TO: Internet Address: rcra-docket@U.S. EPA.gov

RE: RCRA Docket #: RCRA-2002-0031

Revisions to Definition of Solid Waste

DATE: February 25, 2004

RCRA DOCKET:

Please find enclosed the Ohio Environmental Protection Agency's comments on U.S. EPA's proposal to modify the hazardous waste rules to exclude certain hazardous secondary materials from the definition of solid waste when they are legitimately recycled. This proposal was issued October 28, 2003, in the *Federal Register* (Vol. 68, No. 208, pg. 61558).

Ohio EPA requests that these comments be made an official part of the record. If you have any questions or need additional clarification regarding the enclosed comments, please do not hesitate to contact Karen Hale, Division of Hazardous Waste Management, at (614) 644-2917 or karen.hale@epa.state.oh.us

Sincerely,

Christopher Jones
Director

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cc: Michael A. Savage, Chief, DHWM
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1. Section IV: Request for Comment on a Broader Exclusion for Legitimate Recycling

Ohio EPA supports the concept of recycling if done properly and protective of human health and the environment. Recycling presents us an opportunity to conserve our natural resources and to put back into commerce material that would otherwise be disposed of. Therefore, Ohio EPA supports the development of a broad exclusion where adequate legitimacy criteria are used to further define "discard" and hence, when a hazardous secondary material is a solid waste. We believe the use of legitimacy criteria to define discard focuses on those factors that are most meaningful in distinguishing waste management (i.e., sham recycling) from beneficial use. The broad exclusion should consist of legitimacy criteria, notification requirements and application of the existing speculative accumulation provision. Further, we believe that the issue of requiring financial assurance as a condition of exclusion should be evaluated by U.S. EPA in order to protect public dollars in the event that environmental contamination occurs.

The use of legitimacy criteria brings to the forefront those aspects of recycling that are most important in demonstrating that the process is akin to manufacturing. Those aspects are the evaluation and utilization of the value contained in the secondary material. It is the value contained in the secondary material and how it can be regained that should be used to determine whether a material is being discarded; not an approach that draws regulatory lines in the sand based on who or what industry recycles the material. The lack of any scientific basis when defining "discard" is arbitrary and skews the facts by not focusing on what the material has to offer and its usefulness.

2. Section III (B): Legitimate Recycling

As stated above, we support developing a broad exclusion based on appropriately crafted legitimacy criteria to further define "discard." However, if U.S. EPA finalizes another approach, we encourage you to codify the legitimacy criteria. Below you will find our suggestions for revising the proposed legitimacy criteria for use as the basis for a broad exclusion and/or codification.

Legitimacy Criteria: In general, the four legitimacy criteria that U.S. EPA has proposed are good. They target the aspects of hazardous secondary material processing that differentiate beneficial use of a secondary material from discarding it. However, we do have suggestions for revising the criteria in an effort to remove ambiguity for the purpose of promoting consistent application of the criteria by generators, recyclers and the overseeing agencies.

Ohio EPA believes that for a recycling process to be deemed legitimate, three of the four criteria must be met by the recycler. The three criteria pertain to the management of the secondary material, the contribution the material makes to the

process or product and that a valuable product or intermediate is produced from the recycling process. The remaining criterion which pertains to the level of hazardous constitutent(s) in the end-product needs to be evaluated by the recycler and/or the consumer.

Criterion #1: This criterion pertains to the storage and management of the secondary material prior to recycling. U.S. EPA proposes that the secondary material be stored and managed in a manner like an analogous product, or if no analogous product exists, then in a manner that minimizes the potential for releases to the environment. We do not believe that storing a material in the same manner as an analogous product necessarily minimizes its potential for release to the environment. This criterion needs to be revised to contain a storage/management performance standard that is based on the type of material being recycled and the method of storage/management used. Or, at the very least, a prohibition against storage in open piles should be added to this criterion. A material stored in open piles exposed to the elements of weather is not a method that minimizes the threat of releases to the environment. The material would be dispersed into the environment by wind and water, posing a potential risk to the environment over time.

That said, depending on the physical properties and characteristics of the secondary material, storage of piled material under a roofed shelter protected from rain, wind and storm water run-on may be deemed to protect against and minimize releases to the environment. Therefore, a case-by-case determination may be an option.

