintain for at least three years records of each shipment of materials received at the reclamation facility that were excluded from regulation under the terms of this exclusion. Such records would need to document the name and address of the generator of the hazardous secondary materials, the name of the transporter and the date such materials were received, and the type and quantity of hazardous secondary materials received. The Agency believes that this information is the minimum needed to enable effective oversight of recycling activities that would no longer be subject to the existing hazardous waste regulations.

In addition to these proposed record keeping provisions, the Agency is considering additional records that would more thoroughly document excluded recycling activities by reclaimers. Examples of such additional records would include more thorough characterization of the hazardous secondary materials that are received for reclamation, the types of units in which they were stored at the reclamation

facility, how they were transported (e.g., by truck), whether or not the hazardous secondary material was transported as a DOT hazardous material, and other similar conditions. We request comment on whether such additional record keeping conditions are warranted for reclaimers.

Storage of Recyclable Hazardous Secondary Materials. We are proposing today a general performance standard for storage of excluded hazardous secondary materials at reclamation facilities that operate under this proposed exclusion. Specifically, the hazardous secondary materials must be managed in a manner that is at least as protective as that employed for analogous raw materials. An ''analogous raw material'' is a raw material for which a hazardous secondary material is a substitute and serves the same function and has similar physical and chemical properties as the hazardous secondary material. A raw material that has significantly different physical or chemical properties would not be considered analogous even if it serves the same function. For example, a metal-bearing ore might serve the same function as a metal-bearing air pollution control dust, but because the physical properties of the dust would make it more susceptible to wind dispersal, the two would not be considered analogous. Similarly, a hazardous secondary material with high levels of toxic volatile chemicals would not be considered analogous to a raw material without these volatile chemicals. Where there is no analogous raw material, or if the hazardous secondary material is managed in a land-based unit, the material must be contained. For example, in the case of the metal-bearing air pollution control dust, dust suppression measures would likely be needed to contain the hazardous secondary materials. For the hazardous secondary material with high levels of toxic volatile chemicals, a closed tank or container would probably be needed to contain the volatile chemicals. For further discussion of how to determine if a material is contained, see section IX of today's preamble.

Storage conditions for reclamation facilities that operate under today's proposed exclusion would allow the Agency to determine that the recyclable materials are not discarded. The great majority of damages documented in the study of recent recycling-related damage incidents occurred at commercial reclamation facilities, and mismanagement of hazardous secondary materials was found to be a cause of environmental problems in 35% of the incidents. Accordingly, EPA believes that this proposed condition for storage, or some similar condition, is necessary and appropriate for reclamation facilities that take advantage of this exclusion, and will establish an expectation for the owner/operators of such facilities; i.e., that they must manage hazardous secondary materials in at least as protective a manner as they would an analogous raw material, and in such a way that materials would not be released into the environment.

The Agency considered a number of alternatives to this proposed storage condition, including specifying a much more rigorous set of conditions equivalent to current Subtitle C regulatory requirements for storage (see, for example, the requirements for tanks and containers, which are specified in subparts I and J of 40 CFR Part 264), or to a similar, but less stringent set of storage conditions (e.g., requiring the hazardous secondary material to be stored in an engineered unit). However, we do not believe that an elaborate set of conditions for storage are necessary for the purpose of this exclusion. For one thing, we are proposing today that generators who wish to take advantage of this exclusion must make ''reasonable efforts'' to evaluate the reclamation facilities they ship materials to, to ensure that the hazardous secondary materials will be legitimately and safely recycled. In making such reasonable efforts, we expect that generators will make an assessment of the reclamation facilities' material storage practices and equipment. Thus, we believe generators will themselves evaluate the storage and handling practices of hazardous secondary materials at the reclamation facilities they do business with. We request comment on whether or not the condition should be written in more specific terms, that is, in a way that would provide greater clarity with regard to how storage units should be designed and operated.

Management of recycling residuals. We are today proposing a condition pertaining to management of residuals that are generated from reclamation of hazardous secondary materials excluded from regulation under this proposal. The proposed condition specifies that ''any residuals that are generated from reclamation processes will be managed in a manner that is protective of human health and the environment. If any residuals exhibit a hazardous characteristic according to subpart C of 40 CFR part 261, or themselves are listed hazardous wastes, they are hazardous wastes (if discarded) and must be managed according to the applicable requirements of 40 CFR parts 260 through 272.''

The purpose of this condition is primarily to clarify the regulatory status of these waste materials, and to emphasize in explicit terms that recycling residuals must be managed properly. The study of recent (i.e., post-CERCLA, post-RCRA) recycling-related environmental problems revealed that mismanagement of residuals was the cause of such problems in one third of the incidents that were documented. Some common examples of these mismanaged residuals were 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. In many of these damage incidents, the residuals were simply disposed in on-site landfills or piles, with little apparent regard for the environmental consequences of such mismanagement, or possible CERCLA liabilities associated with cleanup of these releases.

One issue that the Agency considered with respect to this proposed condition was the regulatory status of wastes generated from the reclamation of hazardous secondary materials that would be listed hazardous wastes if they were not recycled. One argument could be that these residuals should be regulated as listed hazardous wastes, since they were derived from materials that were physically and chemically identical to listed hazardous wastes, and could contain hazardous constituents that might pose significant threats to human health and the environment if the residuals were mismanaged. A different argument would be that such a regulatory construct is unwarranted, since the recycled hazardous secondary materials are not wastes, provided they meet the conditions of the exclusion, and therefore the ''derived from'' concept as articulated in § 261.3(c)(2) should not be applied to these wastes. Further, such waste residuals from reclamation processes often do not resemble the hazardous secondary materials that were reclaimed, and thus, the argument goes, it should not be assumed that they would always need to be managed as hazardous wastes.

The Agency does not believe it is necessary to apply the ''derived-from'' principle to the residuals generated from the reclamation of excluded hazardous secondary materials. If the residuals exhibited a hazardous characteristic, or they themselves were a listed hazardous waste, they would be considered hazardous wastes, and would have to be managed accordingly. If they did not exhibit a hazardous characteristic, or were not themselves a

listed hazardous waste, they would need to be managed in accordance with applicable state or federal requirements for non-hazardous wastes. Thus, they would be subject to the same regulatory system that applies to wastes that are not hazardous wastes. The Agency does not see a compelling reason to establish as part of this rulemaking a different regulatory system based on the ''derived-from'' principle for reclamation residuals. We solicit comment on this aspect of today's supplemental proposal.

Financial Assurance. EPA is proposing today the condition that owner/operators of reclamation facilities that would operate under the terms of this exclusion for transferred materials demonstrate financial assurance, in accordance with the current requirements of Subpart H of 40 CFR Part 265. Under Part 265 Subpart H, owners and operators must demonstrate that resources will be available to pay for closure, and post-closure care at their facilities. They also must meet liability coverage requirements for sudden and accidental occurrences at their facilities. The requirements found in Subpart H of 40 CFR 265 also outline how owners and operators should determine cost estimates, provide the acceptable mechanisms for demonstrating financial assurance, and set the minimum amounts of liability coverage required.

We believe that requiring financial assurance for these reclamation facilities is necessary for the Agency to determine that the materials managed at these facilities are not discarded, and is supported by the findings of the recycling studies we conducted as part of this rulemaking effort.

For example, the study of current good recycling practices indicated that one of the main reasons that generators audit recyclers is to evaluate their financial health and resources to respond to accidents or other problems that could cause adverse environmental or human health consequences. This is primarily because of the joint-and-several liability provisions of CERCLA, under which a generator can become a ''responsible party'' obligated to help pay for remediation expenses if (in this example) a recycler to whom he sent recyclable hazardous secondary materials were to create contamination problems, but lacked the resources to pay for their cleanup. Because American manufacturers have considerable experience with these types of CERCLA liability issues, evaluating the financial health of the reclamation facility before shipping recyclable materials to them has become a standard business precaution for many generators. Today's proposed condition for financial assurance thus can be seen as a regulatory precaution against the same concern, ensuring that the reclamation facility owner/operators who would operate under the terms of this proposed exclusion are financially sound.

The need for some type of financial assurance for recyclers in this context also is supported by the study of recycling-related environmental problems. The study indicates that business failure is a primary causative factor associated with these damage incidents. For example, of the 208 damage incidents that were documented, at least 138 of the recyclers are no longer in business. While there may not be a clear cause-and-effect relationship in all of these cases, we believe that this clearly suggests a correlation between the financial health of recycling companies and the probability that their recycling activities will result in some form of environmental damage. In our view, this further supports the need for some type of financial assurance condition for this exclusion.

As proposed, reclaimers of excluded hazardous secondary materials would need to have financial assurance in accordance with the applicable financial assurance requirements for hazardous waste treatment storage and disposal facilities (cited above). We believe that these financial assurance requirements are appropriate for reclamation facilities that would be managing excluded hazardous secondary materials, since such management will typically involve some type of storage, and reclamation, which is defined as ''treatment'' under the existing RCRA regulations. If a reclamation facility were to manage excluded materials in land-based units (e.g., piles), it would be subject to the additional Subpart H financial assurance requirements for land disposal facilities.

The Agency currently has underway a review of the Subpart H financial assurance regulations now in effect for hazardous waste treatment, storage and disposal facilities. The Agency does not intend to address general issues related to the financial assurance mechanisms as a part of today's rulemaking, since these issues are being addressed in the broader review. However, in the context of this rulemaking, the Agency is interested in receiving comments as to whether or not the existing Subpart H requirements need to be modified in some way specifically for reclamation facility owner/operators that would be affected by today's proposed exclusion. EPA also solicits comment on whether we should adopt the financial assurance requirements that were promulgated as part of the standardized permit rule (see 70 FR 53419, September 8, 2005), which are EPA's most recently issued RCRA financial assurance requirements.

We are also interested in options that would involve tailoring the costing requirements associated with Subpart H requirements for today's rulemaking. For example, the Subpart H financial obligations are tied in large part to the estimated future cost of closing the hazardous waste facility. Closure costs can be difficult to estimate, or subject to disagreement, and failure to close might not be the problem at a given facility. For example, closure cost estimates might not address the kind of releases identified in the recycling study. Thus, a simpler alternative might be to set a standard, fixed amount of financial assurance that would need to be demonstrated. For example, EPA's study of environmental problems associated with hazardous material recycling was able to identify actual or estimated cleanup costs associated with 89 of the damage cases that were documented. Of these cases, 71 (80%) involved cleanup costs of $5 million or less, while 81 cases (91%) cost $10 million or less. It should be noted that there are important uncertainties associated with these cost data, as explained in our study report. With these uncertainties in mind, these findings might be used as the basis for identifying a specific, minimum amount of financial assurance that reclamation facility owner/operators would need to demonstrate. Such funds would thus be available for any environmental damage associated with the reclamation operations at such facilities.

This type of approach to establishing financial assurance requirements for reclamation facilities would be less flexible than the current regulations, but it would have the virtue of simplicity and transparency. Similarly, the regulatory language of individual financial assurance mechanisms might need to be modified slightly, to make it clear that funds would be available for environmental damages beyond closure. The Agency solicits comment on such alternative approaches to financial assurance requirements for reclamation facilities that would operate under today's proposed exclusion.

Finally, the Agency anticipates that, when and if today's proposed exclusion for transferred materials is promulgated and becomes effective, there are likely to be some generators of recyclable hazardous wastes that will choose not to use the exclusion, and thus will continue to manage their wastes under the current hazardous waste regulatory

system. These generators may nevertheless wish to ship their hazardous waste to a reclamation facility that is operating under this exclusion. In such situations, it is possible that questions could arise as to the regulatory status of the hazardous waste materials that are sent to such reclamation facilities. Today's proposed exclusion includes a provision (§ 261.4(a)(24)(vi)) that is intended to clarify that the reclamation facilities may still claim the exclusion in these types of situations. The Agency requests comment on this provision.

D. Enforcement

Under today's proposal, hazardous secondary materials transferred for the purpose of reclamation would be excluded from RCRA subtitle C regulation, but would be subject to certain conditions and restrictions. 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 from the point at which the material was used and could not be reused without reclamation. If a reclaimer were to fail to meet any of the above-described pre-conditions or restrictions on the management of hazardous secondary materials that are applicable to the reclaimer, then the materials would be considered discarded by the reclaimer and would be subject to RCRA subtitle C regulation from the point at which the reclaimer failed to meet a condition or restriction, thereby discarding the material.

Please note 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 adequately demonstrate that he has met his obligations, including the obligation under proposed 40 CFR 261.4(a)(24)(iv)(A) to make reasonable efforts to ensure that the material will be recycled legitimately and otherwise managed in a manner that is protective of human health and the environment. 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, and where the generator's decision to ship to that reclaimer is based on an objectively reasonable belief that the hazardous secondary materials would be recycled legitimately and otherwise managed in a manner consistent with this regulation, the generator would not have violated the terms of the exclusion.

XI. Legitimacy: Proposed 40 CFR 261.2(g)

A. What Is the Purpose of Distinguishing Legitimate Recycling From Sham Recycling?

Under the RCRA Subtitle C definition of solid waste, many existing hazardous secondary materials are not solid wastes and thus, not subject to RCRA's ''cradle to grave'' management system if they are recycled. The basic idea behind this construct is that recycling of such materials often closely resembles normal industrial manufacturing, rather than waste management. However, since there can be significant economic incentive to manage hazardous secondary materials outside the RCRA regulatory system, there is a clear potential for some handlers to claim that they are recycling, when in fact they are conducting waste treatment and/or disposal in the guise of recycling. To guard against this, EPA has long articulated the need to distinguish between ''legitimate'' (i.e., true) recycling and ''sham'' recycling, beginning with the preamble to the 1985 regulations that established the definition of solid waste (50 FR 638, January 4, 1985) and continuing with the 2003 proposed codification of criteria for identifying legitimate recycling.

