DEPARTMENT OF THE TREASURY
Office of the Secretary

Public Information Collection Requirements Submitted to OMB for Review

During the period March 17 through March 24, 1983 the Department of the Treasury submitted the following public information collection requirement(s) to OMB (listed by submitting bureaus), for review and clearance under the Paperwork Reduction Act of 1980, Pub. L. 95-651. Copies of these submissions may be obtained from the Treasury Department Clearance Officer, by calling (202) 395-2179. Comments regarding these information collections should be addressed to the OMB reviewer listed at the end of each bureau’s listing and to the Treasury Department Clearance Officer, Room 309, 1625 “I” Street, NW., Washington, D.C. 20220.

Internal Revenue Service
OMB Number: 1545-0338.
Form Number: Letter 11705C.
Title: Information Request for Group Exemption Letter.
OMB Number: N/A (new submission).
Form Number: Form CSC-10-261.
Title: Correspondence Review Followup Letter.
OMB Number: 1545-0317.
Form Number: Letter 266C.
Title: Exemption Form 4361, Ministers Waiver Disapproved.
OMB Number: N/A (new submission).
Form Number: 5498.
Title: Individual Retirement Arrangement Information.
OMB Number: 1545-0514.
Form Number: 4822.
Title: Statement of Annual Estimated Personal and Family Expenses.
OMB Number: 1545-0275.
Form Number: Letter 500-4-448.
Title: Involuntary Conversion Follow-up.
OMB Number: 1545-0364.
Form Number: Form 4669.
Title: Employee Wage Statement.
OMB Reviewer: Norman Frumkin.
Date: March 28, 1983.

Customs Service
OMB Number: 1515-0041.
Form Number: CF 6009-B and 6009-C.
Title: Customs Declaration.

Floyd Sendlin,
Chief, Information Resources Management Division
[IF Doc. 63-4660 Filed 4-1-83; 8:45 am]
BILLING CODE 4810-25-M

Debt Management Advisory Committee; Meeting

Notice is hereby given, pursuant to Section 10 of Pub. L. 92-463, that a meeting will be held at the U.S. Treasury Department in Washington, D.C. on April 26 and 27, 1983, of the following debt management advisory committee: Public Securities Association, U.S. Government and Federal Agencies Securities Committee.
The agenda for the Public Securities Association U.S. Government and Federal Agencies Securities Committee meeting provides for a working session on April 26 and the preparation of a written report to the Secretary of the Treasury on April 27, 1983.
Pursuant to the authority placed in Heads of Departments by section 10(d) of Pub. L. 92-463, and vested in me by Treasury Department Order 101-5, I hereby determine that this meeting is concerned with information exempt from disclosure under section 552b(c)(4) and (9)(A) of Title 5 of the United States Code, and that the public interest requires that such meetings be closed to the public.
My reasons for this determination are as follows. The Treasury Department requires frank and full advice from representatives of the financial community prior to making its final decision on major financing operations. Historically, this advice has been offered by debt management advisory committee established by the several major segments of the financial community, which committees have been utilized by the Department at meetings called by representatives of the Secretary. When so utilized, such a committee is recognized to be an advisory committee under Pub. L. 92-463. The advice provided consists of commercial and financial information given and received in confidence. As such debt management advisory committee activities concern matters which fall within the exemption covered by section 552b(c)(4) of Title 5 of the United States Code for matters which are "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

Although the Secretary’s final announcement of financing plans may or may not reflect the recommendations provided in reports of an advisory committee, premature disclosure of these reports would lead to significant financial speculation in the securities market. Thus, these meetings also fall within the exemption covered by 552b(c)(9)(A) of Title 5 of the United States Code.
The Assistant Secretary (Domestic Finance) shall be responsible for maintaining records of debt management advisory committee meetings and for providing annual reports setting forth a summary of committee activities and such other matters as may be informative to the public consistent with the policy of 5 U.S.C. 552b.
Dated: March 29, 1983.
Roger W. Mele,
Assistant Secretary (Domestic Finance).
[IF Doc. 63-4660 Filed 4-1-83; 8:45 am]
BILLING CODE 4810-25-M

Internal Revenue Service
Nonconventional Source Fuel Credit; Publication of Inflation Adjustment Factor and Reference Prices for Calendar Year 1982

AGENCY: Internal Revenue Service, Treasury.


SUMMARY: The inflation adjustment factor and reference prices are used in determining the availability of the tax credit for production of fuel from nonconventional sources under section 44D of the Internal Revenue Code.


FOR FURTHER INFORMATION CONTACT:

For the inflation factor— Dennis Cox, PM/PERR, Room 3144, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, D.C. 20224, Telephone Number (202) 662-5741 (not a toll-free number).

For the reference prices—Noel J. Sheehan, CC/CE, Room 5240, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, D.C.
SUPPLEMENTARY INFORMATION: The inflation adjustment factor for calendar year 1982 is 1.2876.

The reference price for qualified fuels other than gas from Devonian shale is $28.50 per barrel for the 1982 calendar year.

Because the above reference price does not exceed $23.50 multiplied by the inflation adjustment factor, the phaseout of credit provided for in section 44D(b)(1) of the Internal Revenue Code does not occur for any qualified fuel based on the above reference price.

For gas from Devonian shale, the reference price is $6.70 per MCF for the 1982 calendar year.

Because the above reference price exceeds $5.08 multiplied by the inflation adjustment factor, the phaseout of credit provided for in section 44D(b)(1) of the code is complete and for 1982 there is no credit for gas produced from Devonian shale.

Gerald G. Portney,
Associate Chief Counsel (Technical).

UNITED STATES INFORMATION AGENCY

United States Advisory Commission on Public Diplomacy; Meeting

A meeting of the U.S. Advisory Commission on Public Diplomacy will be held on Wednesday, April 13, 1983, in Room 600, 400 C Street, SW. From 9:45 a.m. to 12:00 the Commission will discuss the Voice of America's programming policies and proposed enhancement of its technical facilities. At 2:00 p.m., the Commission will meet with the U.S. Information Agency's Chief Inspector and then with the Director of USIA's Television Service to discuss program policies.