The use of a specific performance standard would provide generators and recyclers flexibility in the method they use to store their materials and focus on protecting the environment. We believe this criterion should be revised as follows:

> "The secondary material to be recycled is managed as a valuable product. The methods used to store and manage the secondary material must be designed and maintained to minimize the direct exposure of the secondary material to weather and to minimize the release of the secondary material to the environment considering the hazards the material poses to human health and the environment, the hazardous constituents of concern contained in the material, and the physical and chemical properties of the material. The use of piles to store or manage secondary material is prohibited unless it can be demonstrated that such a method is protective of the environment."

Secondary materials recycling should maintain a materials management and storage approach that promotes prevention of releases. We believe a performance standard will accomplish this by focusing the standard on the design and maintenance of the storage/management method. Our suggested storage standard may be more stringent than the standards currently imposed on the storage of some analogous materials but we do not believe that such a comparison is a sufficient reason for not imposing more protective storage and management standards on hazardous secondary materials.

Criterion #2: This proposed criterion requires that a hazardous secondary material provide a useful contribution to the process or the product. We believe that this is one of two criteria that are essential in distinguishing legitimate hazardous secondary material recycling from waste management (i.e., sham recycling).

The secondary material must contribute to the process or the product in a manner that is transparent, able to be demonstrated, and evident. However, we do not believe that the driving contributing aspect of the hazardous secondary material be the hazardous component of the material. It may be a nonhazardous component of the material that is of value to the process or product. One example is the plastic component of spent blast media used to manufacture composite lumber.

Of course, the ultimate disposition of the hazardous component of the hazardous secondary material should be evaluated. It may be removed during the recycling process or industrial process and appear in a residual that is subject to regulation under the CWA, CAA or RCRA. We do not believe that this is a scenario that should cause the recycling to be "sham." Conversely, the hazardous constituent(s) may appear in the end-product. This aspect of hazardous secondary material recycling is considered by criterion #4, "toxics along for the ride."

Criterion #3: This proposed criterion requires the recycling process to yield a valuable product or intermediate that is sold to a third party or used by the recycler or the generator as an effective substitute for a commercial product or as a useful ingredient in an industrial process.

This is the other criterion that is essential in distinguishing recycling from waste management and demonstrates that recycling is akin to manufacturing. Ohio EPA supports its use as a criterion to define legitimate recycling. Based on the plain dictionary meanings of "valuable," "product" and "intermediate," and the intent and explanation of the criterion given in the preamble, its purpose is clear in most regards. However, we believe the criterion insufficiently guards against a generator or recycler who uses his own end-product in order to make the product appear successful and hence, the recycling legitimate.

For example, a generator produces a hazardous secondary material that he uses as an ingredient to make a product. The secondary material is appropriately stored and managed, it is similar to a raw material normally used in the production process, it contributes a desirable characteristic to the product, and the levels of toxics in the product are similar to analogous products. Furthermore, the product meets applicable industry standards. However, sale of the product is quite limited due to color variation in the product and the recycler has difficulty producing the needed quantities of product of consistent color for large applications. The recycler is only able to sell 40% of the product that he produced in a year and continues production. The recycler uses the product himself to reduce his inventory and make the recycling appear more successful.

As written, this criterion does not require that the end-product of an industrial process, one that uses an intermediate derived from a hazardous secondary material or a hazardous secondary material as an ingredient, be a valuable product and sold to a third party. This criterion should be revised to clearly state this expectation. We suggest this criterion be revised as follows:

"The recycling process yields a valuable product or intermediate that is:
(i) Sold to a third party; or
(ii) Used by the recycler or the generator as an effective substitute for a commercial product or as a useful ingredient in an industrial process to yield a valuable product that is sold to a third party." (New language underlined)

Criterion #4: This criterion is commonly referred to as "toxics along for the ride." Its purpose is to discern when a hazardous constituent is possibly being discarded through recycling by appearing in the product at increased levels as compared with similar products. The relevance of this criterion to a demonstration that a recycling scenario is legitimate is vague and often conflicts with criterion #2, an essential criterion that distinguishes legitimate recycling from waste management. However, we still believe it's important for the criterion to be evaluated by the recycler.

