

June 25, 2007

OSWER Docket
U.S. Environmental Protection Agency
Mail Code 5305T
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

ATTN: Docket ID No. EPA – HQ - RCRA – 2002 – 0031

RE: Proposed Rule, Supplemental Revisions to the Definition of Solid Waste (72 FR 14172)

Dear Sir/Madam:

The Hazardous Waste Recycling Task Force (“Task Force”) of the Association of State and Territorial Solid Waste Management Officials (herein referred to as “ASTSWMO”) has reviewed the March 26, 2007 supplemental proposed rule containing suggested revisions to the definition of solid waste at 72 FR 14172. Further, the Task Force surveyed the States on major aspects of the proposed rule. Twenty-four States representing nine regions completed the survey. The enclosed comments include State responses to the Task Force survey.

It is important to note that a majority of the responding States indicated that each is likely to adopt revisions to the definition of solid waste rule if certain changes are made to the rule. In short, States support additional measures to the rule applied to notification, recordkeeping, reporting, and storage of excluded hazardous secondary materials. Respondents also supported mandatory recycling criteria making it easier to determine when materials are being legitimately recycled. The comments we offer below represent the majority opinion of the responding States regarding major aspects of the rule. We note that where the term “States” is used in these comments, it refers to States that responded to the survey. Individual States may also submit comments reflecting their own unique perspectives on the proposed components of the rule. These comments have not been reviewed or adopted by the ASTSWMO Board of Directors.

We appreciate the opportunity to provide comments on this important proposal, and look forward to continuing to work with U.S. EPA on definition of solid waste issues of

mutual interest. Please contact me at 614-644-2927 or Karen.hale@epa.state.oh.us if you have any questions regarding the following comments.

Sincerely,

Handwritten signature of Karen Hale (OH) in cursive script.

Karen Hale (OH)
Chair
ASTSWMO Hazardous Waste Recycling Task Force

cc: Charlotte Mooney, OSW
ASTSWMO Hazardous Waste Recycling Task Force
ASTSWMO Board of Directors

Reclamation done under the control of the generator

1. Hazardous secondary materials (HSM) generated and reclaimed at the generating facility and HSM generated and reclaimed by the same person:

A strong majority of the States support this exclusion with changes. Several noted it would be beneficial to companies and encourage them to reclaim and reuse their own wastes.

Changes to facilitate oversight are the most common changes requested by States, especially, more complete and extensive notification and recordkeeping by generators and extending those requirements to reclaimers. Ambiguous language which may hamper understanding and enforcement of the exclusion is a problem identified by many States. In addition, the certification should include more information to identify the reclamation companies and they should be required to be United States corporations.

2. Tolling contractor/batch manufacturer reclamation:

A majority of the States support this exclusion with changes. The most common concern is the inability to conduct oversight and monitor the HSM, especially to verify legitimacy. Additional notification and recordkeeping is the most common suggested change to provide verification and oversight. Ambiguous language, the lack of specific language for the contracts and financial assurance were cited as concerns by a number of States.

3. Expansion of tolling contractor/batch manufacturer reclamation to other types of contractual arrangements:

The States do not support expanding the scope of the exclusion beyond the current proposal for HSM that is being reclaimed by a tolling contractor to other types of contractual arrangements. Such an approach goes beyond the scope of the intent of tolling arrangements and makes it more difficult for a generator to maintain control of their HSM. Expanding the exclusion to include other types of contractual agreements may make it more difficult to ensure that the HSM is being legitimately recycled. Generators do not have a say over the day-to-day operations of the commercial reclamation facilities with which they contract, therefore, their HSM is not in their control. Contract reclamation is most appropriately addressed under the requirements of the transferred-based exclusion.

4. HSM managed in land based units:

The use of land-based units to manage hazardous secondary material destined for reclamation should be prohibited. Land-based storage units most often pose a risk of contaminating soil and/or groundwater. Because of this, U.S. EPA has imposed stringent controls on land-based units used to manage hazardous wastes and requirements for the treatment of hazardous wastes that are placed on the land. Merely excluding a material from the definition of solid waste does not reduce the risk to the environment when it is released from a storage unit.