Mary Jane Winnett,
Management Analyst.
Sunshine Act Meetings

This section of the FEDERAL REGISTER contains notices of meetings published under the “Government in the Sunshine Act” (Pub. L. 94–409) 5 U.S.C. 552b(e)(3).

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1

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DATE AND TIME: Tuesday, April 5, 1983, 9:30 a.m. (eastern time).

PLACE: Commission Conference Room 200, second floor, Columbus Plaza Office Building, 2401 E Street NW, Washington, DC 20506.

STATUS: Part will be open to the public and part will be closed to the public.

MATTERS TO BE CONSIDERED:

1. Ratification of Notation Vote(s);
3. Freedom of Information Act Appeal No. 83-1-FOIA-6-BA, concerning a request for documents contained in a closed age
5. Limited Scope Commissioner Charges.

Closed:

1. Litigation Authorization; General
2. CPCCP’s Proposed Final Rules.

Note.—Any matter not discussed or concluded may be carried over to a later meeting. In addition to publishing notices on EEOC Commission meetings in the Federal Register, the Commission also provides recorded announcements a full week in advance on future Commission sessions. Please telephone (202) 634–6746 at all times for information on these meetings.

CONTACT PERSON FOR MORE INFORMATION: Treva McCall, Executive Secretary to the Commission at (202) 634–6746.

Issued: March 29, 1983.

[83–456–1 Filed 3–31–83; 10:49 am]
BILLING CODE 6712–01–M

2

FEDERAL COMMUNICATIONS COMMISSION

Deletion of Agenda Item From March 31st Open Meeting.

March 29, 1983.

The following item has been deleted from the list of agenda items scheduled for consideration at the March 31, 1983, Open Meeting and previously listed in the Commission’s Notice of March 14, 1983.

Video—1—Title: Cablevision of Chicago’s notification of aeronautical frequency usage pursuant to § 76.810 of the
Commission’s Rules. Summary: The Commission will consider whether to issue a Notice of Apparent Liability for forfeiture against Cablevision of Chicago for its use of aeronautical frequencies without authorization.

Issued: March 29, 1983.

William J. Tricarico,
Secretary, Federal Communications Commission.

Closed (Pursuant to 5 U.S.C.

[8–463–83 Filed 3–31–83; 2:00 pm]
BILLING CODE 6712–01–M

3

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

March 29, 1983.

TIME AND DATE: 2:30 p.m. Tuesday, March 28, 1983.

PLACE: Room 600, 1730 K Street NW, Washington, D.C.

STATUS: Closed (Pursuant to 5 U.S.C. 552(c)(10)).

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following:


It was determined by a majority vote of Commissioners that Commission business required that a closed meeting be held on this item and that no earlier announcement of the meeting was possible.

CONTACT PERSON FOR MORE INFORMATION: Jean Ellen (202) 653–5632.

BILLING CODE 6735–02–M

4

INTERNATIONAL TRADE COMMISSION

TIME AND DATE: 10 a.m., Wednesday, April 13, 1983.

PLACE: Room 117, 701 E Street, NW., Washington, D.C. 20438.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agenda.
2. Minutes.
3. Raffications.
4. Petitions and complaints, if necessary:
   a. Certain rotary wheel printers (Docket No. 924).
   b. Any items left over from previous agenda

CONTACT PERSON FOR MORE INFORMATION: Kenneth R. Mason, Secretary (202) 523–0161.

BILLING CODE 7020–01–M

5

MISSISSIPPI RIVER COMMISSION

TIME AND DATE: Beginning 1:00 p.m. and adjourning 4:30 p.m., April 25, 1983.

PLACE: 1400 Walnut Street, Vicksburg, Mississippi.

STATUS: Open to the public for observation but not for participation.

MATTERS TO BE CONSIDERED: The Commission will consider the West Memphis, AR, and Vicinity Feasibility Report and Environmental Assessment.

CONTACT PERSON FOR MORE INFORMATION: Mr. Rodger D. Harris; telephone 601–634–5766.

[5–460–83 Filed 3–30–83; 4:19 pm]
BILLING CODE 3710–02–G

6

NATIONAL COMMISSION ON STUDENT FINANCIAL ASSISTANCE

Notice of Public Hearing

DATE: April 4, 1983.

PLACE: Room 311, Cannon House Office Building, Washington DC.

TIME: 10 a.m. to 5 p.m.

PURPOSE: To hear testimony on the real cost of the Guaranteed Student Loan Program. Specifically, the witnesses will comment on a report contracted by the Commission to Touche Ross & Co.
FOR FURTHER INFORMATION CONTACT:
Donna M. Lumia, Hearing Coordinator
(202) 724-2914.
Submitted the 18th day of March, 1983.
Richard T. Jerue,
Chief Executive Officer.
[S-461-83 Filed 3-31-83; 4:19 pm]
BILLING CODE 6620-00-M

STATUS: Closed meeting.
PLACE: 450 5th Street NW., Washington,
D.C.
DATE PREVIOUSLY ANNOUNCED: Friday,
March 18, 1983.
CHANGES IN THE MEETING: Additional
items. The following additional items
will be considered at a closed meeting
scheduled for Wednesday, March 30,
1983, at 10 a.m.
Report to Congress:
Access to investigative files by Federal,
State, or self-regulatory authorities.