On October 28, 2003 (68 FR 61581–61588), EPA extensively discussed our position on the relevance of legitimate recycling to hazardous secondary materials recycling in general and to the redefinition of solid waste specifically. We proposed to codify in the RCRA hazardous waste regulations four general criteria to be used in determining whether recycling of hazardous secondary materials is legitimate. In today's action, we are proposing two changes to the proposed legitimacy criteria and asking for public comment on those changes. The changes are (1) a restructuring of the proposed criteria, called factors in this proposal, to make two of them mandatory, while leaving the rest as factors to be considered, and (2) additional guidance on how the economics of the recycling activity should be considered in a legitimate recycling determination.

As we explained in the 2003 proposal, it is the Agency's longstanding policy that, for activities to qualify as recycling of hazardous secondary materials, they must be legitimate. This principle applies to both recycling of excluded hazardous secondary materials and recycling of regulated hazardous secondary materials. The definition of legitimate recycling is intended to apply to all recycling of hazardous secondary materials, including:

- Recyclable hazardous secondary materials that would be excluded from Subtitle C regulation as wastes under today's proposed exclusion from the definition of solid waste.
- Hazardous secondary materials that, because they are recycled, are excluded or exempted from Subtitle C regulation under other regulatory provisions (e.g., see the exclusions in 40 CFR 261.2(e) and 261.4).
- Recyclable hazardous wastes that are regulated under Subtitle C prior to recycling.

Apart from the definition of solid waste implications, the concept of legitimate recycling also is used to determine if a recycling unit is exempt from RCRA Subtitle C permitting (except for certain air emission standards) or a regulated waste treatment or disposal unit, subject to full RCRA Subtitle C permitting.

The concept of legitimate recycling is designed to be used in addition to and in concert with more specific criteria or requirements when they have been established in the regulations for specific recycling activities or recycled hazardous secondary materials. Affected parties should look to those regulatory provisions, in addition to the definition of legitimate recycling, to ensure compliance. For example, for a zinc micronutrient fertilizer manufacturer who uses hazardous secondary materials as a feedstock, the consideration of hazardous constituents in the final product would involve an analysis of whether the operation is legitimate recycling and an analysis of whether the fertilizer meets the contaminant limits specified in 40 CFR 261.4(a)(21).

By ensuring that use of hazardous secondary materials in an industrial process is legitimate recycling, the Agency seeks to ensure that when a facility claims that it is recycling, the hazardous secondary material is in fact being recycled and is contributing to a valuable product and is not being treated or disposed of in the guise of recycling.

B. Definition of Legitimate Recycling in the 2003 Proposal

In the 2003 proposed rule (68 FR 61581–61588), EPA proposed codifying specific regulatory provisions for determining when hazardous secondary materials are recycled legitimately. Previously, the criteria considered in

evaluating legitimate recycling have been discussed extensively in preambles to definition of solid waste rulemakings and, notably, in a 1989 memorandum that laid out a single list of criteria to be considered in evaluating legitimacy (the ''Lowrance Memo''; OSWER directive 9441.1989(19), dated April 26, 1989).

The 2003 proposal consolidated the criteria in that memorandum into four criteria. EPA was clear in its expectation that most, if not all, legitimate recycling would conform with all four of the criteria, but stated that the application of those criteria would require some subjective evaluation of the criteria in each specific situation to which they are being applied. In those cases where a legitimate recycling operation does not meet all four criteria, the structure of the definition of legitimacy was designed to be flexible enough to allow those situations to be deemed legitimate.

In general, the proposed regulatory language stated that legitimacy determinations must be made by considering whether:

- The hazardous secondary material to be recycled is managed as a valuable commodity;
- The hazardous secondary material provides a useful contribution to the recycling process or to a product of the recycling process;
- The recycling process yields a valuable product or intermediate;
- The product of the recycling process does not contain significant amounts of hazardous constituents that are not found in the analogous products or exhibit a hazardous characteristic not exhibited by the analogous product.

The full proposed regulatory text can be found in the proposed rule (68 FR 61596).

It is the Agency's opinion that the concept of legitimate recycling proposed in the October 2003 proposal and in today's supplemental proposal is not substantively different than our longstanding policy, as expressed in earlier preamble and guidance statements. As part of proposing regulatory provisions on the legitimacy of recycling, we are simply reorganizing, streamlining, and clarifying the existing legitimacy principles. We believe that the regulatory definition of legitimate recycling, when applied to specific recycling scenarios, will result in determinations that are consistent with the earlier policy. Therefore, we generally do not see the need for the regulated community or overseeing agencies to revisit previous determinations and expect any written determinations from these agencies to, in effect, be grandfathered. For a more detailed analysis on how the definition of legitimacy has evolved from earlier preamble and guidance statements, see the October 28, 2003 proposal (68 FR 61581–61588), where we provided a thorough explanation of how the proposed criteria related to existing guidance. The Agency does not intend to reiterate that analysis in today's supplemental proposed rule, but will explain below the changes we are proposing to make from the 2003 proposal.

The 2003 proposal did result in comments on the Agency's proposal to codify legitimacy and we are requesting further comment on this issue. The Agency believes that there are many benefits to codifying the legitimacy factors, as discussed in the 2003 proposal. Many commenters, particularly the state regulatory agencies, but some members of industry as well, agreed with EPA's rationale for codifying the legitimacy in part 261. However, some commenters urged EPA to retain the existing legitimacy guidance instead of codifying it in the regulations. These commenters stated that the existing guidance provides a more flexible way to assess whether an activity constitutes legitimate recycling and raised several concerns with the codification of legitimacy. The commenters expressed concern that codification could alter the application of legitimacy. Although EPA intends to preserve current interpretations of legitimacy, the commenters raised the concern that putting legitimacy in the regulations could eliminate the flexibility in the existing guidance for subjective evaluation and balancing of the factors when making a determination. EPA is requesting comment on this issue.

In addition, the commenters raised the concern that codification of legitimacy would place too much burden on the regulated entity to make a showing that it is engaged in legitimate recycling. 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. EPA expects that regulated entities have evaluated and will continue to evaluate their recycling operations using these factors and will reach their conclusions about legitimacy without prior approval by an overseeing agency. However, EPA is requesting comment on whether codifying the factors in today's proposal would place increased burden on the regulated entity and, if so, what the reasons are for such increased burden. Finally, the concern has been expressed that codification would fix into place a specific formulation of EPA's legitimacy factors, and therefore would limit future evolution of them. Future changes to the factors could become more difficult if they have been codified. The Agency believes there are many benefits to codifying the legitimacy factors, as discussed in the 2003 proposal, but is requesting comment on this issue.

EPA is interested in comments about the benefits and drawbacks of codifying legitimacy. In particular, EPA solicits comments on current practices for assessing legitimacy, on any problems with current practices that may be alleviated by codifying the factors, and on alternative means of addressing any such problems.

C. Changes Proposed in This Action

1. New Structure of Legitimacy Factors

a. *Design of the new structure.* For the reasons discussed below, EPA is proposing a new structure for the definition of legitimate recycling. The proposed design of the definition has two basic parts. The first part is considered the core of legitimacy, which includes a requirement that the hazardous secondary material being recycled provides a useful contribution to the recycling process or to the product of the recycling process and a requirement that the product of the recycling process is valuable. These two factors are fundamental to the definition of legitimacy and, therefore, an industrial process that does not conform to them would be considered sham recycling (i.e., treatment or disposal in lieu of recycling).

The second part of the proposed structure for legitimacy is a list of two factors that must be considered, but not necessarily met, when a recycler is making a legitimacy determination. EPA believes that these factors are important in determining legitimacy, but has not proposed to make them mandatory because the Agency believes that there may be some situations in which a legitimate recycling process does not conform to one of these factors. Therefore, EPA is proposing that the management of the hazardous secondary material and the presence of hazardous constituents in the product of the recycling activity be factors that must be considered in the overall legitimacy determination, but not mandatory requirements that must be met as part of a definition of legitimacy. The full proposed regulatory text for the legitimacy portion of this supplemental proposal is found in 40 CFR 261.2(g).

b. *Why EPA is proposing this change.* In the 2003 proposed rule, the regulatory text for legitimacy was made

up of paragraph (g) of proposed section 261.2, which stated that hazardous secondary materials that are not legitimately recycled are discarded and, therefore, solid wastes. Paragraphs (1) through (4) then listed the four proposed legitimacy criteria after a statement that legitimacy determinations must be made by considering them. Proposed criteria 1 and 2 focused on the hazardous secondary material being recycled and criteria 3 and 4 focused on the product of the recycling process.

In the 2003 proposed rule, the application of the four criteria to a recycling process was proposed to require some evaluation and balancing. That is, although the Agency expected that most legitimate recycling practices would conform to all the pieces of legitimacy, it was aware that there would be some cases in which legitimate recycling may not conform to one or more of the criteria. As in the Lowrance Memo, the structure of legitimacy allowed circumstances in which certain criteria weighed more heavily than others in the final legitimacy determination.

Analysis of public comment on the 2003 proposal shows that there was general agreement from industry, states, and other commenters that recycling cannot be legitimate if the hazardous secondary material being recycled does not provide a useful contribution to the process or to the product and if the recycling process does not yield a product or intermediate that is valuable to someone. Certain commenters requested that EPA provide more information on how it defines the terms used in the regulation and there was some disagreement with the specifics laid out in the preamble. Some commenters, particularly several states, felt that all four criteria should be mandatory requirements. However, almost all commenters agreed that proposed criteria 2 and 3 should be met in order for recycling to be considered legitimate.

EPA agrees with the importance of criteria 2 and 3 and, for this proposal, has decided that these two concepts are, in fact, at the very core of what it means to recycle legitimately. Therefore, today's proposed regulatory language states in 40 CFR 261.2(g)(2) that ''Legitimate recycling must involve a hazardous secondary material that provides a useful contribution to the recycling process or to a product of the recycling process and the recycling process must produce a valuable product or intermediate.'' This statement is followed by paragraphs (i) and (ii) to give more details on how the Agency defines these critical concepts.

EPA has determined that the other criteria in the 2003 proposal, criterion 1 and criterion 4, are still important concepts in making legitimacy determinations, but should not be mandatory. Instead, today's proposed regulations state these two factors need to be considered in making a determination as to the overall legitimacy, which are found in 261.2(g)(3). In stating these factors need to be considered, EPA expects that anyone making a legitimacy determination will look carefully at how their hazardous secondary materials are managed as compared to analogous raw materials and at the hazardous constituents in their products.

However, these two factors would not be mandatory 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 because that factor is not applicable or relevant to the materials being recycled or to the particulars of the recycling process. For example, it is possible that a solid, powdery hazardous secondary material could be shipped to a recycling facility in flexible, woven ''supersack'' containers, where the supersacks are then stored at the facility in a well-designed, designated indoor containment area and then legitimately recycled. If, however, an analogous raw material (i.e., with similar physical and chemical characteristics) was typically received and stored at the same facility in sealed steel drums, one could conclude that the hazardous secondary material was not managed ''in a manner consistent with the analogous raw material.'' In this case, therefore, a strict finding could be made that this factor was not met, even though the differences in storage practices do not affect protectiveness. In evaluating the legitimacy of a recycling process in situations like this, EPA does not believe that such a strict finding should necessarily be the determining factor. We are proposing that this factor not be mandatory in making legitimacy determinations in order to allow flexibility for these types of situations.

For similar reasons, the Agency is also proposing that the factor which addresses ''toxics along for the ride'' be a consideration in making legitimacy determinations, rather than a mandatory requirement. One illustration as to why some flexibility may be needed in assessing this proposed factor could be a hypothetical situation in which a pharmaceutical manufacturer uses a ''virgin'' solvent (''Solvent X'') as a process ingredient, and generates a spent solvent that is identical to the virgin solvent, except that it has become contaminated with a relatively small amount of a different solvent (''Solvent Y''). Solvents X and Y are assumed to have essentially the same toxicity and solvent properties, and both chemicals would be considered ''hazardous constituents'' under RCRA for waste identification purposes. In this example, the spent material (i.e., the mixture of solvents ''X'' and ''Y'') is no longer useful to the generator in making pharmaceuticals. It would potentially be useful, however, to a manufacturer of oil-based paints, as a substitute for virgin Solvent X. If the spent material was used in this manner by the paint manufacturer, the resulting paint products could contain significant concentrations of a hazardous constituent (i.e., ''Solvent Y'') not found in analogous products made from virgin Solvent X. Thus, this recycling practice could be determined as not meeting today's proposed legitimacy factor that addresses ''toxics along for the ride.''

Given that the paint products made from spent (i.e., secondary) materials would essentially have the same solvent properties and potential environmental hazards as paint made from virgin solvents, it might be reasonable to determine that the overall recycling practice was legitimate. Again, because of situations like this, we believe that this factor is best expressed as a consideration in making legitimacy determinations, rather than as a mandatory requirement.

