

EPA Releases 2007 Reproposal to the Definition of Solid Waste Rule

On March 15, 2007, EPA released an unofficial pre-publication supplemental proposed rule on the Definition of Solid Waste (DSW). The official version was published in the federal register on Monday, March 26th at 72 FR 14171-14218. The supplemental proposal offers a broad restructuring of the agency's October 2003 proposal. The agency has decided to focus its DSW on the concept of whether a material is "discarded" rather than limiting the exclusion to materials that are recycled in a continuous industrial process in the same generating industry, as was originally proposed. Under the new proposal, if a hazardous secondary material is being legitimately recycled, then it is not viewed as being discarded and therefore is not regulated as a RCRA hazardous waste. The new focus is a significant improvement for electronics manufacturers as most waste is recycled by the suppliers, recyclers, or other third parties.

EPA has deemed the proposed regulation as deregulatory since certain hazardous materials that are currently subject to RCRA regulations would no longer be regulated as hazardous wastes under the new proposal. Since EPA has categorized the DSW reproposal as deregulatory and thus less stringent, states are under no obligation to adopt the proposed changes if they are finalized. One peculiarity resulting from this is that one would still need to follow RCRA hazardous waste manifest requirements for shipment through a state where the rule has not been adopted. (Section XV, Part C).

The proposed rule would provide three different exclusions: 1) an exclusion for materials that are reclaimed under the control of the generator; 2) an exclusion for materials that are transferred by the generator to another company for the purpose of reclamation (transfer-based exclusion), and 3) a case-specific petition process for obtaining non-waste determinations. No changes were proposed for recycled materials that are considered inherently waste-like, used in a manner constituting disposal, or burned for energy recovery.

Transfer-Based Exclusion (Section X)

The transfer-based exclusion (which would apply to F006 electroplating sludge among other things) is likely to be of most interest to the electronics industry. However, there are several conditions and restrictions that must be met to qualify for the transfer-based exclusion. Materials that are speculatively accumulated would not be eligible for the exclusion. EPA also proposes that materials would need to be directly transferred from the generator to the reclaimer, and not be handled by anyone other than the transporter (i.e. middleman such as a broker). In order to be eligible for the exclusion, generators are required to make "reasonable efforts" to ensure that their materials are safely and legitimately recycled. EPA devotes significant discussion to whether they should specifically define "reasonable efforts" or leave more flexibility and uncertainty to industry. Generators and reclaimers that are currently subject to the hazardous waste regulations would be required to submit a one-time notification to EPA with their intent to avail themselves of the exclusion. Additional notification would be required for materials being exported for recycling. Generators must maintain records that document shipments (transfers) for a period of three years.

Reclaimers (Section X)

EPA has also proposed that reclaimers of materials using the transfer-based exclusion be subject to certain conditions which pertain to record keeping, storage of secondary hazardous materials, management of recycling residuals, and financial assurance. Reclaimers would also be required to submit the one-time notification to EPA, comply with restrictions regarding speculative accumulation and ensure that they legitimately recycle the excluded materials.

Generator-Controlled Exclusion for Contractual Arrangements (Section IX, p. 14186)

Under the exclusion for materials that are reclaimed under control of the generator, hazardous secondary materials that are generated pursuant to a written contract between a tolling contractor and batch manufacturer and reclaimed by the tolling contractor would be eligible for the exclusion. 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. EPA has requested comments 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 materials. Of the three exclusion options offered by EPA, this one has the strongest support and has the highest likelihood of being finalized. We should take the opportunity to broaden this option to include as many of our waste management practices as possible.

Legitimacy Criteria (Section XI)

EPA has also changed its proposed codification of the legitimacy criteria. The original proposal sought to codify four criteria for legitimate recycling. Under the new proposal, EPA proposes that the legitimacy criteria be codified such that there are two mandatory factors that must be met, and two factors that must be “considered,” but not necessarily met. In order to be legitimately recycled, 1) the material must provide a useful contribution to the recycling process or to the product of the recycling process, and 2) the recycling must yield a valuable new product or intermediate. The non-mandatory factors that should also be considered in the overall legitimacy determination are whether 1) the recycled material is managed as a valuable product, and 2) the recycled product does not contain toxic constituents at levels equal to or exceeding the non-recycled product. Addressing the legitimacy criteria would form the core of the generators’ “reasonable efforts.”