Land-based units should only be used if they meet stringent design and operational requirements currently in place for the storage of hazardous waste to prevent releases of HSM or hazardous constituents to the environment. Furthermore, the use of land-based units must also include monitoring the unit to detect releases, and the burden of proof that the unit is not releasing hazardous constituents should be the responsibility of the generator or reclaimer.

HSM transferred off-site for reclamation

5. General comment:

The States do not support the transfer-based exclusion unless additional requirements are added to ensure that HSM is managed in a manner protective to human health and the environment. A majority of the responding States indicated that they would consider supporting the exclusion if additional measures are added to the final rule. The conditions and restrictions must be clearly defined in the rule to be enforceable and effectively implemented by the States. Below are the States' comments regarding the conditions and restrictions for this exclusion.

6. Notification and tracking:

Based on the experience of the States, a one-time notification is not adequate. Both the facility providing HSM for reclaiming and the reclaimer should each be required to update their notification whenever there are changes to any of the data items during the "life" of the notification. The notification should identify:

- a. The name and location of the HSM generator and the reclaimer;
- b. The type of HSM (perhaps by the EPA waste code it would hold if it were not excluded);
- c. The amount of HSM being handled on a yearly basis; and
- d. A description of the reclamation process.

Notifications should include certification by an authorized representative. Further, the rule should be explicit that all reclaimers, even if they do not generate or manage any hazardous waste and only process HSM, must notify the U.S. EPA or appropriate State of their reclamation activity and obtain an EPA ID number.

States support a requirement for the generator to maintain documentation of how legitimacy of the recycling was determined. The documentation needed to establish compliance with the exclusion by all parties involved should be defined and standardized to facilitate its proper completion and evaluation.

7. Reasonable Efforts/Due Diligence:

The States have consensus opinion that procedures and documentation for conducting the “reasonable efforts” and due diligence inquiries under this rule, and standards for determining that a reclaimer has met those standards, should be established and standardized in the rule. The questions specified in the preamble and labeled (A) through (F) on page 14192 are comprehensive and should be included in the final regulatory requirements (72 FR 14172; 14192). This documentation needs to be part of the records that must be maintained by the generator.

Members are concerned that smaller businesses will not have the resources and time to conduct thorough investigations, and without standardized methods and documentation, will be unable to effectively interpret and compare the information they receive. At the very least, additional detailed guidance needs to be provided to encourage generators to make “apples to apples” comparisons, and to allow reclaimers to be evaluated on an objective basis. As above, the documentation needed to establish compliance with the exclusion by reclaimers should be defined and standardized to make its completion and evaluation both meaningful and achievable.

8. Operational requirements for reclaimers under the transferred-based exclusion:

The consensus of State members was very consistent in calling for defined operational requirements for HSM reclaimers. Since any spills, releases, and residuals from the reclamation activities will involve hazardous wastes, members believe that it is very important to have some basic protections and standards defined by the rule.

There is also consensus among the States that operational requirements need to be added to better ensure that a reclamation process is legitimate, speculative accumulation does not occur, and spills/releases of HSM are prevented. Suggested measures to be required include: marking of HSM-containing tanks, containers and other units; waste analysis plans to prevent incompatible materials from being mixed together; and spill cleanup procedures and contingency planning.

While perhaps not strictly an operating requirement, the States support that reclaimers be subject to a financial assurance requirement. However, the States are concerned

that the existing financial assurance requirement for reclaimers, 40 CFR part 264 Subpart H, would not be suitable since it refers specifically to permitted hazardous waste facilities.

Since it is proposed that HSM is excluded from being solid or hazardous waste when it is being reclaimed, and there are no permit requirements for reclaimers (and hence no set and defined units or capacities, no closure plan based on investigation and cleanup of storage and reclamation units and capacities, and no closure cost estimate based on that closure plan), applicability of the existing Subpart H financial assurance requirement is not appropriate. We suggest that U.S. EPA develop a financial assurance mechanism specific to HSM reclaimers that addresses the costs for removing HSM and remediating contaminated areas where HSM was managed.