At the same time, it should be noted that ''toxics along for the ride'' is an important consideration when the toxic constituents affect either the performance of the product or cause adverse environmental or health effects. For example, elevated levels of lead in foundry sand would not be a problem when the sand is re-used in the foundry molds, but it has been a significant problem when the sand was sold as children's play sand.[4] In such a case, the high levels of lead would disqualify this use from being considered legitimate recycling.

Under this proposed structure, if a facility making a legitimacy determination decides that one of these

[4] One of the profiles in the docket for today's proposal shows that from 1997–1998, a horticultural nursery purchased approximately 375 tons of foundry sand which contained lead above the regulatory limits, that was then bagged and sold as play sand to approximately 40 different retailers. (U.S. EPA, An Assessment of Environmental Problems Associated with Recycling of Hazardous Secondary Materials, Appendix 2).

two factors to be considered is, in fact, not applicable to the recycling process, we recommend that the facility document why the recycling process is legitimate, even though it may not meet one or more of the factors to be considered.

EPA believes that the new structure for the definition of legitimacy will clarify what the Agency believes are the most important elements of legitimacy and requests comment on this structure for making legitimacy determinations related to hazardous secondary material recycling.

2. Consideration of Economics in Legitimate Recycling

EPA also notes that the economics of the recycling activity may be relevant to legitimate recycling determinations. Consideration of economics has long been a part of the Agency's concept of legitimacy, as evident in the Lowrance Memo and earlier preamble text (50 FR 638, January 4, 1985 and 53 FR 522, January 8, 1988) [see also American Petroleum Institute v. EPA (''API II''), 216 F.3d 50, 57–58 (DC Cir. 2000)]. In addition, in our October 2003 proposal, EPA proposed that consideration of economics be part of the second legitimacy criterion (i.e., whether the hazardous secondary material provides a useful contribution). In their comments to the October 2003 proposal, states and some other stakeholders supported including a consideration of economics when making legitimacy determinations, although they also expressed a need for clarification of how economics should inform legitimacy determinations. Today's proposal, unlike the October 2003 proposal, does not codify specific regulatory language on economics, but offers further guidance and clarification on how economics may be considered in making legitimacy determinations. The Agency believes that we are clarifying how economics has traditionally been implemented via the Lowrance Memo guidance, and therefore, does not believe the consideration of economics as explained below impacts existing legitimacy determinations.[5]

Specifically, EPA believes that consideration of the economics of a recycling activity can be used to inform and help determine whether the recycling operation is legitimate. Positive economic factors would be a strong indication of legitimate recycling, whereas negative economic factors would be an indication that a further look at the recycling operation may be warranted in assessing its legitimacy. While not specifically addressed in the proposed regulations, consideration of economics could be a factor in informing whether the hazardous secondary material input provides a useful contribution and whether the product of the recycling operation is of value.

Consideration of the economics of a particular recycling operation can greatly assist in making legitimacy determinations. Appropriate information for this consideration could include an understanding of the major costs, revenues, and economic flows for a recycling operation. Information that may be useful could include (1) the amount paid or revenue generated by the recycler for recycling hazardous secondary materials; (2) the revenue generated from the sale of recycled products; (3) the future cost of processing existing inventories of hazardous secondary materials and (4) other costs and revenues associated with the recycling operation. The economics of the recycling transaction may be more of an issue when hazardous secondary materials are sent to a third-party recycler, although where the hazardous secondary material being recycled is under the control of the generator, the generator must still be able to show that the hazardous secondary material is, at a minimum, providing a useful contribution and producing a valuable product.

The basic economic flows can suggest whether the recycling operation will process inputs, including hazardous secondary materials, and produce products over a reasonable period of time, recognizing that there will be lean and slow times.[6] Thus, processing inputs that produce legitimate products is a threshold for legitimate recycling. A general accounting of the major costs, revenues, and economic flows for a recycling operation over a reasonable period of time[7] can provide information to consider whether recycling is likely to continue at a reasonable rate, compared to the rate at which inputs are received, or whether it is likely that significant amounts of unrecycled material are likely to be accumulated and then abandoned when the facility closes.[8] Any bona fide sources of revenues would be included in this consideration, such as payments by generators to recyclers for accepting hazardous secondary materials and subsidies supporting recycling. However, in order to have some level of confidence that beneficial products are or will be produced; we believe that at least some portion of the revenues should be from product sales (or savings due to avoided purchases of products if the hazardous secondary materials are used directly by the recycler), consistent with the hazardous secondary material being recycled to make a useful product.

Two examples illustrate this concept. A recycling operation that generates revenues from sales of recycled products that greatly exceed the costs of the operation is likely to quickly process the hazardous secondary materials it receives into useful products. A very different example is an operation that has, relative to its revenues, large inventories of unsold product and large future liabilities in terms of stocks of unprocessed hazardous secondary material. This operation would draw closer attention to determine whether it is engaged, in essence, in treatment and/or abandonment in the guise of recycling.

When the economics of a recycling operation is similar to that of manufacturing using raw materials, the Agency believes that such an operation is likely to be legitimate. That is, the recycler pays for hazardous secondary materials as a manufacturer would pay for raw materials, the recycler sells products from the recycling process as a manufacturer would sell products of manufacturing, and revenues equal or exceed costs. In this scenario, hazardous secondary materials are valuable (i.e., the recycler is willing to pay for them) and make a useful contribution to a valuable recycled product (otherwise the recycler would not be willing to pay for them). In addition, the sale of the products of recycling demonstrates their value.

However, we also recognize that the economics of many legitimate recycling operations that utilize hazardous secondary materials differs from the economics of more traditional manufacturing operations. An understanding of the economics of these

[5] Today's supplemental proposal would make the ''useful contribution'' factor a central, or mandatory, part of the definition of legitimacy (along with the ''valuable product'' factor). However, we do not believe that consideration of economics should also be considered a mandatory factor. Nevertheless, the economics of a recycling activity is a consideration because it can assist in informing the useful contribution and valuable product factors of the definition of legitimate recycling.

[6] As an example, metal prices fluctuate and at times are below the cost of processing. However, recovery of metals is usually legitimate recycling.

[7] Where the hazardous secondary material being reclaimed is under the control of the generator, the recycling operation is generally part of an overall manufacturing operation, which would be part of the evaluation.

[8] In general, overaccumulation of hazardous secondary materials is subject to the speculative accumulation provisions, as defined in 40 CFR 261.1(c) (8).

operations can be useful in evaluating the legitimacy of a recycling operation. For example, many recyclers are paid by generators to accept hazardous secondary materials. Generators may be willing to pay recyclers because they can save money if the recycling is less expensive than disposing of the hazardous secondary materials in landfills or incinerators. Another example is a scenario where recyclers receive subsidies which may be designed to develop recycling infrastructure and markets, remove problematic materials from disposal, or achieve other benefits of recycling. For example, the recycling of electronic materials can be legitimate even though the recycler is often subsidized for processing the material. Both of these examples involve situations that are different from manufacturing using raw materials, but as long as they are appropriately considered, an analysis of the economics of these operations can assist in determining the legitimacy of the recycling.

Any analysis of the economics of a recycling operation should recognize that a recycler may be able to charge generators and still be a legitimate recycling operation properly excluded from regulation. In short, because these hazardous secondary materials are hazardous wastes if disposed of, typically the generators' other alternative management option already carries a cost that is based on the existing market for hazardous waste transportation and disposal. Hence, unless there is strong competition in recycling markets or the hazardous secondary materials are extremely valuable, a recycler may be able to charge generators simply because alternative disposal options cost more. While the generator's objective may be finding the least cost alternative for getting rid of the hazardous secondary material, the recycling may well be a legitimate recycling operation.

Recognizing that such a dynamic exists can assist those making determinations in evaluating legitimacy of the recycling operation. For example, if a recycler is charging generators fees (or receiving subsidies from elsewhere) for taking hazardous secondary material and receives a far greater proportion of its revenue from acceptance fees than from the sale of its products, both the useful contribution and the valuable product factors may warrant further review, unless other information would indicate that such recycling is legitimate. Fees and subsidies could indicate that the economic situation allows the recycler to charge high fees, regardless of the contribution provided by the inputs, including hazardous secondary materials. In this situation, recyclers may also have an increased economic incentive to over-accumulate or overuse hazardous secondary materials, or to manage them less carefully than one might manage more valuable inputs. Additionally, if there is little competition in the recycling market, and/or if acceptance fees seem to be set largely to compete with the relative costs of alternative disposal options rather than to reflect the quality or usefulness of the input to the recycling operation, this may also suggest a closer look at ''useful contribution.''

A relatively low proportion of revenues coming from sales of recycled products compared to payments by generators may suggest the need for more consideration of the ''valuable product'' criterion. It is possible that it is appropriate for product sales revenues to be dwarfed by acceptance fee revenues because markets for the particular products are highly competitive or because high alternative disposal costs allow for high acceptance fees. However, relatively low sales revenues could also point to a review of product sales prices to see whether they are lower than other comparable products, products are being stockpiled rather than sold, or very little product is being produced relative to the amount of inputs to the recycling operation. These could be possible indicators that the recycled product may not be valuable and, thus, sham recycling may be occurring.

A consideration of the future cost of processing or alternatively managing existing inventories of hazardous secondary material inputs also can inform the legitimacy determination. When hazardous secondary materials make a significant useful contribution to the recycling activity, a recycler will have an economic incentive to process input materials relatively quickly or efficiently, rather than to maintain large inventories. While recyclers often need to acquire a sufficient amount of a hazardous secondary material to make it economically feasible to recycle, there should be little economic incentive to over-accumulate such materials that make a useful contribution. Overly large accumulations of input materials may indicate that the input materials are not providing a useful contribution or that the recycler is increasing its future costs of either processing or disposing of the material, and hence may be faced with an unsound recycling operation in the future. Again, it is important to weigh this factor against other considerations. For example, it is possible that the recycler has acquired a large stock of hazardous secondary material because the price was unusually low or perhaps the material is generated episodically and the recycler has few opportunities to collect it.

When recycling is conducted under the control of the generator, the recycler may not account formally for some of the costs and savings of the operation. Still, when deciding whether to undertake or continue the recycling operation or to utilize alternative outside recycling or disposal options, the recycler will evaluate basic economic factors as a part of doing business. Also, the recycler would be likely to account for the costs of virgin materials avoided by using hazardous secondary materials. Similarly, sales of recycled products under the control of the generator that are sold to an external market may be used to evaluate the valuable product criterion. Thus, the recycler should have available the basic information necessary to consider the economics of an on-site or internal recycling operation for purposes of making a legitimacy determination. We recognize, however, that an evaluation of the economic structure of a recycling operation under the control of the generator is likely to be less rigorous than that of a typical offsite commercial recycling operation.

We request comment on how the economics of the recycling activity should be considered in making overall legitimate recycling determinations consistent with prior legitimacy determinations under the Lowrance Memo. We are specifically interested in whether economics should simply be a consideration that informs legitimacy overall or whether the economics of recycling should be a separate factor, including regulatory language, to consider. In addition, we are interested in hearing from both the regulated community and the States about other ways in which consideration of economics can inform and support determinations of legitimate recycling for both on-site and offsite recycling.

XII. Petitions for Non-Waste Classification: Proposed 40 CFR 260.30(d), 260.30(e), 260.30(f), 260.34

A. What Is the Intent of This Provision?

The intent of the non-waste determination petition process is to provide petitioners with an administrative procedure for receiving a formal determination that their recycled hazardous secondary material is not discarded. This process would be available in addition to the solid waste exclusions proposed today. Once a non-

waste determination has been granted, the hazardous secondary material would not be subject to the restrictions and conditions that the exclusions discussed elsewhere in today's supplemental proposal would include (e.g., prohibition on speculative accumulation, or, for the transfer-based exclusion, recordkeeping, reasonable efforts, financial assurance, storage standard and export notice and consent).

The petition process would be voluntary. Facilities may choose to continue to self-implement any applicable waste exclusions and, for the vast majority of cases, where the regulatory status of the material is evident, self-implementation will still be the most appropriate approach. In addition, facilities may continue to contact EPA or the authorized state asking for informal assistance in making these types of waste determinations. However, for cases where there is ambiguity about whether a hazardous secondary material is a solid waste, the formal petition process will provide regulatory certainty for both the facility and the implementing Agency

EPA anticipates that most generators who recycle their hazardous secondary materials would use either the self-implementing exclusions proposed today or existing exclusions. We request comment on how frequently the non-waste determination process is likely to be used and how best to minimize the burden to the authorized states and to the regulated community.

The Agency is proposing three types of non-waste determinations: (1) For hazardous secondary materials recycled in a continuous industrial process, (2) for hazardous secondary materials indistinguishable in all relevant aspects from a product or intermediate, (3) for hazardous secondary materials that is recycled under the control of the generator, such as through contracts similar to the tolling arrangements proposed in section IX of today's preamble.

B. Non-Waste Determination for Hazardous Secondary Material Recycled in a Continuous Industrial Process

As discussed earlier in today's supplemental proposal, court decisions have made it clear that hazardous secondary material that is recycled in a continuous industrial process is not discarded and therefore, not a solid waste. The October 2003 proposed rule attempted to parse the language of some of those decisions in order to identify when material destined for recycling is clearly not a solid waste. As explained earlier, we are not finalizing that approach. Instead, the Agency has decided to link the rulemaking more explicitly to the concept of ''discard'' which underlie those decisions. EPA believes that today's supplemental proposal excludes from the definition of solid waste hazardous secondary materials recycled in a continuous industrial process by virtue of the determination that such materials that are legitimately recycled under the control of the generating facility and not speculatively accumulated are not discarded and therefore not solid waste.