When the evidence supporting criterion #2 is strong and it is clear that the hazardous secondary material or a component therein contributes to either the process or the product, the impact criterion #4 has on determining whether the recycling scenario is legitimate is reduced. However, when the evidence supporting criterion #2 is weak, criterion #4 can play a significant role in determining whether the recycling is legitimate. We believe it is appropriate and necessary to consider criterion #4 in conjunction with criterion #2.

Each of the criteria need to be as straight-forward and transparent as possible so that the recycler understands what is required from the criteria and to better ensure that each criterion will be implemented in a consistent manner. This criterion is the most unclear of the four. This is due to the use of the terms “significant” and “significantly” in the tests used to determine this criterion is met.

One test requires a comparison of the hazardous constituent levels in the recycled end-product to the levels of those same constituents also found in analogous products and that those constituents not be present at significantly elevated levels than the analogous product. We believe the term “significantly” should be defined using a “bright-line” approach with an option for the recycler to demonstrate no unexpected risk from the recycled end-product should the end-product contain hazardous constituent(s) at levels greater than the bright-line levels. However, this test should not be viewed as an evaluation or measure of overall product safety. Although there is no federal products liability law, forty-nine states have such laws in place.

A bright-line approach provides the recycler and the overseeing agency with a parameter that is clearer, able to be demonstrated and enforceable. The bright-line level should be set at one standard deviation above the highest concentration of each of the hazardous constituent(s) found in analogous products. We believe setting the parameter at such a level provides that the product does not contain expected hazardous constituents at highly unexpected levels. The bright-line approach also provides for ease of implementation of the test by the recycler and the overseeing agency.

As mentioned above, the test should also contain an option where the recycler can perform an evaluation of the product if it contains increased constituent levels greater than one standard deviation as compared to analogous products. The option should consist of a demonstration that includes evaluation of the uses of the end-product, routes of exposure during use and the bioavailability of the hazardous constituent(s) of concern during use of the end-product. The methods used in the evaluation need to be established and valid. If the presence of the constituent poses a risk during use, the recycler should label the product regarding the presence of the constituent. This option should also be used to define "significant" in the second test which pertains to end-products that contain hazardous constituents that are not contained in similar products.

In the preamble, U.S. EPA presents two hazardous secondary material recycling scenarios as examples of "toxics along for the ride" that may indicate discard of the hazardous constituent. Although it is not stated in the preamble, it is implied that the recycling is therefore, not legitimate. Ohio EPA does not agree with the implication that the presented recycling scenarios are not legitimate based on "toxics along for the ride." We would consider the contribution the hazardous secondary material (including a nonhazardous portion of the material) provides to the process or product and the use of the product. Because if the constituent of concern is bound in the product and it is not released, and the contribution of the secondary material to the product is evident, it does not matter that the constituent is present.

3. Section III (A)(8): What type of Notification would be required?

Ohio EPA supports the development of a notification requirement for all generators who recycle hazardous secondary materials that would otherwise be defined as hazardous wastes if disposed of. Notification of recycling to the overseeing agency is needed because of two equally important reasons: 1) to compile meaningful information regarding the recycling of hazardous secondary materials and 2) to ensure the legitimacy criteria and/or exclusion are being properly implemented by the generator and the recycler.

In addition to the notification information proposed in the rule, at the very least we believe that the generator should also provide the name and address of the recycler. We prefer that notification be required when the generator first uses the exclusion and that the generator re-notify the overseeing agency each time his address changes, he excludes a new hazardous secondary material or he changes his recycler. Re-notification is important in that it ensures that the information the overseeing agency maintains and compiles remains meaningful. The generator needs to submit the initial notice or re-notification to the overseeing agency within thirty days of commencing recycling or changing certain information.

From the enforcement aspect, the reason for the notification and re-notification is so that the overseeing agency knows who is excluding their hazardous secondary material through recycling so that the overseeing agency may evaluate the generator's and the recycler's use of the exclusion if it so chooses. This is to ensure that the generator is properly implementing the legitimacy criteria (and/or the proposed exclusion) in a manner that is consistent throughout the state. We believe that it is important to maintain consistency so that generators and recyclers do not gain a business advantage by improperly applying the legitimacy criteria

(and/or proposed exclusion).