9. Sequential reclamation of HSM by multiple reclamation facilities under the transfer-based exclusion:

States generally do not support sequential reclamation of HSM by multiple reclamation facilities under the transfer-based exclusion.

The primary concern expressed by respondents is that it will be more difficult to ensure that HSM is being legitimately recycled when it is being transferred to multiple successive facilities for reclamation. There is a belief that the HSM tracking mechanism in the proposed rule is not sufficient to follow it through multiple reclamation facilities.

There is also concern that the HSM will be of lesser value as it moves successively through reclamation facilities. States do not believe that the proposed rule provides an adequate mechanism to track the HSM through the reclamation process. A final concern expressed was that if HSM were abandoned, it would be difficult to determine who the responsible party for mismanaging the material is.

10. One-time notification requirement for generators and reclaimers:

More than 60% of the States responding to the survey felt that the information given was not sufficient to properly regulate the recycling program. Most respondents believe that a one-time notification would not be sufficient to allow States to monitor HSM generators and reclaimers. Rather, most felt that some type of annual or biennial reporting should be required. In addition to the increased reporting, more information on the reclaimer, the process and responsibility for the residuals should also be required in the notification.

A smaller percentage of States responding to the survey believe that the required notification information is sufficient to regulate the programs, but even several of those had comments suggesting additional notification requirements.

11. Should the one-time notification information be available to all the States and U.S. EPA through the use of RCRAInfo?

All of the States responding to the survey responded positively to this question. Everyone supported the fact that RCRAInfo is available to all of the States and the U.S. EPA. They emphasized that use of this platform would bring necessary uniformity and consistency to the notification process. Each State would be able to follow a facility's recycling of HSM from generation to conclusion simply by using a database they are already familiar with, even when the HSM crossed State lines. Please consider the comments provided to the docket by the RCRAInfo Change Management Process Site Identification Program Group (Site ID Group) for specifics regarding how the use of RCRAInfo can be implemented.

12. Additional information and recordkeeping:

The vast majority of the responding States (21 States) consider it important that "generators and reclaimers retain additional information about the HSM that is reclaimed" and 74% of respondents considered this to be very important.

The three main reasons for collecting additional information are:

1. Compile credible information regarding the quantity of HSM being recycled. This information is needed to measure the performance and net effect of the rule,
2. Ensure that generators and reclaimers meet the conditions for the exclusion, and
3. Document and ensure the legitimacy of the reclamation/recycling.

A majority stated that the additional information should be submitted (annually or biennially) to the overseeing agency by both the reclaimer and generator. Generally, additional information requested by the States fall into the following categories, in order of preference:

1. Amount of HSM reclaimed.
2. Reclamation process information.
3. Legitimacy evaluation with reasonable efforts question responses.
4. Amount of product produced.
5. Uses of product.
6. Demonstration that speculative accumulation is not occurring.
7. Residuals management.
8. Product shipment information.
9. Evaluations of toxics in HSM-derived products

Legitimacy Factors

13. General Comment:

A strong majority of the States believe they will have difficulty enforcing the applicability of non-mandatory legitimacy factors. Codifying legitimacy factors provides the foundation for discussion between the regulating agency and the regulated community. Non-mandatory legitimacy factors are viewed as unenforceable. To enforce against sham recycling, these factors must be mandatory, clear and specific. It is difficult, and in some States impossible, to enforce guidance and non-mandatory factors against regulations and statutes.

14. Management of HSM:

A vast majority (86%) of respondents believe it is important that recyclers of HSM meet this recycling factor when determining if their material is being legitimately recycled. The current proposal does not require that storage of HSM be done in a manner to preserve its value. The proposal only states that management may be considered when evaluating if it is being legitimately recycled. Respondents believe that the manner in which a material is managed and stored is definitely indicative of its value and the legitimacy of the recycling. Material that is of little value and/or has no market is likely to be mismanaged since there is no monetary return from recycling the material to support its management. Further, the mismanagement of a material is a factor that can be readily recognized and a telltale sign that other aspects of the recycling need to be re-evaluated. Codification of this provision as a mandatory legitimacy factor will ensure consistency in determining when an activity is legitimate recycling and not discard.