However, production processes can vary widely from industry to industry. In the October 2003 proposal, we attempted to define ''recycled in a continuous industrial process'' using the NAICS codes. Based on the comments we received, we determined that identifying which hazardous secondary materials are recycled within a continuous industrial process presents difficulties as courts have, at least implicitly, acknowledged.[9] Even if EPA had more specific information on some hazardous secondary materials, it still would be impossible to know if the Agency has addressed every possibility. Thus to determine whether an individual hazardous secondary material is recycled in a continuous industrial process, and therefore not a solid waste, EPA may need to evaluate case-specific fact patterns, which is best done through a case-by-case procedure. We are titling this procedure a ''non-waste determination'' to acknowledge that this procedure constitutes an administrative process for formally recognizing that a specific hazardous secondary material is not a solid waste.

EPA is proposing four criteria for making this ''non-waste determination'' that a specific hazardous secondary material is reclaimed in a continuous industrial process. The first is the extent that the management of the hazardous secondary material is part of the continuous production process. At one end of the spectrum, if the material is handled in a manner identical to virgin feedstock, then it is fully integrated into the production process. At the other end of the spectrum, materials indisputably discarded prior to being reclaimed are not a part of the continuous primary production process. (''*AMC II*''), 907 F. 2d 1179 (DC Cir. 1990) (listed wastes managed in units that are part of wastewater treatment units are discarded materials (and solid wastes), especially where it is not clear that the industry actually reuses the materials). For cases that lie within the spectrum, the petitioner would need to provide sufficient information about the production process to demonstrate that the management of the hazardous secondary material is an integral part of the production process and is not waste treatment.

The second criterion for making this non-waste determination is the capacity of the production process to use the hazardous secondary material in a reasonable timeframe and ensure that it will not be abandoned (for example, based on past practices, market factors, the nature of the material, and any contractual arrangements). Abandonment of stockpiled recyclable hazardous secondary materials is one way that discard can occur at recycling operations and is one of the major causes of environmental problems. As indicated in the recycling studies, 69 of the 208 incidents of environmental damage involve abandonment of the hazardous secondary material as the primary cause of damage. For today's proposed exclusions for hazardous secondary materials recycled under the control of the generating facility and hazardous secondary materials transferred to another facility for recycling, EPA is proposing speculative accumulation (as defined in 40 CFR 261.1(a)(8)) as the method for determining when a material is unlikely to be recycled and therefore may end up being discarded via abandonment. For the non-waste determination, the petitioner would not necessarily need to demonstrate that the material would not be accumulated speculatively per 40 CFR 261.1(a)(8), but he must provide sufficient information about the material and the process to demonstrate that the

[9] *See,* for example the *ABR* decision, where the Court acknowledged that the term, ''discard,'' could be ''ambiguous as applied to some situations, but not as applied to others,'' and particularly cited the difficulty in examining the details of the many processes in the mineral processing industry. 208 F.3d at 1056. While the court overturned EPA's regulations for casting too wide a net over continuous industrial processes, it acknowledged that there are large number of processes, some of which may be continuous and some of which may not. Determining what is a continuous process in the mineral processing industry, according to the Court, would require examination of the details of the processes and does not lend itself, well, to broad abstraction. Specifically, the court stated: Some mineral processing secondary materials covered under the Phase IV Rule may not proceed directly to an ongoing recycling process and may be analogous to the sludge in AMC II. The parties have presented this aspect of the case in broad abstraction, providing little detail about the many processes throughout the industry that generate residual material of the sort EPA is attempting to regulate under RCRA, 208 F.3d at 1056.

In the case of today's supplemental proposal, which applies across industries, there are far larger and more diverse processes. While the Agency believes it is proposing a reasonable set of principles, they must still be applied to the details of the industrial processes in question.

hazardous secondary material will in fact be reclaimed in a reasonable timeframe and will not be abandoned. EPA is not proposing an explicit definition of ''reasonable timeframe'' because such a timeframe would vary according to the material and industry involved, and therefore determining this timeframe should be made on a case-specific basis. However, an applicant may still choose to use the speculative accumulation timeframe as a default if it wishes.

The third criterion for this non-waste determination is whether the hazardous constituents in the hazardous secondary material are recycled rather than released to the air, land or water at significantly higher concentrations from either a statistical or from a health and environmental risk perspective than would otherwise be released by the primary production process. To the extent that the hazardous constituents are a continuation of the original hazardous secondary material, their release to the environment is an indicator of discard. The Agency recognizes that normal production processes also result in a certain level of releases and, in evaluating this criteria, would not deny a petition if the increase in releases is not significantly different from either a statistical or risk perspective. However, when unacceptably high levels of the constituents that make the hazardous secondary material of regulatory concern are released to the environment rather than recycled, then that material (or at least the portion of the material that is of most concern) is not in fact being ''reused within an ongoing industrial process.''

The fourth and final criterion for this non-waste determination includes any other relevant factors that demonstrate the hazardous secondary material is not discarded. This ''catch-all'' criterion is intended to allow the applicant to provide any case-specific information it deems important in making the case that its material is not discarded and therefore not a solid waste.

EPA requests comment on these criteria, as well as any other criteria that may be relevant for making this non-waste determination.

C. Non-Waste Determination for Hazardous Secondary Material Indistinguishable in All Relevant Aspects From a Product or Intermediate

Although the courts have made clear that hazardous secondary materials recycled within a continuous industrial process are not discarded and therefore not solid waste, they have also said that hazardous secondary materials destined for recycling in another industry are not *automatically* discarded. In the *Safe Foods* case, the Court stated ''Nobody questions that virgin * * * feedstocks are products rather than wastes. Once one accepts that premise, it seems eminently reasonable to treat [recycled] materials that are indistinguishable in the relevant respects as products as well.'' 350 F.3d at 1269. In most cases, hazardous secondary materials that are indistinguishable from products are unambiguously excluded from solid waste regulation under 40 CFR 261.2(e). However, there may be some instances which would benefit from a non-waste determination similar to that proposed today for hazardous secondary materials reclaimed in a continuous industrial process. EPA is proposing four criteria for making a non-waste determination for hazardous secondary materials indistinguishable in all relevant aspects from a product or intermediate.

The first criterion for this non-waste determination is consideration of likely markets for the hazardous secondary material (for example, based on the current positive value of the material, stability of demand, and any contractual arrangements). This evaluation of market participation is a key element for determining whether companies view and handle these hazardous secondary materials like products rather than like negatively-valued wastes. EPA's report on how market incentives affect the management of hazardous secondary materials indicates that both high value and stable markets are strong incentives to refrain from over-accumulating recyclable materials, thus maximizing the likelihood that the hazardous secondary materials will be recycled and not abandoned.

The second criterion for this non-waste determination is the chemical and physical identity of the hazardous secondary material and whether it is comparable to commercial products or intermediates. This ''identity principle'' is a second key factor that the Court in *Safe Food* found useful in determining whether a material is indistinguishable from a product. It is important to note that the identity of a material can be ''comparable'' to a product without being identical. However, to qualify for a non-waste determination, any differences between the hazardous secondary material in question and commercial products or intermediates must be insignificant from either a statistical or from a health and environmental risk perspective.

The third criterion for this non-waste determination is whether the hazardous constituents in the hazardous secondary materials are recycled rather than released to the air, land or water at significantly higher concentrations from either a statistical or from a health and environmental risk perspective than would otherwise be released by the production process. The Agency believes that to the extent that the hazardous constituents are a continuation of the original hazardous secondary material, their release to the environment is a possible indicator of discard. The Agency recognizes that normal production processes also result in a certain level of releases and, in evaluating this criteria, would not deny a petition if the increase in releases is not significant from either a statistical or a health and environmental risk perspective. However, when high concentrations of the constituents that make the hazardous secondary material of regulatory concern are released to the environment rather than reclaimed, then that material (or at least the portion of the material that is of most concern) is not being handled as a commercial product or intermediate.

As with the non-waste determination for hazardous secondary materials reclaimed in a continuous industrial process, the fourth and final criterion for this non-waste determination includes any other relevant factors that demonstrate the material is not discarded. This ''catch-all'' criterion is intended to allow the applicant to provide any case-specific information it deems important in making the case that its material is not discarded.

EPA requests comment on these criteria, as well as any other criteria that may be relevant for making this non-waste determination.

D. Non-Waste Determination for Hazardous Secondary Material Reclaimed Under the Control of the Generator Via a Tolling Arrangement or Similar Contractual Arrangement

As discussed earlier in today's preamble, EPA is proposing that hazardous secondary materials recycled via a specific type of tolling (or contractual) arrangement are not discarded and therefore are not solid waste, and is requesting comment if other types of tolling arrangements would also not involve discard. Because the generator maintains control over the recycled hazardous secondary material and it is legitimately recycled, the hazardous secondary material would not be considered discarded. By maintaining control over, and potential liability for, the recycling process, the generator ensures that the materials are not discarded. See ABR 208 F.3d at 1051 (''Rather than throwing these materials [destined for recycling] away,

the producers saves them; rather than abandoning them, the producer reuses them.'').

However, the large variety of contractual arrangements may preclude EPA from identifying all possible arrangements that clearly do not involve discard. For this reason, the Agency also is proposing that generators may seek a non-waste determination for tolling or other contractual arrangements not covered by the proposed exclusion discussed in section IX of today's preamble.

The first criterion for this non-waste determination would be whether the generator retains ownership and responsibility via a contract or other mechanism for the hazardous secondary materials and the residuals that result from their recycling. Assumption of responsibility of both the hazardous secondary materials and the residuals that would result from their recycling is a key indication that the generator is not abandoning the hazardous constituents that would have caused the hazardous secondary materials to have been hazardous waste had they been discarded.

The second criterion for this non-waste determination is whether the hazardous constituents in the hazardous secondary materials are recycled rather than released to the air, land or water at significantly higher concentrations from either a statistical or from a health and environmental risk perspective than would otherwise be released by the production process. The Agency believes that to the extent that the hazardous constituents are a continuation of the original hazardous secondary material, their release to the environment is a possible indicator of discard. The Agency recognizes that normal production processes also result in a certain level of releases and, in evaluating this criteria, would not deny a petition if the increase in releases is not significant from either a statistical or a health and environmental risk perspective. However, when high concentrations of the constituents that make the hazardous secondary material of regulatory concern are released to the environment rather than reclaimed, then that material (or at least the portion of the material that is of most concern) is not being recycled under the control of the generator.

As with the other types of non-waste determinations, the final criterion for this non-waste determination includes any other relevant factors that demonstrate the material is not discarded. This ''catch-all'' criterion is intended to allow the applicant to provide any case-specific information it deems important in making the case that its material is not discarded.

EPA requests comment on these criteria, as well as any other criteria that may be relevant for making this non-waste determination.

E. Scope and Eligibility

As with any solid waste determination that involves recycling, hazardous secondary materials presented for a non-waste determination must be legitimately recycled. In other words, the hazardous secondary material must provide a useful contribution to the recycling process or to a product of the recycling process, and the recycling process must produce a valuable product or intermediate. For further discussion of legitimacy and the factors to be considered, see section XI of today's preamble.

In addition, non-waste determinations are limited to reclamation activities and would not apply to recycling of ''inherently waste-like'' materials (40 CFR 261.2(d)), recycling of materials that are ''used in a manner constituting disposal,'' or ''used to produce products that are applied to or placed on the land,'' (40 CFR 261.2(c)(1)) and ''burning of materials for energy recovery'' or ''used to produce a fuel or otherwise contained in fuels'' (40 CFR 261.2(c)(2)). Today's supplemental proposal is not intended to affect how these recycling practices are regulated. However, we request comment on whether such practices should be eligible for the case-specific non-waste determinations.

F. Petition Process

The petition process for the non-waste determination would be the same as that for the solid waste variances found in 40 CFR 260.31. In order to obtain a non-waste determination, a facility that manages a hazardous secondary material that would otherwise be regulated under 40 CFR 261 as either a solid waste, or as a conditionally excluded waste, must apply to the Administrator or the authorized state per the procedures described in 40 CFR 260.33. EPA proposes to amend section 260.33 to apply to non-waste determinations also. The application must address the relevant criteria (discussed in further detail above). The Administrator would evaluate the petition and issue a draft notice tentatively granting or denying the application. Notification of this tentative decision will be provided by newspaper advertisement or radio broadcast in the locality where the facility is located. The Administrator would accept comment on the tentative decision for 30 days, and also may hold a public hearing. The Administrator would issue a final decision after receipt of comments and after the hearing (if any). If the application is denied, the facility may still pursue a solid waste variance or exclusion (for example, one of the solid waste variances under 40 CFR 260.31 or solid waste exclusions under 40 CFR 261.4). EPA also may choose to specify the Regional Administrator as the appropriate level of review for this process.

As discussed in more detail in section XV of today's supplemental proposal, under section 3006 of RCRA, EPA would authorize states to administer the non-waste determinations as part of their base RCRA program. Because states are not required to implement Federal requirements that are less stringent or narrower in scope than current requirements, authorized states are not required to adopt the non-waste determination process, and ordinarily the proposed provision could not go into effect in an authorized state until it does choose to adopt it. However, because the non-waste determination process is a formalization of determinations that states may already perform on an ad hoc basis, EPA is proposing to allow states that have not yet formally adopted the proposed regulation in 40 CFR 260.34 to participate in non-waste determinations if the following conditions are met: (1) The state determines that the hazardous secondary material meets the criteria in either paragraph (b), (c) or (d) of proposed section 40 CFR 260.34; (2) the state requests EPA to review its determination; and (3) EPA approves the state determination.