Chairman Shad and Commissioners
Evans, Longstreth and Treadway
determined that Commission business
required the above changes and that no
earlier notice thereof was possible.
At times changes in Commission
priorities require alterations in the
scheduling of meeting items. For further
information and to ascertain what, if
any matters have been added, deleted or
postponed, please contact Steve Boehm
at (202) 272-2467.
March 29, 1983.
[S-460-83 filed 3-31-83; 10:49 am]
BILLING CODE 8010-01-M
Environmental Protection Agency

Hazardous Waste Management System; Proposed Rule

Part II

Federal Register

Monday, April 4, 1983
ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 260, 261, 264, 265, and 266

[SWH-FRL 2116-3]

Hazardous Waste Management System: General; Identification and Listing of Hazardous Waste; Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities; Interim Status Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities; and Standards for the Management of Specific Wastes and Management Standards for Specific Types of Facilities

AGENCY: Environmental Protection Agency.

ACTION: Proposed Rule and Request for Comment.

SUMMARY: On May 19, 1980, as part of its final and interim final regulations implementing Section 3001 of the Resource Conservation and Recovery Act of 1976 (RCRA), the U.S. Environmental Protection Agency (EPA) promulgated a definition of solid waste which, among other things, specifies the materials that are solid wastes when recycled. The Agency is today proposing to amend this definition in response to public comments. The proposed amendment will target the regulations more directly at those hazardous waste recycling operations which the Agency believes pose environmental and human health concerns.

In addition, the Agency is proposing general management standards for persons managing recycled hazardous waste and, in some cases, is tailoring the management standards for specific wastes and specific types of facilities or activities. The effect of these changes will be to encourage recycling of hazardous wastes while at the same time protecting human health and the environment from the improper management of recycled hazardous wastes.

DATES: EPA will accept public comments on this proposed amendment until August 2, 1983.

ADDRESSES: Comments on this proposal are welcome and may be mailed to the Docket Clerk, Office of Solid Waste (WH-562), U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460. Communications should identify the regulatory docket number “Section 3001/Definition of Solid Waste.” The official record for this rule making is located in Room S-269C, U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460 and is available for viewing from 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding holidays.

HEARINGS: Three public hearings—one in Washington, D.C., one in Chicago, Illinois, and one in San Francisco, California—will be held on this proposal. The schedule and location for the hearings are as follows:

June 16, 1983—Department of Health and Human Services, Auditorium, 230 Independence Avenue, S.W., Washington, D.C.


June 23, 1983—Golden Gate University, Auditorium—2nd floor, 536 Mission Street, San Francisco, California.

The hearings will be held in each location between 9:00 a.m. and 4:00 p.m. unless concluded earlier, with registration at 8:30 a.m. Anyone wishing to make an oral statement at the hearing should notify, in writing: Mrs. Geraldine Wyer, Office of Solid Waste (WH-562), U.S. EPA, 401 M Street, S.W., Washington, D.C. 20460. Please indicate at which hearing (location) you wish to make your oral statement. You must restrict your oral statement to ten minutes and should have written copies of your complete comments for inclusion in the official record. You may also submit your written comments at the public hearings.

FOR FURTHER INFORMATION CONTACT: RCRA Hotline, toll free, at (800) 424-9393 or at (202) 382-9000. For technical information, contact Matthew A. Straus, Office of Solid Waste (WH-562), U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460.

SUPPLEMENTARY INFORMATION:

Outline

Part I. Determining Which Materials Are Hazardous Wastes When Recycled

I. EPA has authority under RCRA to regulate hazardous wastes that are recycled

II. The Agency's strategy in exercising its authority over hazardous wastes that are recycled

III. The Agency's existing definition of solid waste

IV. The proposed amendment to the definition of solid waste

A. Changes in Overall Approach Between the Proposed and the Existing Definitions

B. An Overview of the Proposed Definition

1. Materials That Are Solid Wastes

2. Materials That Are Not Solid Wastes

3. Exemptions for Certain Recycling Activities

C. The Agency's Decision to Reject a Standard Based on the Value of the Recycled Material

D. Materials Burned to Recover Energy

E. New definitions relating to burning of hazardous waste

VI. Discussion of specific provisions of the revised definition of solid waste

A. Proposed §261.1(b); Purpose and Scope

B. Proposed § 261.2(a)(1)

C. Proposed § 261.2(a)(2)(i): Wastes That Are Used in a Manner Constitutionally Disposal

D. Proposed §§ 261.2(a)(2)(ii) and 261.6(b)(3)(v): Wastes That Are Burned to Recover Energy, Are Used to Produce Fuels, or Are Contained in Fuels

E. Proposed §§ 261.2(a)(2)(iii), 261.2(c)(1), and 261.6(b)(1)(i) and (ii): Wastes That Are Reclaimed

   1. The Proposed Provisions

   2. The Meaning of "Reclamation"

   3. The Distinction Between "Use" and "Reclamation"

   4. Exception for Materials Reclaimed at the Plant Site and Returned to the Original Manufacturing Process

   5. The Status of Reclaimed Products

F. Proposed §§ 261.2(a)(2)(iv) and 261.2(c)(2): Wastes That Are Accumulated Speculatively

G. Proposed §§ 261.2(a)(2)(v) and 261.2(c)(3): Materials That Accumulate Without Sufficient Amounts Being Used, Reused, or Reclaimed

H. Proposed §261.2(a)(3): Spent Materials, Stages, and By-products To Be Listed As Solid Wastes

I. Proposed §261.2(d): Record-keeping Provisions

Part II: Standards for Managing Hazardous Wastes That Are Recycled

I. The Agency's existing standards for managing hazardous wastes that are recycled and the Agency's rationale for the proposed revisions

II. An overview of the proposed regulations

III. Discussion of specific provisions of the proposed regulation

A. Proposed §261.2(a): Regulated Recyclable Materials

B. Proposed §261.2(b): Exemptions

1. Proposed §§261.6(b)(1)(i) and (ii), and 261.6(b)(2): Hazardous Wastes Reclaimed by the Person Who Generates Them, or Reclaimed by a Person Other Than the Generator for That Person's Subsequent Use

2. Proposed §261.6(b)(1)(iii): Exemption of Regulated Recyclable Materials Used for Precious Metal Recovery


4. Proposed §261.6(b)(1)(v): Temporary Exemption of Regulated Recyclable Materials Being Burned as Fuels, Being Used to Produce Fuels, or That Are Contained in Fuels
Part VI.