15. HSM Contribution to process and/or product:

A vast majority of the States (86%) believe that this is a basic and vital factor that distinguishes recycling from waste treatment and, like other legitimacy factors, this must be a mandatory factor met by the recycler. If some value in the HSM is not regained or put to valuable use in the process or product, then the recycling is not manufacturing, it is waste treatment.

16. Production of a valuable product:

It is important to a vast majority of States that a valuable product is produced from the recycling of HSM, and that this factor is codified and mandatory.

Production of a valuable product from a HSM reclamation process is essential in order to differentiate "sham recycling" from legitimate recycling. If the resulting HSM-derived product is not valuable in the sense that it is not used or purchased by others, the recycling process is not akin to manufacturing. It is waste treatment that results in an unwanted end product. The product must have some intrinsic value to support an assumption that it will not be discarded. States are concerned that sham recycling could lead to releases of HSM into the environment, producing potential cleanup sites if a reclamation facility went bankrupt. Also, a use or market for the product should be identified by the reclaimer, and the generator should be required to know the product manufactured from its HSM.

While evaluation of the economics of the recycling process could be required under this factor (or factor #2), the rule should not absolutely require that the "value" of the product always equal or exceed the cost of producing it. Organizations should be permitted to supplement the cost of having a material legitimately recycled. Due to fluctuations in commodity prices, it is recognized that some recycled products, such as recycled aluminum or recycled oil, vary substantially in value. There are periods of losses and profits.

Several States pointed to specific examples of "sham recycling" which added limited value to the consumer product, and instances where there was no market or need for the product produced from the "recycling" of the material. Codification of the "valuable product" factor should help prevent "sham recycling."

17. Toxics contained in a HSM-derived product:

A vast majority of the States responding to the survey believe that a legitimacy factor regarding the concentration of hazardous constituents in the HSM-derived product should be codified and mandatory. This factor is commonly referred to as toxics-along-for-the-ride (TAR).

While recognizing the difficulty of a mandatory TAR factor, the States point out that TARs are often overlooked by recyclers. It is not protective of human health or the environment to allow products to enter the stream of commerce if the HSM in those products unnecessarily increases the toxicity of the product. The HSM, if reused, or the resulting product should not contain hazardous constituents at concentrations greater than the analogous products made from virgin material. This will help limit accumulation of hazardous constituents in the recycled product. High concentrations of hazardous constituents in a product are a clear danger to the public, unsuspecting user, and the environment. HSM that causes a product to exhibit a hazardous waste characteristic that is not present in a product made from raw material should be completely prohibited.

When TARs affect the performance of the product or increase the risk of adverse environmental or health effects, recycling would not be legitimate.

The proposed rule should require that an HSM-derived product is "indistinguishable in the relevant aspects" from the asserted equivalent product. Without this factor, as with the 'foundry sand as play sand' case [72 FR 14199], TARs would potentially expose the public and the environment to unnecessary toxic contaminants in HSM-derived products.

One State, while suggesting that it is not EPA's responsibility to enforce product safety standards and noting that marketing unsafe products could subject businesses to substantial civil lawsuits and loss of customers, nevertheless recommended that the TARs factor be formalized in the regulations as part of the agencies' review. This State also suggested that any proposed HSM-based consumer product that has possible safety issues should be referred to the U.S. Consumer Product Safety Commission (CPSC) or other applicable federal agency for a safety evaluation, and that non-consumer products destined for industrial use should be referred to OSHA if a potential safety issue is identified. The U.S. EPA and the States should defer this portion of the review to U.S. CPSC or another applicable federal agency and their equivalent State agency(s). Since this is an interstate commerce activity, federal agencies should have primacy to insure a consistent approach.