Comments

The deadline for submitting comments on the proposal has been extended to June 25, 2007. The following highlight some of the questions that we will need to discuss to develop IPC comments. Please contact Fern Abrams, Director of Environmental Policy, at fabrams@ipc.org if you would like to provide feedback to the questions listed below.

Middlemen/Brokers (p.14189)

1. EPA proposes and asks for comment on the requirement that materials would need to be directly transferred from the generator to the reclaimer, and not be handled by anyone else (i.e. middleman such as a broker) other than the transporter. Treatment by one or more reclaimers performing multiple steps (i.e. WRC drying and blending; smelting at Noranda) is acceptable.

Record Keeping (p. 14190)

2. Should generators using the exclusions be required to have more detailed record keeping conditions than proposed (date of shipment, transporter, reclamation facility location, type and quantity of hazardous secondary materials)? For example, 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 hazardous secondary materials were transported as a DOT hazardous material, the date the materials were generated, the quantity of materials, etc.
3. Should generators be required to keep a confirmation receipt from the reclaimer? Is this normal business practice?

Notification Requirements (p. 14189-14190)

One time notification (name, address, EPA ID number of the generator, the name and phone number for contact, type and schedule for handling of secondary hazardous materials) is proposed. EPA asks:

4. Should the one-time notice have additional notification requirements beyond the basic information proposed? For example, should the generator be required to submit more detailed information 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?
5. Should generators be required to submit 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, etc.?
6. Should the notification information be submitted in a particular format (i.e., electronic).
7. Should the notification documentation be kept at the generating facility in lieu of sending it to EPA?
8. Should [Subtitle C Site Identification Form \(EPA Form 8700-12\)](#) be used for the one-time notification required by generators and reclaimers?
9. EPA proposes that generators that export the materials notify the receiving country through EPA and obtain consent from that country before shipment of the materials. Exporters would be required to notify EPA 60 days prior to intended off-site shipment. Is the notification requirement for exporters of secondary hazardous wastes for reclamation appropriate?

Reasonable Efforts (p. 14190-14194)

The proposed rule requires generators to make reasonable efforts to ensure the materials are safely and legitimately recycled, in effect requiring a due diligence effort. EPA proposes six questions it believes would form the core of this due diligence and asks if they should be required and to what degree of specificity.

10. Should generating facility be required to maintain documentation that reasonable efforts were made before transporting the hazardous secondary materials to the reclaimer (i.e. reclaimer audit reports)?
11. Should generating facility be required to maintain a certification statement signed by an authorized company rep that for each reclamation facility to which the generator transferred excluded hazardous secondary materials, the generator made reasonable efforts that the material was legitimately recycled?
12. Should reasonable efforts be codified/defined in the final rule?
13. Are the proposed reasonable effort questions appropriate or necessary?
14. Should the specific questions for the generator to consider when making reasonable efforts be a condition of the exclusion or just an option?
15. If the reasonable efforts questions are codified in the regulations, EPA is proposing that by satisfying reasonable efforts, the generator would also have satisfied the obligation to determine his hazardous secondary materials would be legitimately recycled. Thus allowing the generator to make only one determination before sending hazardous secondary materials for recycling. Is this appropriate?
16. Should the legitimacy determination be an independent requirement for generators who would use the exclusion and not directly linked to reasonable efforts?
17. Should the frequency of periodic updates of the reasonable efforts be identified in the regulations or should that be left to individual situations applying an objectively reasonable belief standard?
18. What are industry standards for off-site facility audits, and how often are they conducted?

Legitimate Recycling (p. 14197-14201)

19. Is it appropriate that EPA has proposed codifying the legitimacy criteria? Are we concerned that codification will eliminate the existing flexibility for balancing of factors? Will codification increase industry burden by requiring the regulated entity to prove legitimacy?
20. What are benefits and drawbacks to codifying legitimacy criteria?
21. In the economics discussion, EPA considers the economics of recycling, i.e. whether the recycler pays the generator for the hazardous secondary material (preferred) or the generator pays the recycler to take the material (less desirable) to be indicative of the likelihood that legitimate recycling will occur. Similarly if the recycler's main revenue is from the generators of secondary hazardous material, in EPA's view, the recycler has little incentive to actually recycle the material as they receive money just for taking it from the generators. EPA asks, how should economics of the recycling activity be considered in making overall legitimate recycling determinations for off-site and on-site recycling? Should economics simply be a consideration that informs legitimacy overall or should the

economics of recycling be a separate factor, including regulatory language, to consider?