V.

III.

I. Regulatory impact

IV. Standards applicable to the various uses of recycled materials. This term refers generally to using, reusing, or reclaiming a waste. It is not the same as the term "recycling," which is used to describe the process of converting waste into something useful. The term "recycled" is used to describe materials that have been previously used and are now being reprocessed. When improperly managed, such wastes have caused many damage incidents. In conjunction with other parts of the statute and with the legislative history, it is clear that Congress intended these wastes to be regulated under the Subtitle C regulations for hazardous waste. The interim final rules published on May 19, 1980, attempted to meet both of these objectives (see 40 CFR 261.2 and 261.6). However, the Agency now believes that this attempt was not completely successful and, accordingly, is proposing the revision described in this preamble.

Part I:

• Summarizes the Agency’s legal authority to regulate recycled materials as hazardous wastes under Subtitle C;

• Explains why we are exercising this authority;

• Discusses the existing regulations and the reasons for amending it; and

• Describes the proposed definition, first generally, and then provision by provision. The new definition defines which materials are hazardous wastes when recycled—and the types of recycling activities deemed to constitute hazardous waste management. This part of the preamble also explains which hazardous waste recycling activities are subject to regulation, and which are exempt.

Part II:

• Explains the reorganized and revised management standards for persons managing recycled hazardous wastes.

Part III:

• Discusses the proposal’s projected regulatory impact;

• Explains why the proposal does not constitute a major rule under Executive Order 12291; and

• Explains our compliance with the Regulatory Flexibility Act and the Paperwork Reduction Act.

Part I: Determining Which Materials Are Hazardous Wastes When Recycled

I. EPA Has Authority Under RCRA To Regulate Hazardous Wastes That Are Recycled

Because no material can be a “hazardous waste” without first being a “solid waste” (Section 1004(5)), a definition of solid waste is the necessary starting point for the hazardous waste management system. Solid waste is defined in Section 1004(27) of RCRA as:

any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities.

This definition does not explicitly state that a material being recycled (or destined for recycling) is a solid waste and, if hazardous, a hazardous waste. However, reading the definition in conjunction with other parts of the statute and with the legislative history (as well as with subsequent expressions of congressional intent) makes it clear that Congress indeed intended that materials being recycled or held for recycling can be wastes and, if hazardous, hazardous wastes.

In this regard, the many statutory definitions dealing with resource recovery are particularly significant. These indicate unequivocally that recycling involves reclaiming material or energy from “solid waste,” demonstrating that a material being recycled can be a solid waste within the meaning of Section 1004(27). In addition to this express statutory language, there is already a body of judicial precedent that upholds RCRA hazardous waste jurisdiction over persons engaged in recycling activities (including seventeen cases to date where courts have exercised jurisdiction in actions instituted under Section 7003 of RCRA against recycling facilities).

Not only can materials destined for recycling or being recycled be solid and hazardous wastes, but the Agency clearly has the authority to regulate recycling activities as hazardous management. EPA possesses the authority to regulate under Subtitle C the storage, treatment, and disposal of hazardous waste. Hazardous waste recycling and ancillary activities are within the statutory meanings of these terms. RCRA’s legislative history likewise shows that Congress specifically intended Subtitle C regulations to control unsafe recycling of hazardous waste. In any case, it would make little sense to allow that recycled materials can be hazardous wastes under RCRA (as shown in the paragraph above) but then to deny that Congress intended these wastes to be regulated under the Subtitle C regulations.

These points are developed fully in Appendix A to this preamble. We have concluded that recycled materials can be hazardous wastes under RCRA and can be regulated under the Subtitle C regulations. This conclusion fully agrees with the statute’s paramount policy objective: to control the management of hazardous waste from its generation to its final disposition.

II. The Agency’s Strategy in Exercising its Authority Over Hazardous Wastes That are Recycled

To determine that recycled materials can be solid and hazardous wastes does not answer the question of precisely which materials are wastes. Sections IV., V., and VI. of the preamble explain our views as to the extent of our authority. Nor does it answer how we are to exercise our authority. We explain in this section the general considerations that shaped our thinking on this question. We also go on to refute the argument that hazardous wastes that are recycled do not require any regulation because they are inherently valuable and do not pose significant environmental risks.
The Agency is convinced that there is a compelling need to exercise the authority granted Congress. The paramount policy objective of RCRA is to control the management of hazardous waste from point of generation to point of final disposition. Further, wastes destined for recycling can present the same potential for harm as wastes destined for treatment and disposal (see the preamble to Part 261, 46 FR at 33091, May 19, 1980). That is, in many cases, the risk associated with transporting and storing wastes is unlikely to vary whether the waste is ultimately recycled, treated, or disposed of. Similarly, using or reusing wastes by placing them directly on the land or by burning them for energy recovery may present the same sorts of hazards as actually incinerating or disposing of them.

This is not to say that hazardous waste recycling always must be regulated in the same way as other types of hazardous waste management. There are certain types of hazardous waste recycling that pose diminished environmental risks, for example, where recycled wastes—because they are valuable—are dealt with much like raw materials.

The Agency also acknowledges the strong statutory policy to encourage recycling, and believes this policy applies even when hazardous wastes are involved. This is especially true when a recycling activity provides a reduced potential for harm. In these situations, the Agency is proposing not to regulate particular recycling activities, but to conditionally exempt those recycling activities where existing commercial or marketing incentives appear sufficient to protect against substantial environmental harm. (We explain specifically how we are doing this in sections IV and VI of this part of the preamble.) In this way, we avoid regulations that could discourage recycling without significantly increasing overall environmental protection. At the same time, we believe these proposed regulations fulfill the overriding statutory mandate to regulate hazardous waste management as may be necessary to protect human health and the environment.