The States suggest that the term "significant" be defined, and propose the following: "significant" shall mean the presence of an Appendix VIII constituent, or hazardous waste characteristic, that is not found in similar non-recycled consumer products or present at a level more than 25% over what is routinely present in a similar product. A revised MSDS shall accompany any recycled product sent for consumer or industrial use."

Without a minimal bright line percentage or some other mandatory definition of "significant," it would be very difficult and expensive for a regulatory agency to refute a claim of "no significant concentrations" or "no significant elevation of concentrations."

To enforce against sham recycling the TARs factor must be codified and mandatory. In the proposed rule language, the TARs factor "may be an indication" that the material is not legitimately recycled; that is not enforceable rule language.

Other Issues

18. Petitions for Non-Waste Classification:

No consensus was reached on this component of the proposal.

Several States cited a common concern that they would not have the resources to review the petitions. The States citing this concern included States that support or are undecided about the availability of a petition process. Several other States believe the

current procedures for variances could accomplish the same objective as the proposed petition process.

Additional substantial comments and recommendations regarding the petition process from the responding States are summarized below.

- Some sort of indemnification mechanism must be in place for the generators, recyclers, and regulatory agencies if a “good faith” error is ever found in the process. This indemnification should cover both the organizations and the individual employees.
- This is a complex topic with potentially large impacts, so an adequate and defensible review process is required.
- Since the judicial direction regarding non-discard is a “continuous process,” all non-waste determinations should include the “reasonable timeframe” criterion and should specify that the tolling arrangement or “other contractual arrangement” must be a written contract with copies maintained at the generating facility and the reclaimer.
- A petitioner should definitely be obligated to inform the agency whenever circumstances change that affect the original basis of the petition, and the agency should be able to revoke a petition.
- If it is determined that approval of a petition was based on incomplete, inaccurate, or false information provided by the generator, the waste should be subject to regulation from the point of generation and not from the date of the determination.
- For clarity and consistency, 260.34(b)(3), 260.34(c)(3) and 260.34(d)(2), should state that “hazardous constituents in the secondary material are reclaimed rather than discarded ... at significantly higher levels ... than would otherwise be released from the primary production process.”
- The petitions allow for the exclusion of HSM if control/liability of the HSM is covered by contracts such as a tolling arrangement. This should be limited to situations where both parties' primary business is manufacturing. Facilities engaged solely in HSM reclamation should not be eligible for the petition. These facilities should only be eligible for the transferred-based exclusion.
- Many hazardous waste vendors seek official approval of various aspects of their programs or products to address actual or perceived regulatory liability, or for marketing advantage, often seeking approval for what is already allowed under existing regulation. EPA has stated an assumption that “most generators who recycle their [HSM] would use either the self-implementing exclusions proposed today or existing exclusions.” In order to minimize the burden on regulators, the

regulation should allow this option only for proposed processes that would directly violate one of the explicit exclusion criteria.

- Determinations would have to be well defined and qualified. It would be helpful for the regulation to include general and specific criteria for consideration in making determinations. Determinations may be subject to case decision challenges.
- There is concern about the deregulation of HSM without some level of oversight. In the 2007 proposal, there have been significant regulatory reductions that encourage recycling. However, it would be negligent to allow total exclusions with no oversight and no restrictions or conditions.

19. How likely is your State to adopt this proposal?

Representatives from twenty-three (23) States responded to this question. Seven (7) or 30.4% of these respondents indicated their State is very likely to adopt this rule as proposed; ten (10) or 43.5% indicated they are likely to adopt the rule if changes are made; and six (6) or 26.1% don't know if the rule will be adopted by their State or not.

The ten (10) States that responded that they would likely adopt the proposed rule if changes were made provided various suggested changes/revisions to the rule. Those changes/revisions include the following.