One aspect of legitimate hazardous secondary material recycling that is unique from normal manufacturing is that the recycler often receives money to obtain his process inputs instead of having to purchase the inputs which is what occurs in normal manufacturing. The recycler may realize a monetary gain without producing or selling the product. Also, this aspect is one that can most entice a person to disregard the law and engage in sham recycling. Therefore, Ohio EPA believes that it is important for the overseeing agency to be aware of the recycling facilities in its state to further protect against recyclers engaging in sham recycling. This can be accomplished by having the generator, a third party, provide the name and address of his recycler.

Another important reason notification and re-notification are needed is so that U.S. EPA and the overseeing agencies can compile credible comprehensive information regarding the recycling of hazardous secondary materials and disseminate that information to the regulated community and the interested public. Currently, only sketchy information exists regarding the types and amounts of hazardous secondary materials being recycled and the valuable non-renewable resources regained and put back into productive use and commerce.

Also, the lack of information collection and dissemination may actually be impeding the public's understanding and acceptance of legitimate recycling. All too often, it is only the horror stories regarding recycling that are told. But, the overseeing agencies cannot present the whole picture and comment on the overall success of recycling because we do not receive the information needed to compile a comprehensive report. Furthermore, it is difficult to afford a change of attitude or opinion if one does not have information on which to support such a change.

The availability of comprehensive information would advertise the successes in recycling and promote the recycling of more secondary materials. The information could be used by industry to research and find uses for their hazardous secondary materials. Also, such information would be helpful to the public in improving their understanding of the ways hazardous secondary materials are being recycled, the methods used in recycling and the amount of resources that are being regained.

4. Section III (A): Exclusion for Hazardous Secondary Materials Generated and Reclaimed in a Continuous Process Within the Same Industry

As explained previously in our comments, Ohio EPA supports the development of a broad exclusion where hazardous secondary materials that are legitimately recycled are not defined as discarded and therefore, are not solid wastes. The exclusion needs to include criteria for the legitimate recycling of hazardous secondary material, notification requirements, a prohibition on speculative accumulation and financial assurance requirement for recyclers.

However, if U.S. EPA is compelled to revise the definition of "discard" to exclude hazardous secondary materials that are "reclaimed in a continuous process in the same generating industry," we offer the following comments on certain components of the proposed primary exclusion.

5. Section III (A)(4): Residuals from the Reclamation of Excluded Secondary Materials

Ohio EPA agrees that residuals generated from the reclamation of excluded hazardous secondary materials should be evaluated using the hazardous waste characteristics to determine if the material is a hazardous waste for the purposes of disposal or further legitimate recycling. However, we do not believe the ultimate use of a reclamation residual for energy recovery should negate the exclusion for the original hazardous secondary material destined for reclamation. One example is the use of distillation bottoms from the legitimate recovery of spent solvents to produce a fuel.

Residuals from the reclamation of excluded hazardous secondary materials that would otherwise be defined as a listed hazardous waste when disposed of should be subject to the hazardous waste rules only if they exhibit a hazardous waste characteristic. This approach is no different than the current approach applicable to residuals generated from the reclamation of characteristic by-products and sludges. If U.S. EPA believes that it's necessary to maintain regulatory authority over any of the reclamation residuals then it should craft specific listing descriptions for the residuals of concern.

U.S. EPA has a policy in place that voids the current recycling exclusion for characteristic by-products and sludges that are reclaimed if any component of the original secondary material is ultimately used in a manner constituting disposal or burned for energy recovery. However, if the residual is disposed of, the exclusion still applies. We understand that this same policy will apply to hazardous secondary materials excluded under this proposal. We believe that this policy needlessly penalizes the generator of the hazardous secondary material for doing the right thing and recycling his secondary material, it encourages the disposal of residuals that have value and further narrows any usefulness this exclusion might offer by recapturing secondary materials that are legitimately recycled. We encourage U.S. EPA to reconsider this policy with respect to reclamation residuals that are burned for energy recovery so that the proposed exclusion remains applicable to the original hazardous secondary material.

6. Section III (A)(4) What is Meant by a "Continuous Process within a Generating Industry?"

U.S. EPA co-proposed two options to establish the regulatory framework and thus, how recycling must be conducted in order to qualify for the exclusion. Ohio EPA supports Option #1 over Option #2.