G. Enforcement

If a regulatory authority determines that a hazardous secondary material is not a solid waste via the proposed petition process, the material is not subject to Subtitle C hazardous waste regulations. However, as part of this process, the applicant has an obligation to submit, to the best of its ability, complete and accurate information. If the information in the application is found to be incomplete or inaccurate and, as a result, the hazardous secondary material does not meet the criteria for a non-waste determination, then the material may be subject to RCRA Subtitle C regulation and EPA or the authorized state could choose to bring an enforcement action under RCRA section 3008(a). Moreover, if the petitioner is found to have knowingly submitted false information, then it also may be subject to criminal penalties under RCRA section 3008(d).

A special situation occurs when a material meets all the criteria at the time the determination is made, but, as circumstances change, ceases to meet the criteria. In particular, proposed criteria 40 CFR 260.34(b)(2) and 40 CFR 260.34(c)(1) depend at least in part on market conditions, which can change over time. EPA requests comments on whether there should be as part of the petition process an obligation for the petitioner to inform the Agency when circumstances change, and whether there should be a formal mechanism for the Agency to revoke a determination if the change in circumstances results in the hazardous secondary material no longer meeting the criteria for a non-waste determination.

XIII. Effect of This Proposal on Other Programs

A. Other Exclusions

In the October 2003 proposal, EPA proposed a number of specific ''conforming changes'' to existing exclusions (68 FR 61578–61580). The purpose of these conforming changes was to simplify and clarify the regulations. EPA did not intend to make any substantive changes as to how currently excluded materials would need to be managed or regulated. However, comments to the proposed changes were overwhelming in favor of retaining the existing exclusions. These existing exclusions are familiar to both the States and the regulated community, and making wholesale adjustments appears to have had unintended consequences in many cases.

Thus in today's supplemental proposal, EPA is proposing to retain the existing exclusions (for example, the scrap metal exclusion in 40 CFR 261.4(a)(13)) exactly as written. However, we request comment on whether any specific regulatory exclusion would need revision in order to avoid confusion or contradictions. EPA also is proposing that hazardous secondary materials that are currently excluded with specific requirements or conditions should be required to continue to meet those requirements (e.g., the drip pad requirements for the wood preserving exclusion in 40 CFR 261.4(a) (9)). In addition, recycling of such materials at new facilities, or at existing facilities that are not currently operating under the terms of an existing exclusion, would also be subject to the existing applicable regulatory exclusion, rather than today's proposed exclusions.

We request comment on the option of allowing a regulated entity to choose which exclusion the person is subject to in those cases where more than one exclusion could apply and, if so, whether that entity should be required to document the choice made.

B. Permitted Facilities

Facilities that currently have RCRA permits or interim status, and are managing hazardous wastes that would become excluded under this rule, could be affected by today's supplemental proposal in a number of ways. Under one scenario, a facility that manages a variety of hazardous waste materials, including some hazardous secondary materials that would become excluded under this rule, would be affected only to the extent that certain units or processes at the facility would no longer be subject to hazardous waste regulations. A somewhat different scenario could involve a facility whose hazardous secondary materials would all become excluded from regulation when this rule takes effect (i.e., the facility is no longer a hazardous waste management facility).

For permitted facilities that would be managing hazardous secondary materials excluded under this rule in addition to regulated hazardous wastes, changes to the facility's permit would be necessary. These facilities would need to maintain their permits, but the units used solely to manage hazardous secondary materials would no longer be regulated solid waste management units subject to permit requirements. (Of course, to the extent that the exclusion were conditional, the owner/operator of the facility would need to comply with the applicable conditions to maintain the exclusion.) In such cases, the facility owner/operator could seek a permit modification from EPA or more typically the authorized state agency to remove the formerly subject unit(s) from the permit.

The Agency believes that owners and operators modifying their permits to remove units managing only wastes excluded by this rule should comply with the requirements of section 270.42(a) for Class 1 permit modifications, with prior Agency approval. Under this approach, owners and operators would be required to submit notification of the permit modification to the implementing agency, along with documentation demonstrating that the operations at the unit meet the conditions of the exclusion, and that the unit is used solely to manage excluded hazardous secondary materials. In addition, the owner or operator would be required to comply with the requirements of section 270.42(a)(ii) for public notification. Under section 270.42(a)(2), the permit modification would not become effective until the owner or operator received written approval by the implementing agency. The implementing agency would approve the permit modification so long as the owner or operator complied with the procedural requirements of section 270.42(a), that the operations met the conditions of the exclusion, and adequately demonstrated that the unit did not manage non-excluded hazardous wastes. EPA believes that Class 1 permit modifications with approval are appropriate in this case even though the proposal would establish a self-implementing exclusion, which does not require a regulatory agency's approval. In this case, the unit in question has been through a formal permit process, and the Agency believes it appropriate that the regulatory agency have the opportunity for a brief review before the permit conditions it imposed are removed. For example, the unit might be intimately tied into other waste management operations at the facility, or perhaps the regulatory agency imposed special provisions under the omnibus provision, which it would want to consider. EPA seeks comment on this approach.

A permitted facility that would no longer be considered a hazardous waste management facility under the exclusion (e.g., a facility managing only hazardous secondary materials that become excluded under today's supplemental proposal) would no longer need a hazardous waste operating permit nor need to comply with the existing hazardous waste regulations governing permitted facilities. (Again, to the extent that the exclusion is conditional, the owner/operator of the facility would need to comply with the applicable conditions to maintain the exclusion.) Owners or operators of such facilities could, therefore, apply to the overseeing agency to terminate the permit by modifying the permit term. The Agency believes that owners or operators seeking to terminate the facility's permit by modifying the permit term should comply with the requirements of section 270.42(a) for Class 1 modifications with prior Agency approval, as described above. To support a request for permit termination by modifying the permit term, the owner or operator would have to demonstrate that the operations meet the conditions of the exclusion, and that the facility does not manage non-excluded hazardous wastes. Further, as discussed below, the owner or operator would have to demonstrate that corrective action obligations at the facility have been addressed, or, where

corrective action obligations remain, that continuation of the permit is not necessary to assure that they will be addressed (e.g., where the facilities cleanup obligations will be addressed under an alternative federal or state enforcement mechanism, or other federal or state cleanup authority). The Agency seeks comment on this approach.

As was explained in the October 2003 proposal (68 FR 61580), where a permitted facility has not yet completed facility-wide corrective action, but manages only hazardous secondary materials that would become excluded under this proposed rule (see 40 CFR 264.101), the obligation to address facility-wide corrective action would remain in effect.

At some facilities, corrective action obligations will likely continue to be addressed through the corrective action provisions of the permit. In these cases, maintenance of the permit would ensure that facility-wide corrective action will be addressed. Thus, in these cases, the permit would not be terminated by modifying the permit term, but would be modified to remove the provisions that applied to the now-excluded hazardous secondary material. The facility's permit would, thereafter, only address corrective action.

In other cases, however, EPA or an authorized state may have available an alternative federal or state enforcement mechanism, or other federal or state cleanup authority, through which it could choose to address the facility's cleanup obligations, rather than continue to pursue corrective action under a permit. In these cases, where the alternate authority would ensure that facility-wide corrective action will be addressed, maintenance of the permit would not be necessary.

A facility that is operating under interim status would be affected by promulgation of today's supplemental proposal in much the same way as would a permitted facility, and the issue of corrective action would be addressed in a similar manner. At an interim status facility managing only hazardous secondary materials that become excluded under today's supplemental proposal, the Part 265 interim status standards that applied to the hazardous waste management units at the facility, as well as the general facility standards in Part 265, would no longer apply. At the same time, the owner or operator would retain responsibility for unaddressed corrective action obligations at the solid waste management units.

Owners and operators of permitted and interim status facilities with corrective action obligations should refer to the Agency's February 25, 2003 guidance entitled ''Final Guidance on Completion of Corrective Action Activities at RCRA Facilities,'' (68 FR 8757) for a detailed discussion of corrective action completion.

In addition to the above described issues relating to permits and corrective action, today's supplemental proposal also may have implications with regard to closure of hazardous waste storage units at affected facilities. In cases where hazardous waste storage units would only be managing excluded hazardous secondary material pursuant to today's supplemental proposal, the current regulations could be read as triggering the closure requirements for those units, since owners/operators of non-land-based hazardous waste units (e.g., tanks, containers, containment buildings) must begin closure within 90 days of receiving a unit's final volume of hazardous wastes. See 40 CFR 264.113(a) and 265.113(a).

In the October, 2003 proposal (68 FR 61580–61581), EPA expressed the view that requiring closure of units in these situations would serve little environmental purpose, since after closure the unit would be immediately reopened and used to store the same (now excluded) hazardous secondary material. In that notice, the Agency proposed that closure of storage units would not be required when the wastes in such units were excluded under the proposal.

In response to that proposal, several commenters stated that one of the main purposes of the RCRA subtitle C closure requirements is to identify and remediate any releases originating from the units. The Agency notes that releases from these units are discarded and solid and hazardous wastes, and agrees with commenter's concern that such releases should be addressed. The Agency does not agree, however, that the specific subtitle C closure requirements are most appropriate to address cleanup of releases from these units, if any have occurred. Rather, the Agency believes that a better approach would be to address potential releases from these units as part of corrective action for all releases at the facility. This approach would achieve the same environmental results, and would provide the owner or operator the option of integrating the cleanup more closely into the broader facility response.

When considering the issue of addressing releases from these units, the question arises about what happens to the funds that provide financial assurance for closure. The requirements in Part 264 and 265 Subpart H, which apply at these units prior to the exclusion taking effect, provide for release of financial assurance upon certification by the owner or operator that closure has been completed in accordance with the approved closure plan, and Agency verification of that certification (see 264.143(i) and 265.143(h)). Similar provisions at sections 264.145(i) and 265.145(h) provide for release of financial assurance for post-closure care.

Under the approach to closure discussed above, owners and operators of units that manage only wastes that would be excluded under this supplemental proposal would not be subject to closure requirements and, therefore, would not submit a certification of closure, and thus would not trigger release of financial assurance. As discussed in section X.C.2 of today's preamble, reclaimers who receive hazardous secondary materials that have been excluded under the proposed 40 CFR 261.4(a)(24) would still be required to meet Subpart H financial assurance requirements as a condition of the exclusion. In this case, the financial assurance provided for closure would satisfy that requirement (perhaps with some modification).

However, persons who recycle materials under the proposed exclusions for materials recycled under the control of the generator (40 CFR 261.2(a)(2)(ii) and 40 CFR 261.4(a)(23)) would not be required to meet Subpart H financial assurance requirements as a condition of the exclusion. The Agency believes that those owners and operators should be released from financial assurance requirements upon demonstrating that no releases from the unit remain to be addressed. In complex facilities, that demonstration might be difficult, or it might be inconsistent with broader corrective action strategy (for example, if historical releases from the unit were mingled with other general facility contamination). Where such a situation exists, the Agency believes that financial assurances obtained for closure and/or post-closure should be redirected to address the corrective action needs at the unit. (In general, however, EPA believes that these situations will be the exception rather than the rule, since the overwhelming majority of units in question would have upgraded to current subtitle C standards, e.g., secondary containment for tanks, etc.). The Agency requests comment on modifying the regulations to allow financial assurances obtained for closure and/or post-closure to be redirected to address the corrective action needs at units that manage only

wastes that would be excluded by this proposal.

C. Imports and Exports

The proposed exclusion for hazardous secondary materials recycled under the control of the generating facility is limited to recycling performed in the United States or its territories. However, the transfer-based recycling exclusion and non-waste determinations included in today's supplemental proposal do not place any geographic restrictions on movements of such hazardous secondary materials, provided they meet the description of the exclusion. It is therefore possible that in some cases excluded hazardous secondary materials could be generated in the United States or its territories and subsequently exported for reclamation to a facility in a foreign country. Under today's supplemental proposal, the exclusion would be effective while the hazardous secondary material is within the United States or its territories. However, such excluded hazardous secondary materials may be subject to regulation as hazardous wastes in the receiving country, even if they are excluded from the definition of solid waste domestically (i.e., under RCRA). If this is the case, the U.S. exporter of the hazardous secondary material will need to comply with any applicable requirements of the importing country. (For further discussion, see section X.C.1 of today's preamble regarding specific export/import conditions for hazardous secondary materials excluded under this proposal.)

D. Superfund

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

E. National Partnership for Environmental Priorities

If today's proposed changes to the RCRA definition of solid waste are promulgated, the Agency expects that affected companies will take advantage of this new regulatory framework by exploring new opportunities to recycle their hazardous secondary materials. We believe that these regulatory changes are consistent with EPA's efforts to encourage and promote sustainable methods and practices by manufacturers and other businesses. In this context, ''sustainability'' is defined as economic development that meets the needs of the present without compromising the ability of future generations to meet their own needs.