Some recycling activities pose a much greater potential for harm than others, and we are proposing regulations, or are developing regulatory controls, to guard against these. There are three such activities: (1) Those where wastes are recycled in a manner analogous to disposal or incineration; (2) those where wastes are overaccumulated before recycling; and (3) those where recyclers cannot guarantee an end market for their recycled materials—specifically where wastes are regenerated or recovered (reversals). If we did not generate the reclaimed material and are not themselves going to use it the proposed regulations, for the most part, are targeted at these activities.

Some commenters, however, question whether the Agency should regulate any form of hazardous waste recycling. They maintain that recycled wastes are inherently valuable because they are not being thrown away, and so will not be mishandled. This argument goes much too far. In fact, recycling operations account for some of the most notorious hazardous waste damage incidents—including nearly one-third of the 61 imminent hazard actions filed to date under Section 7003 of RCRA, and 20 of the first 160 interim priority sites listed under the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund). Appendix B to this preamble summarizes the damage incidents known to the agency involving recycling of hazardous wastes, briefly describing the recycling operations, the types of wastes being recycled, and the types of contamination caused. It is important to note that these incidents did not involve sham operators who merely held themselves out as recyclers but in reality disposed of an intended to dispose of the waste received. Rather, Operators of these damage sites engaged in some recycling and meant to recycle the wastes they received.

Facilities that recycle hazardous wastes have caused serious health and environmental problems by directly placing the wastes on the land and by burning the wastes as fuels or burning waste-derived fuels. Improper storage, overaccumulation of inventory, and unsafe transport before recycling have also been recurring problems where the facilities are independent reclaimers—i.e., reclaimers who do not generate the waste and do not use the reclaimed material. 1 The resulting damages include contamination of soil, ground water, surface water, and air. In the case of indiscriminate storage of incompatible wastes (such as oxidizers and flammables, or acids and cyanides) before recycling, fires and explosions have also been a recurring circumstance. In addition, since many of these recyclers have failed to label or otherwise document their incoming materials, later cleanup efforts have been extremely difficult.

A number of these recyclers are located in metropolitan areas, resulting in a risk of immediate exposure to large numbers of people if wastes are mismanaged. Damage incidents caused by independent recycling facilities in Cleveland and Hamilton, Ohio; Gary, Indiana; and Columbia, South Carolina are examples of the Agency’s concern. 2 Perhaps the archetypal damage case involving an independent hazardous waste recycler is the incident involving the Chem-Dyne Corporation. Located in Hamilton, Ohio, Chem-Dyne was in the business of obtaining organic wastes and blending them to form “Chem-Fuel”, a fuel substitute. Chem-Dyne also engaged in waste reclamation. The company overaccumulated huge amounts of these materials. The site constituted a dangerous fire hazard due to the improper storage of flammable organic materials, and there were in fact a number of fires at the plant. In addition, many of the accumulated drums leaked excessively. As a result, some of the chemical wastes present (including benzene, 1,2-dichloroethane, trichloroethane, and other toxic and carcinogenic wastes) contaminated both surrounding soil and the groundwater. Volatilizing toxicants have polluted the air. Surface cleanup costs are estimated at $3.5 million; ground water cleanup costs have not yet been estimated. The company is in receivership.

The cleanup costs for other incidents also are very high. Although reliable cost estimates are not yet generally available for most of the sites, costs at a number of sites already have proven considerable: $30 million for cleanup of the Seymour site; over $1 million at the Midco site for surface cleanup, with an unknown amount needed to complete the cleanup; $29.1 million to date at the Silresim site; and $1.7 million to date at the Ottati and Coss/Great Lakes Container Corp. sites. At the Laskin Greenhouse site, approximately $1.7 million has already been spent; additional work is anticipated. Most of

1 The sources for these damage incidents are found in appendix B unless otherwise noted. In addition, certain statements are taken from allegations in the government’s verified complaints in RCRA Section 7003 actions. The agency recognizes that the courts must decide ultimately whether these allegations have been proved and we stress that in citing these allegations we are not seeking in any way to prejudice the outcome of those actions. At the same time, these allegations are based upon the Agency’s investigations of the sites in question, and the agency believes them to be factually accurate. In any case, we are citing these allegations to demonstrate that there is a need for regulations in this area, not to exhaust the potential liability of particular facilities.

the recyclers involved in these incidents are either bankrupt or have insufficient funds to meet cleanup expenses.

We consequently have determined that some exercise of our authority is necessary to protect human health and the environment. Before explaining how we are proposing to craft these standards, however, we discuss briefly the Agency's current regulations defining which recycled materials are solid wastes, and how these materials are to be regulated.

III. The Agency's Existing Definition of Solid Waste

The key feature of the existing definition of solid waste states that certain materials are always solid wastes, irrespective of whether they are disposed of or are destined for recycling. These materials are garbage, refuse, sludge, materials that have served their original intended use and "sometimes (are) discarded," and manufacturing or mining by-products that "sometimes (are) discarded." (See 40 CFR 261.2 (a) and (b); see also the preamble to Part 261, 45 FR, at 33093, May 19, 1980.)

Thus, the existing regulations establish broad jurisdiction over recycled materials and recycling operations, although this is tempered by regulating quite narrowly (see 40 CFR 261.6). There are several problems with this approach.

First, materials within the terms of the existing definition are considered to be solid waste, even if they are being recycled in a manner not ordinarily thought of as disposal. For example, bottom ash from utility boilers (a by-product) being used as an ingredient in concrete is considered to be a solid waste because it is "sometimes discarded." A sludge used similarly also would be a waste because all sludges are defined without exception as solid wastes.

Second, the "sometimes discarded" test sweeps many product-like materials into the solid waste net—unless the material is never thrown away.

Although the Agency never intended to call these "legitimate by-products" solid wastes, a zealous but literal reading of the regulation yields this result.