The difference between Option #1 and #2 is that Option #2 prohibits the exclusion of secondary material when it is reclaimed within the same generating industry if the reclaimer also reclaims hazardous secondary material generated from companies outside his generating industry. U.S. EPA explains in the preamble discussion that Option #2 would establish a bright-line to distinguish facilities that are engaged in recycling that is eligible for the proposed exclusion, and facilities which could be considered to be engaged in commercial recycling.

However, such a distinction is neither necessary nor warranted because it already exists within the hazardous waste program. Under both proposed Options, facilities that store and reclaim secondary materials generated outside of their industry must have a hazardous waste storage permit. Therefore, the commercial recyclers will be distinguished by their permit. The "bright-line" is the permit. To further attempt to distinguish the intra-industry recyclers from the commercial recyclers does nothing to further protect the environment or prevent sham recycling. It does make the exclusion more complex with no added value.

We are aware that off-site commercial recyclers who do not store materials prior to recycling do not need to obtain a hazardous waste permit but we do not believe that many of these facilities exist. The standard of prohibiting storage without a permit prior to recycling is difficult to attain when receiving off-site materials. We are not aware of any recyclers using this approach in Ohio. Also, we do not have a regulation that allows for some minimum amount of time like 48 or 72 hours before storage begins.

U.S. EPA presented Option #2 as if it served a particular purpose by further delineating the commercial recyclers. But Option #2 does not impact the recycler that accepts hazardous secondary materials from outside his industry. Option #2 only penalizes the generator by rendering its hazardous secondary material ineligible for exclusion based on the business structure of the recycler.

7. Section III (A)(6): Considerations for Defining "Same Generating Industry"

U.S. EPA proposes that a hazardous secondary material that is generated and reclaimed within the same industry is not discarded. An industry is defined using the 4-digit NAICS code. As explained elsewhere in our comments, we support the development of a broad exclusion based on the use of legitimacy criteria to define "discard" that would not necessitate developing a regulatory definition for industry.

However, if U.S. EPA is compelled to use the NAICS code approach, Ohio EPA does not support the use of the 4-digit NAICS code to define industry. The approach is very complex due to the need to evaluate the processes used to produce the product verses those used in the recycling process to determine whether the facilities or processes truly belong to the same industry. This exercise will apply to both on-site and off-site recycling and will be very burdensome for the generator, recycler and overseeing agency to implement. Also, such a narrow definition of industry will do little to facilitate and promote recycling and it establishes an unequal exclusion between certain industries. We suggest that you use the 3 digit NAICS code and develop a mechanism by which a generator/recycler may obtain a variance from the definition of industry when the reclamation process would be defined as a separate industry.

During the comment period, we tried to review and understand the 4-digit NAICS system and anticipate how it will impact both on-site and off-site hazardous secondary material recycling. From what we understand, the 4-digit NAICS system classifies industries based on the processes used to produce the product. Therefore, the use of the 4-digit NAICS system will set in stone the boundaries that make up an industry and prohibit industries from evolving and incorporating additional new processes to further gain more of the wanted product or to reclaim used materials for further use to support the overall operations of the facility. We believe the use of the NAICS code to define industry will do very little to encourage and promote future recycling.

Provided below are general examples that we believe properly apply the NAICS system and demonstrate why its use will limit the amount of secondary materials that will be recycled.

In manufacturing, the most potential for recycling exists in reclaiming materials that support the production of products or that contribute to a portion of the process. Examples are, the use of hydrochloric acid in the pickling of steel or the use of a solvent as a drying agent in the manufacturing of a chemical product. However, under the 4-digit NAICS approach it is unlikely that the reclamation of materials used to support the manufacturing process or the production of product will be excluded due to the differences in the recycling process as compared to the processes used to define the particular industry.

For example, in the manufacture of steel, part of the process includes the pickling of steel. Spent pickle liquor (i.e., spent hydrochloric acid) is generated (waste code K062). This pickle liquor can be reclaimed using a spray roaster and then used again in the steel pickling process. The reclamation process also produces ferric oxide which is sold as a product for use in the production of magnets, ferrites and pigments.