The National Partnership for Environmental Priorities (NPEP) is a voluntary program administered by EPA that fosters the establishment of a new corporate/federal partnership in which both work collaboratively towards voluntary reductions in the use of certain chemicals. Recycling is one means of achieving such reductions in chemical use. The NPEP can provide technical assistance and expertise to assist companies in successfully achieving these goals, while at the same time saving money or increasing production. NPEP members' successes are voluntarily reported to EPA, and members are publicly recognized and rewarded for their accomplishments. For further information on the NPEP program, visit the NPEP Web site at *Http://www.epa.gov/epaoswer/hazwaste/minimize/partnership.htm.*

XIV. Measurement of the Performance Outcomes of This Supplemental Proposal

A. Need for Performance Measurement

Since today's supplemental proposal, if finalized, would make important changes to the Agency's current RCRA regulatory framework for industrial recycling of hazardous secondary materials, and is designed to encourage industrial recycling of such materials, the Agency has a strong interest in being able to measure the performance outcomes that these regulatory changes may have on the regulated community. In general, it is important for the Agency to be able to quantify, monitor, and report to the public the actual performance outcomes of this supplemental proposal. In general, performance measurement of federal programs is expected of by Congress according to the 1993 Government Performance and Results Act (*http://www.whitehouse.gov/omb/mgmt-gpra*) and the 2005 Government Reorganization and Program Performance Improvement Act (*http://www.whitehouse.gov/omb/legislative/grppi_act_2005.pdf*), as well as by the 2002 President's Management Agenda (*http://www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf*), and by the Office of Management and Budget according to the annual Program Assessment Rating Tool (*http://www.whitehouse.gov/omb/part*) initiated in 2003. In particular, measurement of the performance outcomes for this supplemental proposal will enable EPA to evaluate the actual effectiveness with regard to encouraging industrial recycling, affecting future industrial recycling trends, and targeting possible future regulatory and non-regulatory initiatives directed at furthering safe and beneficial industrial recycling practices. As discussed elsewhere in today's preamble, we expect that the regulatory changes being proposed will have the effect of reducing regulatory disincentives to industrial recycling, thereby encouraging new recycling initiatives by the regulated community.

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

B. Approaches to Performance Measurement

1. Use of the Proposed Notification Requirements

Today's supplemental proposal includes a requirement that facilities (both generators and recyclers) taking advantage of an exclusion provide regulatory authorities with certain basic items of information through a one-time

notification. This information would allow EPA to track the number of facilities and the types of hazardous secondary materials affected by the proposed rulemaking, but would not allow us to estimate the amount of material affected. We request comment on whether additional data elements could be added that would help inform EPA and the public about the effect of the proposed exclusions without imposing a significant additional burden on the regulated community.

2. Use of Existing EPA Data Systems

There are two existing data systems which may be of limited utility to EPA for measuring the performance outcomes of this supplemental proposal.

(a) RCRA Biennial Report. Under 40 CFR 262.41, large quantity hazardous waste generators and hazardous waste treatment, storage, recycling and disposal facilities (TSDRFs) are required to prepare and submit Biennial Reports to RCRA-authorized states on the types and quantities of hazardous wastes generated and managed during the reporting year (*http://www.epa.gov/epaoswer/hazwaste/data/biennialreport*). In the past, the Agency has used data from the Biennial Report (BR) for analytic purposes such as establishing baselines for estimating the potential economic impacts on industries and facilities potentially affected by RCRA rulemaking initiatives. While the BR has provided the Agency with considerable valuable data regarding the types and quantities of hazardous wastes that are generated, and where and how they are treated, stored or disposed, this system has a number of limitations, particularly with regard to: (i) How small quantity generators are not required to report to the BR and (ii) how generation and management of hazardous secondary materials that are not regulated as hazardous wastes are not covered in the BR. Under today's supplemental proposal, these limitations may be exacerbated, since current RCRA-regulated hazardous wastes subject to BR reporting will become excluded as recycled hazardous secondary materials. As a result, in the future we expect the BR will provide less data relevant to measuring hazardous secondary materials recycling trends, and thus will be inadequate for measuring the future outcomes and success of this supplemental proposal. Therefore, we request comment on modifying the BRS to require or continue to require that such information be submitted to EPA.

(b) Toxic Release Inventory. Compared to the BR, the Toxic Release Inventory (TRI) may provide greater utility for the purpose of measuring future performance outcomes of today's supplemental proposal, because the TRI is not limited to hazardous waste and not limited to LQGs, but includes annual reporting on industrial materials manufactured, imported, processed, otherwise used, transferred offsite, treated or disposed as waste, or recycled by certain industries. Consequently, by its design and relatively broader scope, the TRI (Form R; *http://www.epa.gov/tri*) contains limited information on RCRA hazardous wastes (as well as more information about other types of industrial materials such as secondary by-products) and it is probably more on-point for the Agency to attempt to use for measuring future outcomes of today's supplemental proposal.

In combination, both the BR and TRI data systems may provide a skeletal but complementary framework for measuring future performance outcomes.

3. Surveys

Another option, either as a stand-alone option or used in combination with the BR/TRI option above, could be to conduct a mail or phone survey of affected facilities. The main advantage of a survey would be the ability to collect data on targeted performance measures that would not be available through either the BR or TRI. Moreover, a survey mechanism could potentially serve a dual purpose as a form of communications outreach to industrial facilities that are not recycling or are unaware of today's supplemental proposal, which would assist EPA in better understanding why some generators are unable or unwilling to recycle their hazardous secondary materials. Such a survey could be voluntary or mandatory, and could involve a statistically-valid sample of industrial facilities, or could focus on particular industries or affected materials. It could be conducted as a one-time effort or periodically (e.g., once every four years) to capture recycling trends over time. To minimize burden, it could also be conducted electronically over the internet. It should be noted, however, that with some exceptions (e.g., surveys of fewer than 10 respondents), conducting a survey of this nature would need OMB approval in accordance with the provisions of the Paperwork Reduction Act.

4. Voluntary Partnerships With Affected Industries

Measuring the impact of today's supplemental proposal might also be done with the voluntary assistance of stakeholder industry and trade associations, many of which also may have a vested interest in assessing their success, or lack thereof. We are aware that some trade associations may maintain data on the recycling activities of their member companies; such associations might be willing to share some of that existing information with the Agency. Another option could be to partner with certain trade associations that may be willing on a voluntary basis to gather relevant information from their members.

5. NPEP Voluntary Program

As discussed in the preceding section of this preamble, EPA's National Partnership for Environmental Priorities (NPEP) is a voluntary program that encourages companies and federal facilities to reduce priority chemicals through waste minimization, reuse, recycling, and reclamation, and to report achievements in reductions. Companies that choose to change their materials management practices from disposal to recycling as a result of today's supplemental proposal could be eligible for membership in NPEP. Companies that join NPEP could identify voluntary goal(s) to initiate new recycling or to increase current recycling at their facility of priority chemicals. Upon completion of their goal(s), the partners can submit a success story of their accomplishments. In turn, these partners will receive EPA support and assistance for reducing priority chemicals and award recognition for their success. Thus, information from NPEP partners might also be of assistance to EPA in evaluating the impacts of today's proposed rule.

C. Request for Comment on Performance Measurement Approaches

The Agency requests comment on the alternative performance measurement approaches described above for enabling the Agency to measure the actual performance outcomes of today's supplemental proposal. In addition to satisfying federal performance measurement requirements, we are also interested in stakeholder views as to the potential utility of measuring the effectiveness of today's proposed exclusions in achieving their intended induced new recycling and industry cost-savings objectives, and how such information might benefit stakeholders and the regulated community. Finally, we also solicit comment on other performance measurement approaches than those described above, that may be more effective in enabling EPA to

measure the actual future outcomes of today's supplemental proposal.

XV. How Would These Proposed Regulatory Changes Be Administered and Enforced in the States?

A. Applicability of Rules in Authorized States

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

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

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

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

B. Effect on State Authorization

Today's proposed rule would eliminate specific requirements that apply to materials currently managed as hazardous waste, and is being proposed, at least in part, in response to recent court decisions on the definition of solid waste. Specifically, in several decisions, courts have held that EPA's current definition of solid waste at 40 CFR 261.2 is overly broad and would lead to the regulation of some hazardous secondary materials that are not discarded and, therefore, are not solid wastes. In this rulemaking, the exclusion for materials reclaimed under the control of the generator (proposed 40 CFR 261.2(a)(2)(ii)) identifies those hazardous secondary materials that are not discarded and, therefore, are not solid wastes under RCRA. EPA also recognizes that there may be some hazardous secondary materials that are not recycled under the control of the generator, but are not solid wastes because they are reclaimed in a continuous industrial process. Because it was not possible to identify all of the continuous industrial process recycling fact patterns, EPA has proposed a petition process for non-waste determinations at proposed 40 CFR 260.30 (see Section VII above).

EPA believes that the proposed rule describes the appropriate scope of the federal program under RCRA. Thus, reclamation under the control of the generator and recycling in a continuous process, as described herein, are not activities associated with discarded materials and would not be subject to RCRA. In addition, today's proposal also conditionally excludes from the definition of solid waste reclaimed materials that are not under the control of the generator and are not recycled in a continuous industrial process. EPA believes that these exclusions will encourage recycling and that they are consistent with RCRA's statutory objective of conserving valuable material and energy resources.

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

However, under RCRA section 3009, a state may adopt standards that are more stringent than the federal program. Thus, a state is not required to adopt today's proposal, or a state may choose to adopt only part of today's proposal. Some states incorporate the federal regulations by reference or have specific state statutory requirements that their state program can be no more stringent than the federal regulations. In those cases, EPA anticipates that the exclusions in today's proposal, when and if finalized, would be adopted by these states, consistent with state laws and state administrative procedures, unless they take explicit action as specified by their respective state laws to decline the proposed revisions. We note that if states choose not to adopt the provisions of today's proposal concerning exports, the provisions of 40 CFR 262 Subparts E or H would apply to hazardous secondary materials that are exported.

C. Interstate Transport

Because some states may choose not to seek authorization for today's supplemental proposal, there will probably be cases where the hazardous secondary materials in question will be transported through states with different regulations governing them.

First, a hazardous secondary material which is subject to an exclusion from the definition of solid waste regulations may be sent to a state, or through a state, where it is subject to the hazardous waste regulations. In this scenario, for the portion of the trip through the originating state, and any other states where the hazardous secondary material is excluded, neither a hazardous waste transporter with an EPA identification number per 40 CFR 263.11 nor a manifest would be required. However, for the portion of the trip through the receiving state, and any other states that do not consider the hazardous secondary material to be excluded, the transporter must have a manifest, and must move the hazardous secondary material in compliance with 40 CFR part 263. In order for the final transporter and the receiving facility to fulfill the requirements concerning the

manifest (40 CFR 263.20, 263.21, 263.22, 264.71, 264.72, 264.76 or 265.71, 265.72, and 265.76), the initiating facility should complete a manifest and forward it to the first transporter to travel in a state where the hazardous secondary material is not excluded. The receiving facility must then sign the manifest and send a copy to the initiating facility.

Second, a hazardous secondary material generated in a state that does not provide an exclusion for the hazardous secondary material may be sent to a state where it is excluded. In this scenario, the hazardous secondary material must be moved by a hazardous waste transporter while the hazardous secondary material is in the generator's state or any other states where it is not excluded. The initiating facility would complete a manifest and give copies to the transporter as required under 40 CFR 262.23(a). Transportation within the receiving state and any other states that exclude the hazardous secondary material would not require a manifest and need not be transported by a hazardous waste transporter. However, it is the initiating facility's responsibility to ensure that the manifest is forwarded to the receiving facility by any non-hazardous waste transporter and sent back to the initiating facility by the receiving facility (see 40 CFR 262.23 and 262.42).

One final point is that RCRA-regulated hazardous wastes, when transported, require an EPA hazardous waste manifest, and are incorporated by reference in Department of Transportation (DOT) regulations in the DOT definition of hazardous material (49 CFR 171.8). Under today's supplemental proposal, a hazardous secondary material that is not a solid waste would no longer need an EPA manifest when transported off-site for recycling, and therefore would not automatically be considered a DOT hazardous material (hazmat). However, if the material contains a chemical or falls into a class of substances that DOT has determined to pose an unacceptable hazard during transportation, it would still be regulated as a DOT hazardous material (a table at 49 CFR 172.101 lists materials considered ''hazardous'' by DOT, according to 23 DOT hazard classes). If it does not, then it would not be so regulated by DOT. EPA believes this is appropriate, since when sent to recycling rather than disposal, these hazardous secondary materials pose no greater risk than similar types of non-waste materials already in transportation for commerce under non-hazmat DOT status. Moreover, regardless of a hazardous secondary material's EPA manifest and DOT hazmat status, EPA believes that today's supplemental proposal is likely to result in a net reduction in annual transportation accident risks during transport of affected materials, due to the expected net reduction in annual miles transported, as a result of the companies which would choose to switch from current offsite hazardous waste management to recycling at either on-site or closer facilities to the generating facility.[10]

XVI. How Has EPA Fulfilled the Administrative Requirements for This Rulemaking?

A. Executive Order 12866: Regulatory Planning and Review

Under section 3(f)(1) of Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is an ''economically significant regulatory action'' because the annual effect on the economy of this proposed action is expected to be greater than $100 million, and the proposed action contains novel policy issues. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

EPA prepared an analysis of the potential national economic costs and benefits associated with this proposed action. The analysis is contained in our ''Economics Background Document: Regulatory Impact Analysis (RIA) for EPA's 2007 Supplemental Proposed Revisions to the Industrial Recycling Exclusions of the RCRA Definition of Solid Waste'' (January 22, 2007, 284 pages) which is available for public review and comment in the EPA Docket (*http://www.regulations.gov*) and is briefly summarized below. If the exclusions are promulgated as proposed today, (i.e., the two generator controlled exclusions involving land- and non-land based units, plus the offsite transfer exclusion, plus the case-by-case petition process) and are adopted by all state governments, EPA expects this action to result in a net effect of $107 million in average annual net cost savings to about 4,600 facilities in 530 industries, and is expected to remove from RCRA regulation 0.65 million tons per year of hazardous secondary materials currently managed as RCRA hazardous waste. These materials consist of 0.59 million tons (91%) that are currently recycled as RCRA hazardous waste, and 0.06 million tons (9%) of hazardous waste that is currently disposed (i.e., landfilled, or incinerated), which EPA expects may switch from disposal to recycling as a result of this action, if promulgated. With respect to each of the proposed exclusions, the $107 million per year best estimate net cost savings effect consists of additive components: (a) $87 million per year for hazardous secondary materials recycled under the control of the generating facility in either land or non-land based units (which includes the onsite, within same-company, and tolling arrangement exclusions), plus (b) $19 million cost savings for conditional exclusion of other offsite transfers, plus (c) $1 million per year cost savings for case-by-case non-waste determinations.