Some critics took this point even further; since all materials are eventually thrown away, everything is "sometimes discarded" and potentially a solid waste. Another criticism was that under this standard generators may have to find out how all other generators are managing the same material—an often difficult or even impossible undertaking.

Commenters also argued against regulating materials that are reused or reclaimed by their generator. The generator, they argued, can ensure that such materials are handled safely, because he will have a definite plan to use the materials productively, and can control their disposition. Unrelated parties, by contrast, cannot guarantee a final use or disposition for their reclaimed materials (such as a buyer for their reclaimed solvents) and so are more prone to overaccumulate or mishandle the wastes they take in. This argument finds empirical support in the damage cases, since most known incidents were caused by independent recyclers who accepted secondary materials for reuse or reclamation, rather than by generators accumulating secondary materials for their own reuse (although generators remain capable of overaccumulating these materials).

The Agency was aware of a number of these problems when it adopted the May 19 definition. To mitigate them, we regulated quite narrowly. (See 45 FR at 33094.) Under 40 CFR 261.6, persons engaging in recycling operations are subject to regulation as hazardous waste generators, transporters, or storage facilities only if they are handling a hazardous sludge or a material listed as hazardous in 40 CFR 261.31 or 261.32.

At the time of promulgation, the Agency believed that all such materials were regulated as such, since most known incidents were caused by independent recyclers who accepted secondary materials. The rule therefore applied to all recyclers who accepted secondary materials for their own reuse or reclamation—perhaps most fundamental—their transportation and recycling activities—that pose a significant potential for environmental harm. The principal example is recycling, their transportation and storage of recyclable materials, and their final use or disposition for their reclamation where this activity is conducted by the generator of the waste.

The proposed amendment would make several important changes in the definition or solid waste. First—and perhaps most fundamental—the amended definition would no longer base a material's status as solid waste on whether it is "sometimes discarded." Instead, a recycled material's regulatory status would depend upon both what the material is and how it actually is managed—and the status could vary with the means of recycling. For example, and electroplating wastewater treatment sludge used as an ingredient in a manufacturing process would not be a solid waste, whereas the same sludge being applied directly to the land for land reclamation would be. This change in regulatory approach meets one of the chief criticisms raised in the comments.

Second, we have tailored the accompanying management standards so as to regulate only those recycling activities—or those particular aspects of recycling activities—that pose a significant potential for environmental harm. The principal example is reclamation where this activity is conducted by the generator of the waste. We consequently have determined that some exercise of our authority is necessary to protect human health and the environment. Before explaining how we are proposing to craft these standards, however, we discuss briefly the Agency's current regulations defining which recycled materials are solid wastes, and how these materials are to be regulated.

IV. The proposed Amendment to the Definition of Solid Waste

A. Changes in Overall Approach Between the Proposed and the Existing Definitions

The proposed amendment would make several important changes in the definition or solid waste. First—and perhaps most fundamental—the amended definition would no longer base a material's status as solid waste on whether it is "sometimes discarded." Instead, a recycled material's regulatory status would depend upon both what the material is and how it actually is managed—and the status could vary with the means of recycling. For example, and electroplating wastewater treatment sludge used as an ingredient in a manufacturing process would not be a solid waste, whereas the same sludge being applied directly to the land for land reclamation would be. This change in regulatory approach meets one of the chief criticisms raised in the comments.

Second, we have tailored the accompanying management standards so as to regulate only those recycling activities—or those particular aspects of recycling activities—that pose a significant potential for environmental harm. The principal example is reclamation where this activity is conducted by the generator of the waste.

The Agency has been assisted greatly in its efforts by petitioners and their counsel in settlement negotiations in Shell Oil v. EPA (D.C. Cir. No. 80-1532) (litigation challenging EPA's May 14, 1990, hazardous waste regulations). Factual material obtained during settlement discussions has been placed in the public docket. The Regulation itself does not speak of "generators" because it applies to "persons" not merely to individual sites. "Person" is defined in 40
investigating alternative approaches, and solicits
person for that person's own subsequent use.)
facilities comply with all federal, State, interstate,
enunciates a strong Congressional policy that
hazardous waste management conducted by federal
exemption of federal agencies because they are
requirements respecting hazardous waste
the provision conditionally exempting from
purposes of this regulation. Conversely, an entity
structure but multiple sites is a single person for
one must know both what it is and how
feasible recycling market) exists.
that are potentially recyclable, but for
speculative accumulation; this activity involves
waste, or by a person who subsequently
one year without 75% being recycled
during that time.
These categories then are divided
further according to the type of waste
involved—spent materials, sludges, by-
products, or commercial chemical
"Spent materials" (proposed
§ 261.2(b)(1)) are materials that have
been used and are no longer fit for use
without being regenerated, reclaimed, or
otherwise re-processed. Examples are
spent solvents, spent activated carbon,
spent catalysts, and spent acids.*
"Sludges" are defined in RCRA and
the implementing regulations as residues
from pollution-control processes. (See
RCRA Section 1004(26A) and 40 CFR
§ 260.10.) The statute further indicates that sludges include not only these
materials but "other such waste having
similar characteristics and effects." The
Agency interprets this language as
covering pollution-control residues other
than those types listed specifically in the
statutory definition.
"By-products" are defined essentially
the same way as in the existing
definition to encompass those residual
materials resulting from industrial,
commercial, mining, and agricultural
operations that are not primary products
and not produced separately (proposed
§ 261.2(b)(3)). As used in the
definition, the term is a catch-all, and includes
most wastes that are not spent materials
or sludges. Examples are process
residues from manufacturing or mining
processes, such as distillation column
residues or mining slags.
"Commercial chemical products" are
the commercial chemical products and intermediates, off-specification
varieties, spill residues, and container residues
listed in 40 CFR 261.33. As explained
more fully below in Section VI. A. and B.
in this part of the preamble, although
these materials ordinarily are not
wastes when recycled (see 45 FR at
78540-541, November 25, 1980), we are
proposing to include them as wastes
when they are recycled in ways that
differ from their normal use.
One difficulty in characterizing these
types of waste is that certain sludges and by-products are more product-like
than waste-like. Examples are
hydrofluorosilicic acid from
manufacture of phosphoric acid (a
sludge commonly used to fluoridate
drinking water), by-product turpentine
from paper manufacture, and various
by-product metals from primary copper
manufacture. These product-like sludges and by-products are potentially subject
to regulation under the implementation
provision in the definition because they
cannot be put to direct use but first must be regenerated or recovered. Similarly,
certain commercial fuels that technically
are by-products remain potentially
subject to regulation under the
definition's burning-as-fuel provision.
The Agency so far has been unable to
devises a narrative standard that
convincingly distinguishes between
reclamation of product-like and waste-
lke sludges and by-products, or a
standard that adequately distinguishes
between legitimate by-product and
waste by-product fuels. 7 To solve this
dilemma, the Agency has structured the
regulation so that not all sludges and by-
products are wastes when reclaimed,
and not all by-products are wastes when
burned as fuels or used to produce fuels.
Rather, we will list those sludges and
by-products that are solid wastes when
reclaimed, and those by-products that
are solid wastes when burned as fuels
or used to produce fuels. That list, at
least for the time being, will be co-
extensive with the hazardous sludges
and by-products listed in 40 CFR 261.31
and 261.32 of the regulations. The
Agency has examined each of these
materials, and is convinced that they
typically are wastes when reclaimed or
when burned as fuels (see the preamble
to Part 261, 45 FR at 33094, May 19,
1980).
Putting all of this together, spent
materials, sludges, by-products, and
commercial chemical products are
considered to be solid wastes when they
are recycled in any one of the following
ways:
(1) Used or reused in a manner
constituting disposal via direct
placement onto the land; this
provision applies to all spent materials, sludges,
and by-products. It also applies to