- Notification: The States feel that the notification should be a condition of the exclusion and should be submitted to EPA or the authorized State. Some States also believe that reclaimers and generators should re-notify when there are changes to the HSM, when the recycling process changes, or when recycling ceases. The States would like for the notification to include the identity of the destination/recycling facility, the method of recycling and be certified by an authorized representative.
- Recordkeeping: States believe that it is pertinent that records be kept by the generator and reclaimer. Generators should document the following information: HSM characterization/analytical, the HSM recycling method/process, due diligence investigation, quantities shipped/name of recycling facility, and certification by an authorized representative.
- Recyclers/reclaimers should also keep records documenting the HSM characterization/analytical information, the HSM recycling method/process information and chemical feedstocks, quantity of HSM received, and certification by an authorized representative.
- Reporting: Most States believe that reporting should be on a biennial basis and should include documentation and answers to the expanded "reasonable efforts" questions, information to document that speculative accumulation has not

occurred, and information to verify original due diligence efforts. It is suggested that the HSM information be submitted in a format similar to the biennial report and at the same frequency. Another reporting requirement suggested was that a closure plan and closure cost estimates be submitted when the initial notification is made and when any changes occur.

- Several States mentioned other items they would like to see changed/revised before the rule could be considered for adoption.
 - a. Amend 261.4(a)(24)(v)(A) to require that the source, contents and date of receipt of the material in tanks, containers, or other units be marked until such time as the HSM is recycled to ensure that speculative accumulation timelines are adhered to and legitimate recycling is accomplished.
 - b. Amend 261.4(a)(24)(v)(B) to require protective storage standards consistent with existing standards in 261.4(a)(20)(ii)(B).
 - c. Define the term “timely” as used in the proposed 261.2(g)(3)(i).
 - d. Define the term “contained” as proposed in 261.4(a)(23)(i) language to include the land-based unit storage requirements; Define “contained” to prevent/prohibit ANY release to land, water, or air.
 - e. Amend proposed 261.2(g)(3)(ii) language to address the hazardous constituent content of the HSM, instead of the end product.
 - f. Include requirements restricting by-products and Toxics-Along-For-The-Ride (TAR).
 - g. The regulation must establish a minimum standard for the efforts that the generator of HSM makes to ensure that the reclaimer legitimately recycles the material.
 - h. Clarify in the rule that spills/releases of HSM become hazardous waste.
 - i. Remove land-based units from the proposal.
 - j. Define “reasonable efforts.”
 - k. Make the four (4) legitimacy criteria mandatory.

20. Additional comments important to the States

Representatives from fourteen (14) States responded to this request for additional information. The following is a synopsis of those responses.

- a. The certification required of generators whose HSM is reclaimed by a parent company does not require that the certification be submitted to a regulatory agency. Without such a requirement, the certification provision will not be enforceable. Notification is the only means regulatory agencies have to ensure protection of human health and the environment and requires little effort on the part of the community taking advantage of an exclusion.
- b. There is some concern regarding the effect of these regulations on HSM exported for recycling. If the HSM is not a hazardous waste in the country of destination, what prevents disposal of the HSM in that country? While this is also a possibility for a hazardous waste, this proposal increases the temptation and opportunity for export-dumping since they need not use a hazardous waste transporter in the United States.
- c. The current proposed rule does not require the product to meet LDR standards and several other conditions that a product made from HSM would currently have to meet in accordance with 40 CFR 266.20(b).
- d. There is no provision in the proposed rule for these materials to meet Subpart CC standards.
- e. The definition of generator is broadly written and allows for co-generators, a subject that has not been adequately addressed in this proposed rule.
- f. This initial program should be implemented with more thought to incrementally add parts to the recycling program in a phased approach, rather than adopting a broad change at the same time. For example, the program could start with allowing the on-site recycling program first for a trial period prior to proceeding to the next step. EPA's efforts to encourage legitimate recycling are supported, but our State would like to see a phased approach that might provide a more orderly process.
- g. It appears as if the conditional exclusion for off-site reclaiming requires both ends of the transaction to have adopted and be in compliance with substantially identical versions of the rule. If a transfer of HSM occurs across a State line, and the reclaimer's receiving State has not adopted the rule or provisions that allow the exclusion, both the reclaimer and the generator of the HSM may face significant jeopardy of enforcement.