These impact estimates are EPA's best estimates within the economic impact estimation uncertainty range of $93 million to $205 million in annual materials management cost savings, and 0.33 to 1.70 million tons per year in affected hazardous secondary materials, respectively, for the net effect of the proposed regulatory exclusions. The purpose of these impact ranges is to reveal two major sources of uncertainty at the launch of our RIA prior to the final draft of this proposal: (1) Our RIA assigned eight implementation conditions to the best estimate impact for the proposed exclusions from a list of 18 possible conditions formulated at the launch of the RIA. In comparison, today's notice proposes nine conditions which differ by five conditions and standards (i.e., recycling legitimacy criteria, reasonable effort by generators, onsite recordkeeping, land placement, and offsite shipment tracking); the impact uncertainty range lower and upper bounds reflect inclusion of two conditions and of 17 conditions, respectively; and (2) the main underlying data in the RIA is the RCRA Biennial Report database about RCRA

[10] As explained in the ''Economics Background Document,'' in the docket for today's rule, EPA expects that as a result of this rule, transportation distances for hazardous secondary materials that are affected by today's rule are expected to be reduced from averages of about 340 miles for disposal at hazardous waste landfills and between 400 to 520 miles for offsite hazardous waste recycling to 0 miles for on-site recycling (for about 9% of the affected facilities) and an average of about 50 miles for non-hazardous waste recycling (for about 91% of the affected facilities). Because, on an annual nationwide basis, 91% of RCRA hazardous waste is transported by truck, transportation risk is predominantly roadway crash risks involving property damage crashes, personal injury crashes, or fatal crashes. Because of the fact that transportation accident risks positively correlate with travel distances, EPA expects a minimum 85% to 90% reduction in baseline annual transport accident risk for affected materials, as a rough estimate, regardless of DOT regulatory status (i.e., 340 to 520 miles average transport distance baseline, compared to 0 to 50 miles hypothetical average post-promulgation distance).

hazardous waste activity, which includes numerical outliers; to address these statistical outliers, the impact uncertainty ranges reflect inclusion of 99% and 100% of the data, respectively, whereas our best estimate includes 99.5% of the data (i.e., 0.5% of the largest hazardous waste streams removed from the impact estimate).

In addition to these uncertainty factors which the RIA attempted to address directly in the impact computations, there are five other sources of impact uncertainty that our RIA describes as sensitivity analyses and provides estimates of potential overall magnitude: (1) Based on extrapolating the adverse comments by some state governments on exclusion options described in the October 2003 proposal, the economic impacts could be 4% to 46% less than estimated in the RIA from state non-adoption of this rule if promulgated; (2) the RIA is based on a single year 2003 snapshot of RCRA hazardous waste data, but recent (1997–2003) trend data show −17% to +38% fluctuation about mean in annual waste tonnages recycled and disposed, and −54% to +54% fluctuation in annual count of hazardous waste facilities; consequently, future annual impacts could fluctuate rather widely relative to the average annual impact estimates of our RIA based on 2003 data; (3) our RIA is based on hazardous waste tonnages reported as managed in 2003 rather than reported as generated; however, recent trend (1997–2003) data show −34% to +39% annual fluctuations between management and generation quantities; (4) to a large degree macro economic conditions determine the quantity of hazardous waste and secondary industrial materials generated and managed in any given year; for example, although our RIA is built upon a single year 2003 snapshot, one of the top-5 industries generating such materials is NAICS 3241 petroleum refining which is expected to grow almost 6% annually through 2010, which could increase future impacts; and (5) our RIA is founded on the ''large quantity generator'' (LQG) and the ''treatment, storage, disposal, recycler facility'' (TSDRF) data from the RCRA Biennial Report, and therefore to some degree if not double-counted in the TSDRF data, excludes from the impact estimates the RCRA regulatory class of ''small quantity generators'' (SQGs), which may represent a 2% to 3% impact underestimation.

Furthermore, our RIA estimate of potential new induced recycling as a result of this proposal if promulgated, does not include an evaluation of whether the U.S. or global markets for recycled industrial secondary materials are large enough to absorb a potential increase in supply of recycled materials. Market conditions for recycled secondary materials can vary considerably over time. Demand for recycled solvents, for example, is largely dependent on the petroleum market: because virgin solvents are made from petroleum products, high petroleum prices encourage solvent recycling. Similarly, high metals prices obviously favor the recycling of metal-bearing secondary materials. In addition, there are four physical factors that suggest U.S. industries may be near their current technical and economic limits for recycling RCRA hazardous wastes: (1) The recent hazardous waste generation trend shows a 25% decline between 1999 and 2003; (2) the recent hazardous waste recycling trend shows a 73% increase in baseline recycling between 1999 and 2003 accounting in aggregate for metals recycling plus solvents recycling plus other materials recycling (e.g., acid regeneration, non-solvent liquid recycling); (3) recycling of RCRA hazardous wastes and secondary industrial materials is technically difficult in some cases because of numerous chemical co-contaminates in the materials; for example, based on a national survey of large RCRA hazardous waste TSDRFs, 90% of facilities reported between 10 and 60 hazardous chemical constituents in wastes, with 287 constituents reported for a single wastestream, and a total of 724 different chemical constituents reported in surveyed wastes; this survey suggests that most LQGs must address a relatively high number of hazardous chemical constituents in evaluating the feasibility of their waste management options such as recycling; and (4) some RCRA hazardous wastes have relatively low (e.g., less than 1%) assay values for constituents with market value.

EPA requests comment on the regulatory impact analysis, including both the estimates of additional recycling and the cost savings that may result from this proposed rule, and welcomes data from the public about the possible impacts of the uncertainty factors. For example, EPA is seeking comments about whether the codification of the legitimacy criteria, while not intended to impose any additional requirements as compared to the current practice, may result in additional costs or benefits that are not included in the RIA, and, if so, what those additional costs or benefits would be.

In addition to estimating the potential impact of this proposal, EPA's economic analysis also examined three other alternative approaches for recycling exclusions: On-site-only exclusion, intra-industry offsite exclusion, and broad inter-industry transfer exclusion with few conditions, as discussed in EPA's October 2003 proposed rule. Our best estimates of the potential net cost savings for these three other approaches are $63 million, $72 million, and $129 million per year, associated with 0.35 million tons, 0.38 million tons, and 0.67 million tons per year secondary materials potentially affected, respectively. Accounting for estimation uncertainty factors, net cost savings and potentially affected materials for these three options could range between $45 million to $147 million per year and 0.24 million to 0.91 million tons per year for the on-site option, between $56 million to $156 million per year and 0.27 million to 0.98 million tons per year for the intra-industry option, and between $114 million to $206 million per year and 0.46 million to 1.57 million tons per year for the broad inter-industry transfer option. In comparison to these three options, and taking account of impact uncertainty factors, the proposed approach is expected to result in approximately the same range in annual cost savings as the highest impact broad inter-industry transfer option of these three alternatives, because it consists of four components: a broad transfer option with certain conditions plus the two generator controlled options plus the case-by-case petition option, but is expected to affect slightly more waste quantities annually from addition of the case-by-case exclusion.

In selecting the options for today's proposal, EPA considered both the cost and benefits of the different options and the potential for each option to result in materials being discarded and then resulting in remediation or environmental damages. The proposed combination option of excluding materials recycled under the control of the generator, hazardous secondary materials transferred for recycling with certain conditions, and a case-by-case non-waste determination results in the second highest estimated cost savings, number of entities affected and amount of material expected to be induced to new recycling. EPA chose not to pursue the option with the highest estimated annual cost savings ($129 million versus $107 million per year for today's proposed approach) because the lack of conditions for materials transferred to a third-party recycler may result in material being discarded and increase the likelihood of new cleanup sites that would need to be funded by public

funds. See our ''Economics Background Document,'' which is in the docket for today's supplemental proposal, for a more detailed discussion regarding the estimated impacts of the proposed approach, as well as the impact uncertainties, and exclusion option alternatives that we evaluated.

B. Paperwork Reduction Act (ICR)

The information collection requirements in this supplemental proposal have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* An Information Collection Request (ICR) document prepared by EPA has been assigned EPA ICR number 1189.19.

The information requirements established for this action, and identified in the ICR supporting today's supplemental proposal, are largely self-implementing, except for notice and consent requirements for hazardous secondary materials exported for recycling. This process will ensure that (1) Regulated entities are held accountable to the applicable requirements; (2) state inspectors can verify compliance when needed; and (3) hazardous secondary materials exported for recycling are actually handled as commodities abroad.

EPA has carefully considered the burden that would be imposed upon the regulated community by the regulations. EPA is confident that those activities required of respondents are necessary, and, to the extent possible, has attempted to minimize the burden imposed. EPA believes that if the minimum requirements specified under the proposed requirements are not met, neither the facilities nor EPA can ensure that hazardous secondary materials sent for recycling are being managed in a manner protective of human health and the environment.

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

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust existing systems to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR Part 9.

To comment on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including the use of automated collection techniques, EPA has established a public docket for this rule, which includes this ICR, under Docket ID No. EPA–HQ–RCRA–2002–0031. Submit any comments related to the ICR for this proposed rule to EPA and OMB. See the **ADDRESSES** section at the beginning of this notice for where to submit comments to EPA. Send comments to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, *Attn:* Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et. seq.,* generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions. Because this action is designed to lower the cost of waste management for industries subject to the supplemental proposal, this proposal will not result in an adverse economic impact effect on affected small entities. Consequently, I hereby certify that this supplemental proposal will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives which minimize any significant economic impact of the proposed rule on small entities (5 U.S.C. Sections 603 and 604). Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on small entities subject to the rule. For more information regarding the economic impact of this supplemental proposal, please refer to the ''Economics Background Document'' available from the EPA Docket (*http://www.regulations.gov*).

EPA therefore concludes that today's supplemental proposal will relieve regulatory burden for all size entities, including small entities. The Agency continues to be interested in the potential impacts of the proposed rule on small entities and welcomes comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

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

burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted.

Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials to have meaningful and timely input in the development of regulatory proposals, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this rule does not include a Federal mandate that may result in expenditures of $100 million or more for State, local, or tribal governments, in the aggregate, or the private sector in any one year. This is because this supplemental proposal imposes no enforceable duty on any State, local, or tribal governments. EPA also has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. In addition, as discussed above, the private sector is not expected to incur costs exceeding $100 million. Therefore, today's supplemental proposal is not subject to the requirements of sections 202 and 205 of UMRA.

E. Executive Order 13132: Federalism

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

This supplemental proposal does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. There are no State and local government bodies that incur direct compliance costs by this rulemaking. State and local government implementation expenditures are expected to be less than $500,000 in any one year. Thus, the requirements of Section 6 of the Executive Order do not apply to this supplemental proposal. In addition, because this rule is less stringent than the current federal program, states are not required to adopt it.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this supplemental proposal from State and local officials.

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

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

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

The Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997) applies to any rule that EPA determines (1) is economically significant as defined under Executive Order 12866, and (2) the environmental health or safety risk addressed by the rule has a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children; and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This supplemental proposal is not subject to the Executive Order because the Agency does not have reason to believe the environmental health or safety risks addressed by this proposed rule present a disproportionate risk to children.

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

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

I. National Technology Transfer and Advancement Act of 1995

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (ANTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities, unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. Today's supplemental proposal does not contain technical standards and therefore the NTTAA is not applicable.

J. Executive Order 12898: Environmental Justice

Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (February 11, 1994), is designed to address the environmental and human health conditions of minority and low-income populations. EPA is committed to addressing environmental justice concerns and has assumed a leadership role in environmental justice initiatives to enhance environmental quality for all citizens of the United States. The Agency's goals are to ensure that no segment of the population, regardless of race, color, national origin, income, or

net worth bears disproportionately high and adverse human health and environmental impacts as a result of EPA's policies, programs, and activities. Our goal is to ensure that all citizens live in clean and sustainable communities. In response to Executive Order 12898, and to concerns voiced by many groups outside the Agency, EPA's Office of Solid Waste and Emergency Response (OSWER) formed an Environmental Justice Task Force to analyze the array of environmental justice issues specific to waste programs and to develop an overall strategy to identify and address these issues (OSWER Directive No. 9200.3–17).