Storage Conditions (p. 14194)

22. Should a storage condition (beyond the requirement that material in land-based units be contained) be imposed on generators as part of the exclusion, and if so, what type of conditions? For example, should there be a condition that specifies a general performance standard for storage of excluded hazardous secondary materials at the generating facility prior to shipment to a reclamation facility?

Reclaimers (p. 14194-14197)

23. EPA proposes four general conditions for reclaimers: record keeping, storage of secondary hazardous materials, management of recycling residuals, and financial assurance and asks if the conditions are appropriate?
24. Should there be additional record keeping conditions for reclaimers? For example, the 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 material was transported as a DOT hazardous material, etc.
25. EPA also discusses and takes comment on whether the residuals from the reclamation of hazardous waste should be considered hazardous waste under the RCRA derived form concept (Part 261.3(c)(2)) or if they should only be considered hazardous waste if they are a listed or characteristic waste.
26. EPA proposes that reclaimers of transferred materials demonstrate financial assurance in accordance with RCRA [Subpart H financial assurance regulations](#). Is this appropriate for reclaimers of conditionally excluded materials? Will these requirements pose a significant deterrence to recycling? Should EPA adopt the financial assurance requirements that were promulgated as part of the [standardized permit rule](#), which are EPA's most recently issued RCRA financial assurance requirements?

Performance Measures (p. 14207-14208)

27. RCRA Biennial Report – required annual reports of large quantity hazardous waste generators and hazardous waste treatment, storage, recycling and disposal facilities (TSDRFs) to prepare biennial reports on the types and quantities of hazardous wastes generated and managed during the reporting year. Since most facilities would no longer be large quantity hazardous waste facilities, should they still be required to report this information?
28. Are current BR and TRI data systems sufficient for assessing future performance outcomes of the proposed rulemaking?

Enforcement (p. 14197)

29. Is the following enforcement appropriate: If a generator fails to meet the conditions and restrictions of the transfer-based exclusion, 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?

Background Studies (Docket No. EPA-HQ-RCRA-2002-0031)

30. Any comments on the EPA studies that affected the rulemaking? Are the results of the studies indicative of industry practices? One study found that there are two main drivers behind companies adopting responsible recycling practices – 1) concern of liability under CERCLA/Superfund, and 2) concerns about corporate responsibility and public relations. (p. 14178-14183)
31. Comments requested on the regulatory impact analysis. For example, will codification of the legitimacy criteria result in additional requirements compared to current practice? (p. 14210-14212)

Links

DSW Reproposal, March 26, 2007 – Published in the Federal Register, 72 FR 14171-14218: <http://www.epa.gov/fedrgstr/EPA-WASTE/2007/March/Day-26/f5159.pdf>

DSW Reproposal, March 15, 2007- Pre-publication version:
<http://www.epa.gov/epaoswer/hazwaste/dsw/index.htm> -

DSW Proposal, October 2003, 68 FR 61557:
<http://www.epa.gov/epaoswer/hazwaste/dsw/abr-rule/abr-rule.pdf>

Standardized Permit Rule, September 2005, 70 FR 53419:
<http://www.epa.gov/fedrgstr/EPA-WASTE/2005/September/Day-08/f16300.pdf>

RCRA Subpart H Financial Assurance Regulations, 40 CFR 265:
<http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=db9a938b0b13583272ddd0649eaf80af&rqn=div5&view=text&node=40:25.0.1.1.6&idno=40>

RCRA Subtitle C Site Identification Form (EPA Form 8700-12):
<http://www.epa.gov/epaoswer/hazwaste/data/form8700/8700-12.pdf>

EPA Background Studies:

www.regulations.gov – Docket No. EPA-HQ-RCRA-2002-0031

- An Assessment of Current Good Practices for Recycling of Hazardous Secondary Materials
- As Assessment of Environmental Problems Associated with Recycling of Hazardous Secondary Materials
- Potential Effects of Market Forces on the Management of Hazardous Recyclable Materials
- Economics Background Document: Regulatory Impact Analysis of US EPA's 2007 Supplemental Proposed Revisions to the Industrial Recycling Exclusions of the RCRA Definition of Solid Waste