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*The problem is to distinguish between materials of a residual character that habitually have been
disposed of and secondary materials that the
industrial community ordinarily uses as
commodities in commerce. Any regulation using
this type of standard, however, is probably too
judgmental to be generally applicable. Further, as
noted already, a standard based upon whether
secondary materials are put to direct commercial
use also is unlikely to work, because most materials
must be processed or reclaimed before use.
However, the Agency solicits comments as to an
appropriate narrative standard. We request
specifically that comments address what a possible
standard which would indicate that secondary
materials are wastes when (i) they contain
significant levels of non-recyclable toxic
constituents, and (ii) they are not
customarily found in raw materials or products for
which the secondary materials are used as
substitutes.
commercial chemical products (and related materials) applied to the land in lieu of their intended use;
(2) Burned for energy recovery (including when burned by a component of a waste-derived fuel), or used to produce a fuel; this provision applies to all spent materials, sludges, and by-products. It also applies to commercial chemical products (and related materials) burned as fuels in lieu of their intended use;
(3) Reclaimed; this provision applies to all spent materials, and to the sludges and by-products that are listed in 40 CFR 261.31 or 261.32.
(4) Accumulated for recycling without a specific market existing for the material (speculative accumulation); this provision applies to all spent materials, sludges, and by-products; and
(5) Accumulated for recycling without sufficient amounts being recycled; this provision also applies to all spent materials, sludges, and by-products.
2. Materials That Are Not Solid Wastes. Not all recycling activities potentially involve waste management. The definition excludes from the concept of reclamation three activities involving direct use or reuse of secondary materials. These activities ordinarily will not be considered to involve waste management. In addition, we state specifically that one type of reclamation operation is an activity outside the Agency's jurisdiction over recycling. These activities are:
(1) Using or reusing secondary materials as ingredients or feedstocks in production processes. Examples are using fly ash as a constituent in cement, or using distillation bottoms from carbon tetrachloride manufacture as a feedstock in producing tetrachloroethylene. The Agency is convinced that in these and similar circumstances, the recycled materials are primarily functioning as raw materials, and therefore ordinarily should not be regulated under Subtitle C.
(2) Using secondary materials as substitutes for raw materials in recovery processes that usually use raw materials as feedstocks—even though material values are recovered from the secondary materials as an end-product of the process (for example, when secondary materials are smelted at primary smelting facilities). Because the secondary materials are merely substitutes for the primary material ordinarily used in an essentially primary material-based process, the Agency does not regard such processes as involving waste management.
(3) Using or reusing secondary materials as substitutes for commercial products. Examples mentioned in the public comments are spent solvents used as roofing materials and by-product hydrochloric acid from chemical manufacture used in steel pickling. In these examples, the recycled materials are substituting for other commercial products, and material values are not being recovered from them.
(4) Reclamation conducted at a single plant site when the reclaimed material is reused within the original process in which it was generated. In this situation, secondary materials are not used or reused directly, but are reclaimed first. Where, however, reclamation occurs at the plant site and the reclaimed material is returned to the original process in which they were generated, the entire set of operations is really a closed-loop type of process. Regulating the reclamation step thus could amount to regulating an on-going production process.
3. Exemptions for Certain Recycling Activities. We also have chosen to conditionally exempt from regulation certain recycling activities that do constitute waste management. The most important of these exemptions are regulations governing storage and transportation of wastes in the following situations:
• When wastes are reclaimed by their generator;
• When wastes are reclaimed by a reclaimer who subsequently uses the reclaimed material;
• When non-listed spent materials are burned as fuels (either by their generator or by another person). 10
In these situations, there appears to be a significantly reduced risk of waste mismanagement, because the generator or ultimate user has decided to retain control of the recycled waste and, thus, can assure a market for the recycled materials. Our investigation of hazardous waste recycling activities indicates that improper storage, overaccumulation, and subsequent damage have been associated with reclamation where the market for the recycled material is uncertain or where the recycling technology is unproven.
Overaccumulation is a particular risk where reclaimers are paid to take wastes they don't intend to use themselves, since this creates an incentive to keep accepting wastes that may prove unsalable after recycling. The most severe damage incidents, such as Chem-Dyne and Silresim, all fit this pattern. These circumstances are least likely to be present when a generator or ultimate user reclaims because of the continued exercise of control and ability to assure the wastes' end disposition. We consequently are proposing conditional exemptions for these situations. The conditions are designed primarily to guard against overaccumulation which (based on existing data), is the chief danger in these operations.
We note, however, that we are continuing to investigate the potential of these facilities to store wastes improperly. (We are doing this particularly in the course of conducting a Regulatory Impact Analysis of our storage regulations.) In devising the conditional exemptions proposed today, our premise (based on the known data) is that overaccumulation of wastes is the chief danger to guard against. The conditions attached to these proposed exemptions serve as adequate safeguards against overaccumulation in our view. It may be that the risks of improper storage by these facilities—prior to prolonged waste accumulation—are greater than they appear. In this regard, we are examining not only storage at recycling operations but also the incidence and severity of spills and leaks from raw material and product storage, since this type of storage is analogous to storage prior to recycling. These further investigations thus may lead to a regulatory approach with some immediate controls on storage for those recycling operations that would be conditionally exempt under today’s proposal.
The following charts illustrate the principles discussed in this section. The matrix in Figure 1 indicates which types of secondary materials are proposed to be solid wastes when recycled in particular ways. The flow charts in Figures 2 and 3 indicate which materials are solid wastes and which materials (if hazardous) are regulated as hazardous wastes under the proposed definition. The table in Figure 4 summarizes which recycled materials are or are not considered to be solid and hazardous wastes and which solid and hazardous wastes will be regulated when they are recycled under the proposed rules.