Based on the 4-digit NAICS definition of steelmaking, spray roasting does not appear to be a process used to define steelmaking. Therefore, the roasting process would be defined as a separate establishment and a different industry. The exclusion would not apply to the spent pickle liquor. However, it is logical to view this processing of spent pickle liquor as an expansion of the steelmaking industry that supports the production of steel. This example shows how the use of the 4-digit NAICS system locks in the definition of an industry and does not allow the expansion of an industry by adding innovative and different technologies to maintain its production or support its operations.

Industries with the same 4-digit NAICS code will produce similar secondary materials from their processes. The greatest potential for reclamation exists with companies reclaiming secondary materials and reusing them in the production process. However, due to input specifications, the industry may not be able to reclaim the secondary material to a purity required for production. However, the material may be able to be reclaimed and used by another chemical production facility outside the generator's 4-digit NAICS code. The use of the 4-digit NAICS code will not promote this type of recycling but the 3-digit NAICS code would.

As proposed, the 4-digit NAICS approach to defining industry will apply to all industries except the petroleum and mineral processing industries. For those industries, the SIC code classification will still apply. The SIC system classifies industries based on products; the NAICS system focuses on processes used to produce the products. Therefore, the petroleum and mineral processing industries are not restricted from incorporating innovative technologies to reclaim their hazardous secondary materials. This approach establishes an inequitable exclusion between the industries defined using SIC codes and industries using the 4-digit NAICS code because the NAICS system is very narrow and is based on the type of processes used to produce a product to define an industry and the SIC system is based on the products produced.

Since the 3-digit NAICS code encompasses more processes, its use will reduce the burden of implementing a NAICS approach by reducing the extent of evaluation needed to discern the processes used at the generating and recycling facilities. Also, it provides companies with more of an opportunity to incorporate processes into their operations to reclaim hazardous secondary materials since the processes defining the industry under the 3-digit NAICS code are not as narrow as the 4-digit NAICS code.

Finally, a mechanism to provide a variance from the definition of industry is needed to accommodate those situations where a hazardous secondary material would still not be excluded under the 3-digit approach due to the recycling processes used but it should be due to the legitimacy of the recycling.

8. Section III (A)(6): Regulatory Option for On-site Recycling

Ohio EPA supports an exclusion for all hazardous secondary materials that are generated and legitimately reclaimed on-site. However, we do not support the application of the definition of industry (i.e., the use of the NAICS codes) to on-site recycling or a restriction that the generating and reclamation processes must be operated by the same person; the reclamation facility may be operated by a contractor and/or it may be located on a contiguous property. On-site recycling provides the generator the opportunity to maintain oversight and responsibility of the material, reduces his liabilities due to the transportation of secondary materials and reduces the need to purchase raw materials.

With the use of the NAICS code approach to define industry, we understand that it is possible for an on-site reclamation process to be defined as a different establishment and therefore, a different industry from the generating process. This would render the hazardous secondary material ineligible for exclusion. We believe that legitimate on-site reclamation should be eligible for exclusion regardless of whether the generating and reclamation processes are within the same industry. Companies should be able to legitimately recycle their hazardous secondary materials to further gain the material they produce or regain materials that are used to support their production processes (e.g., spent solvents, foundry sands or spent pickle liquor).

We attempted to compile information regarding the problems Ohio EPA has experienced with on-site recyclers. Unfortunately, there was no efficient way to sort for information specific to on-site recyclers due to the lack of notification required from recyclers and the manner in which enforcement information is entered and maintained in RCRAInfo. Through a manual review of enforcement cases and use of institutional knowledge to identify on-site recycling facilities, we pursued enforcement action against 10 facilities for violations related to the recycling of hazardous secondary materials since 1988. None of the violations appear to be the result of sham recycling or speculative accumulation.

Many argue that excluding hazardous secondary materials that are reclaimed on-site or otherwise excluded will increase the likelihood that U.S. EPA or the state will be responsible for the cleanup of manufacturing facilities that also engage in legitimate recycling should such facilities go bankrupt or be abandoned. Under RCRA, facilities that reclaim spent and listed hazardous wastes generated off-site are subject to financial assurance requirements and the burden of cleanup on the state is reduced should they go out of business or be abandoned. We understand these concerns. Ohio EPA strongly supports imposing financial assurance requirements on recyclers of hazardous secondary materials.