This supplemental proposal would streamline hazardous waste management requirements for certain hazardous secondary materials sent for recycling. Facilities that would be affected by today's proposal include those generating hazardous secondary materials, as well as facilities which recycle such materials. Disposal facilities would not be affected by this proposal. The wide distribution of affected facilities throughout the United States does not suggest any distributional pattern around communities of concern. Specific impacts on low income or minority communities, therefore, are undetermined. Overall, no disproportionate impacts to minorities or low income communities are expected.

List of Subjects

40 CFR Part 260

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

40 CFR Part 261

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

Dated: March 15, 2007.

Stephen L. Johnson,

Administrator.

For the reasons stated in the preamble, title 40, Chapter I of the Code of Federal Regulations is proposed to be amended as follows:

PART 260—HAZARDOUS WASTE MANAGEMENT SYSTEM: GENERAL

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

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

Subpart B—Definitions

2. Section 260.10 is amended by adding in alphabetical order the definitions of ''Land-based unit'' and ''Hazardous secondary materials generated and reclaimed under the control of the generator'' to read as follows:

§ 260.10 Definitions.

* * * * *

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

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

(2) That such material is generated and reclaimed by the same ''person'' as defined in § 260.10, if the generator certifies the following: ''on behalf of [insert company name] I certify that the indicated hazardous recyclable material will be sent to [insert company name], that the two companies are under the same ownership, and that the owner corporation [insert company name] has acknowledged full responsibility for the safe management of the hazardous recyclable material,'' or

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

* * * * *

Land-based unit means a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt dome formation, salt bed formation, or underground mine or cave.

* * * * *

Subpart C—[Amended]

3. Section 260.30 is amended as follows:

a. By revising the section heading.

b. By revising paragraph (b).

c. By adding paragraphs (d), (e), and (f).

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

* * * * *

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

* * * * *

(d) Materials that are reclaimed in a continuous industrial process;

(e) Materials that are indistinguishable in all relevant aspects from a product or intermediate; and

(f) Materials that are reclaimed under the control of the generator, including control through contracts, such as tolling arrangements.

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

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

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

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

* * * * *

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

§ 260.34 Standards and criteria for non-waste determinations.

(a) An applicant may apply to the Administrator for a formal determination that a material is clearly not discarded and therefore not a solid waste. The determinations will be based on the criteria contained in paragraphs (b), (c), or (d) of this section as applicable. If an application is denied, the material might still be eligible for a solid waste variance or exclusion (for example, one of the solid waste variances under § 260.31 or solid waste exclusions under § 261.4). Determinations may also be granted by the State if the State is either authorized for this provision or if the following conditions are met:

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

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

(3) EPA approves the State determination.

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

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

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

(3) Whether the hazardous constituents in the secondary 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 primary production process; and

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

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

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

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

(3) 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.

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

(d) The Administrator may grant a non-waste determination for material which is reclaimed under the control of the generator, including control through contracts such as tolling arrangements, if the applicant demonstrates that the generator retains control of the production and the residuals, and that the material is not discarded. The determination will be based on the following criteria:

(1) Whether the generator retains ownership and liability via a contract or other mechanism for the material and the residuals resulting from its recycling.

(2) 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 a production process.

(3) Other relevant factors that demonstrate the material is not discarded.

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

§ 260.42 Notification requirement for generators of hazardous secondary materials generated and reclaimed under the control of the generator.

Generators of hazardous secondary material that has previously been subject to regulation as hazardous wastes, but which will be excluded from regulation under § 261.2(a)(2)(ii) must send a one-time notification to the Regional Administrator. Such notices must identify the name, address, and EPA ID number of the generator (if applicable); the name and phone number of a contact person; the type of material that will be managed according to this exclusion; and when the material will begin to be managed in accordance with this exclusion. A revised notice must be sent to the Regional Administrator in the event of a change to the name, address or EPA ID number of the generator, or a change in the type of material generated. If reclamation takes place at a facility other than the generating facility, the reclaimer must also send a one-time notification to the Regional Administrator. Such notices must identify the name, address, and EPA ID number of the reclamation facility (if applicable); the name and phone number of a contact person; the type of material that will be managed according to the exclusion; and when the material will begin to be managed in accordance with this conditional exclusion. A revised notice must be sent to the Regional Administrator in the event of a change to the name, address or EPA ID number of the reclamation facility, or a change in the type of material reclaimed.

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

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

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

Subpart A—[Amended]

8. Section 261.2 is amended as follows:

a. By revising paragraph (a)(1).

b. By revising paragraph (a)(2).

c. By revising paragraph (c)(3).

d. By revising Table 1 in paragraph (c)(4).

e. By adding paragraph (g).

§ 261.2 Definition of solid waste.

* * * * *

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

* * * * *

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

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

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

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

(D) A military munition identified as a solid waste in 40 CFR 266.202.

(ii) A hazardous secondary material is not discarded if it is generated and reclaimed within the United States or its territories, provided that the material is only handled in non-land-based units, it is a hazardous secondary material generated and reclaimed under the control of the generator as defined in § 260.10, and it is not speculatively accumulated as defined in § 261.1(c)(8). (See also § 260.42)

* * * * *

(c) * * *

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

* * * * *

(4) * * *

TABLE 1

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

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

* * * * *

(g) Legitimate Recycling.

(1) Hazardous secondary material that is not legitimately recycled is discarded material and is a solid waste. Persons who recycle such material, as well as persons claiming to be excluded from hazardous waste regulation under § 260.31, § 260.34, § 261.2 or § 261.4 because they are engaged in recycling, must be able to demonstrate that the recycling is legitimate. Moreover, hazardous secondary material must be legitimately recycled to qualify for special management standards under § 261.6 and 40 CFR Part 266.

(2) Legitimate recycling must involve a hazardous secondary material that provides a useful contribution to the recycling process or to a product of the recycling process, and the recycling process must produce a valuable product or intermediate.

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

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

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

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

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

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

(ii) The product or intermediate is valuable if it is:

(A) Sold to a third party; or

(B) Used by the recycler or the generator as an effective substitute for a commercial product or as an ingredient or intermediate in an industrial process.

(3) The following factors need to be considered in making a determination as to the overall legitimacy of a specific recycling activity. If these factors are not met, then this fact may be an indication that the material is not legitimately recycled:

(i) How the hazardous secondary material to be recycled is managed. The generator and the recycler should manage such material as a valuable commodity. Where there is an analogous raw material, the hazardous secondary material should be managed, at a minimum, in a manner consistent with the management of the raw material. Where there is no analogous raw material, the hazardous secondary material should be contained. Materials that are released to the environment and are not recovered in a timely manner are discarded. If the material is not managed as a valuable commodity, that fact may be an indication that the material is not legitimately recycled.

(ii) Whether the product of the recycling process:

(A) Contains significant concentrations of any Appendix VIII of Part 261 hazardous constituents that are not found in analogous products; or

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

(C) Exhibits a hazardous characteristic (as defined in Part 261 subpart C) that analogous products do not exhibit. If a product contains any of these concentrations or exhibits a hazardous characteristic, that fact may be an indication that the material is not legitimately recycled.

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

§ 261.4 Exclusions.

(a) * * *

(23) Hazardous secondary material generated and reclaimed within the United States or its territories is not a solid waste provided that:

(i) If it is managed in a land-based unit as defined in § 260.10, the material must be contained; and

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

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

(iv) Generators of hazardous secondary material that has previously been subject to regulation as hazardous wastes, but which will be excluded from regulation under this paragraph (a)(23) must send a one-time notification to the Regional Administrator. Such notices must identify the name, address, and EPA ID number of the generator (if applicable); the name and phone number of a contact person; the type of material that will be managed according to this exclusion, and when the material will begin to be managed in accordance with this exclusion. A revised notice must be sent to the Regional Administrator in the event of a change to the name, address or EPA ID number of the generator, or a change in the type of material generated. If reclamation takes place at a facility other than the generating facility, the reclaimer must send a one-time notification to the Regional Administrator. Such notices must identify the name, address, and EPA ID number of the reclamation facility (if applicable); the name and phone number of a contact person; the type of material that will be managed according to the exclusion, and when the material will begin to be managed in accordance with this conditional exclusion. A revised notice must be sent to the Regional Administrator in the event of a change to the name, address

or EPA ID number of the reclamation facility, or a change in the type of material reclaimed.

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

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

(ii) The material is not handled by any person or facility other than the generator, the transporter, or a reclaimer; and

(iii) The generator and each reclaimer of hazardous secondary material that has previously been subject to regulation as hazardous wastes, but which will be excluded from regulation under this paragraph, must send a one-time notification to the Regional Administrator. Such notices must identify the name, address, and EPA ID number of the generator or reclaimer (if applicable); the name and phone number of a contact person; the type of material that will be managed according to the exclusion, and when the materials will begin to be managed in accordance with this conditional exclusion. A revised notice must be sent to the Regional Administrator in the event of a change to the name, address or EPA ID number of the generator, or a change in the type of material generated, and

(iv) Generators of hazardous secondary materials that are eligible for this exclusion must satisfy the following conditions:

(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 efforts 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 use any credible evidence available, including information gathered by the generator, provided by the reclaimer, and/or provided by a third party.

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

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

(2) Name and address of the reclamation facility to which it was sent, and

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

(C) If it is managed in a land-based unit as defined in § 260.10, the material must be contained.

(v) Reclaimers of hazardous secondary material excluded from regulation under this exclusion must satisfy the following conditions:

(A) The reclaimer must maintain at the reclamation facility for no less than three years records of all shipments of excluded material that were received at the facility. For each shipment, these records must at a minimum contain the following information:

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

(2) Name and address of the generating facility from which it was sent; and

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

(B) The reclaimer must manage the hazardous secondary material in a manner that is at least as protective as that employed for analogous raw material or is otherwise contained. An ''analogous raw material'' is a raw material for which a hazardous secondary material is a substitute and serves the same function and has similar physical and chemical properties as the hazardous secondary material. Where there is no analogous raw material, or if the secondary hazardous material is managed in a land-based unit as defined in defined in § 260.10, the material must be contained.

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

(D) The reclaimer must comply with the financial requirements of 40 CFR part 264, subpart H.

(vi) A reclamation facility at which hazardous secondary materials are managed in accordance with the provisions of this exclusion may also accept and manage fully regulated hazardous wastes from generators who do not use this exclusion. Such materials are not solid wastes, and the RCRA regulatory status of the reclamation facility will not be affected, provided that the reclamation facility complies with the requirements specified in § 261.4(a)(24)(i), (ii), (iii) and (v).

(25) Exports. Hazardous secondary material that is exported from the United States and recycled at a reclamation facility located in a foreign country, provided that the exporter complies with the requirements of § 261.4(a)(24)(i)–(iv) and also with the following requirements:

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

(A) Name, mailing address, telephone number and EPA ID number (if applicable) of the exporter.

(B) The estimated frequency or rate at which the materials is to be exported and the period of time over which it is to be exported.

(C) The estimated total quantity of material specified in kilograms.

(D) All points of entry to and departure from each foreign country through which the material will pass.

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

(F) The name and address of the reclaimer and any alternate reclaimer.

(G) A description of the manner in which the material will be recycled in the foreign country that will be receiving it.

(H) The name of any transit country through which the material will be sent and a description of the approximate length of time it will remain in such country and the nature of its handling while there.

(ii) Notifications submitted by mail should be sent to the following mailing address: Office of Enforcement and Compliance Assurance, Office of Federal Activities, International Compliance Assurance Division, (Mail Code 2254A), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Hand-delivered notifications should be sent to: Office of Enforcement and Compliance Assurance, Office of Federal Activities, International Compliance Assurance Division, (Mail Code 2254A), Environmental Protection Agency, Ariel Rios Bldg., Room 6144, 1200

Pennsylvania Ave., NW., Washington, DC. In both cases, the following shall be prominently displayed on the front of the envelope: ''Attention: Notification of Intent to Export.''

(iii) Upon request by EPA, the exporter shall furnish to EPA any additional information which a receiving country requests in order to respond to a notification.

(iv) EPA will provide a complete notification to the receiving country and any transit countries. A notification is complete when EPA receives a notification which EPA determines satisfies the requirements of paragraph (a) (5) (i) of this section. Where a claim of confidentiality is asserted with respect to any notification information required by paragraph (a)(5)(i) of this section, EPA may find the notification not complete until any such claim is resolved in accordance with 40 CFR 260.2.

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

(vi) When the conditions specified on the original notification change, the exporter must provide EPA with a written renotification of the change, except for changes to the telephone number in paragraph (a)(5)(i)(A) of this section and decreases in the quantity indicated pursuant to paragraph (a)(5)(i)(C) of this section. The shipment cannot take place until consent of the receiving country to the changes has been obtained (except for changes to information about points of entry and departure and transit countries pursuant to paragraphs (a)(5)(i)(D) and (a)(5)(i)(H) of this section) and the exporter receives from EPA a copy of the Acknowledgment of Consent to Export reflecting the receiving country's consent to the changes.

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

(viii) If a shipment cannot be delivered for any reason to the recycler or the alternate recycler, the exporter must renotify EPA of a change in the conditions of the original notification to allow shipment to a new recycler in accordance with paragraph (a)(5)(vi) of this section and obtain another Acknowledgment of Consent to Export.

(ix) Exporters must keep copies of notifications and Acknowledgments of Consent to Export for a period of three years following receipt of the Acknowledgment.

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