9. Section III (A)(7): How is EPA Proposing to Define "Continuous Process?"

In part, U.S. EPA proposes to define "continuous process" to include processes where hazardous secondary materials are not speculatively accumulated as defined in 40 CFR 261.1 and that are not managed by a broker or middleman in the course of reclamation. Ohio EPA supports the use of the current speculative accumulation provision to define continuous process and under a limited approach believes the use of brokers or middlemen should be allowed.

The speculative accumulation provision currently applies to the recycling of hazardous wastes and hazardous secondary materials. We encourage U.S. EPA to apply this same restriction to hazardous secondary materials reclaimed under this proposed exclusion. The current speculative accumulation provision is familiar and understood by both the overseeing agencies and the regulated community. Its use will promote programmatic consistency with regards to the recycling of hazardous secondary materials and hazardous wastes. Also, it will help to reduce the complexity of the proposed exclusion.

We believe that the one calendar year time frame and the amount of material that needs to be recycled as specified in the existing speculative accumulation provision are reasonable parameters and should apply to the exclusion. The time frame and the amount of material that must be recycled allows the recycler some flexibility should equipment need repaired or the process be taken down for scheduled maintenance. In addition, when a new recycler commences operation, just like with manufacturing facilities, the operator will need time to work "bugs" out of the system and to fine tune the process to get it operating optimally. Recyclers need this flexibility to deal with these occurrences.

We do not believe that the speculative accumulation provision needs to be expanded to include specific reporting requirements because of the requirements of 40 CFR 261.2 (f). According to 40 CFR 261.2 (f), the generator or owner/operator of a recycling facility is required to demonstrate that the recycled hazardous secondary material meets the conditions of the exclusion in an enforcement action. Enforcement actions include requests for information and inspections. Therefore, the overseeing agency already has the jurisdiction to request information pertaining to the recycling of hazardous secondary materials when necessary.

Finally, the proposed definition of continuous process prohibits the transfer of hazardous secondary material to a broker or other middleman on its way to being reclaimed. Ohio EPA supports the proposed prohibition only if the generator is unaware that his material is received and/or managed by a broker/middleman and then sent on to a particular recycler as excluded secondary material. The use of a broker/middleman should be part of the information provided by the generator on the notification to the overseeing agency. Brokers and middlemen would also be subject to the legitimacy criteria.

10. Section III (A)(9): What Conforming Changes to Existing Regulations Are Proposed?

Should Option #1 be adopted, U.S. EPA believes that the exclusion under 261.4(a)(8) is no longer needed and can be eliminated. Ohio EPA does not support eliminating this exclusion. We are not certain at this time that currently excluded secondary materials would remain excluded under the proposed exclusion. We believe there is a chance that some materials would be recaptured and subject to regulation under RCRA.

In the preamble discussion regarding on-site recycling, U.S. EPA explains that if the generating and reclaiming establishments are in different industries according to NAICS, even if the establishments are situated on the same site, the hazardous secondary material would not be excluded. Therefore, it is possible that materials previously excluded would be recaptured by RCRA and subject to regulation when legitimately recycled due to the way the NAICS approach is based on processes.

For now, if U.S. EPA chooses to revise the definition of solid waste using the NAICS approach, all existing exclusions should be maintained until the regulated community, recyclers and overseeing agencies become familiar with the approach and learn how the system actually will impact different industries.

11. Section III (A)(10) How Would the Proposal be Implemented and Enforced?

U.S. EPA proposes that storage units used to manage hazardous wastes, that are subsequently excluded under the proposed exclusion, are not subject to the hazardous waste closure requirements. Ohio EPA does not support this approach. We believe that any leaks, spills and other environmental damage from storage units and generator accumulation units should be cleaned up before such units are used to manage excluded materials. The closure should occur as soon as possible to remove contamination in order to avoid future problems from the movement of contamination.

With respect to a generator accumulation area, if a generator chooses not to close an accumulation area when it will no longer be used for the management of hazardous waste, any future contamination which occurs in that area may be attributed to the accumulation of hazardous waste. The longer a generator waits to close a hazardous waste accumulation area, the more complicated the closure may become due to the possibility of contamination spreading into, or out of the unit. Therefore, in the best interest of the generator, the accumulation unit should be closed as soon as possible when hazardous wastes are no longer managed in the area.

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