Footnotes:
10 Fly ash at present is not subject to Subtitle C regulation as a result of the 1980 amendment to RCRA (amended section 9001[b][3][A][II]). It is included in the text only as an example.
C. The Agency’s Decision to Reject a Standard Based on the Value of the Recycled Material

The Agency seriously considered a standard that would count a recycled material as a solid waste when a person other than the generator is paid to recycle it. The corollary also would apply: when a recycler pays to obtain the material it is not a solid waste. The logic here was that recyclers who pay for their materials must recycle them to stay in business; in addition, the materials they buy have demonstrated economic value and so are less waste like. Conversely, when a recycler must be paid to take material, the material may not be recycled, since its mere receipt generates cash flow.

FIGURE 1.—PROPOSED MATRIX OF WHICH TYPES OF SECONDARY MATERIALS WILL BE DEFINED AS SOLID WASTES WHEN USED, REUSED, AND RECLAIMED AND WHICH TYPES OF RECYCLING ACTIVITIES CONSTITUTE WASTE MANAGEMENT

<table>
<thead>
<tr>
<th>Primary Material</th>
<th>Use Constituting Disposala</th>
<th>Burning for Energy Recovery, or Use to Produce a Fuelb</th>
<th>Reclamationc (§261.2a(2)(iii))</th>
<th>Speculative Accumulationd (§261.2a(2)(iv))</th>
<th>Accumulation without sufficient amounts being recycledd (§261.2a(2)(v))</th>
</tr>
</thead>
<tbody>
<tr>
<td>Spent Materials (both listed and nonlisted/characteristic)</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Sludges (listed)</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Sludges (non-listed/characteristic)</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>By-products (listed)</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>By-products (non-listed/characteristic)</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Commercial chemical products listed in 40 CFR 261.93 that are not ordinarily applied to the land or burned as fuels</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

a This waste management activity involves the direct placement of recycled materials onto the land (e.g., use of recycled materials for land reclamation, as dust suppressants, etc.)

b It should be noted that the actual burning of these wastes in boilers and industrial furnaces is proposed to be exempt from regulation (§261.6(a)(1)). These wastes also are proposed to be exempt from regulation when they are used to produce a fuel by a facility for their own subsequent use of by facilities that ultimately burn these wastes from non-sludge wastes that are hazardous solely because they exhibit a characteristic (i.e., from non-listed spent materials).

c Reclamation is defined in proposed §261.2c(1) to constitute either the processing of wastes to recover usable products or the regeneration of wastes (e.g., removal of contaminants or impurities so that the waste can be put to further use). The provision does not apply, however, to materials reclaimed at the plant site and then reused within the original process in which they were generated. In addition, reclamation conducted by a person generating the waste, or reclamation conducted by a person other than the generator for that person’s subsequent use ordinarily is proposed to be exempt from regulation (§261.6(b)(1)(c) and (d)). The principal exception is when wastes are stored or otherwise processed in surface impoundments. Spent batteries being reclaimed likewise remain subject to regulation. This waste management activity is defined in proposed §261.2c(2) to include wastes that are potentially usable, reusable, or reclaimable but are held without having any known market or disposition while hoping a market will develop.

d This waste management activity is defined in proposed §261.2c(3) to include those materials which are accumulated for over one year without 75 percent being recycled during that time.
FIGURE 2
MATERIALS DEFINED AS BOTH SOLID AND HAZARDOUS WASTE UNDER
THE PROPOSED HAZARDOUS WASTE MANAGEMENT SYSTEM

Is the material a "discarded material." A discarded material is any garbage, refuse, sludge, or any other solid, liquid, semi-solid or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations or community activities.

NO

Is material excluded under 40 CFR 261.4(a)

YES

Is material excluded under 40 CFR 261.4(b)

NO

Material is not a solid waste.

YES

Material is not a hazardous waste for purposes of the hazardous waste management regulations.

Is material a spent material, sludge, by-product, or commercial chemical product listed in 40 CFR 261.33 (not ordinarily used by being applied to the land) which is used in a manner constituting disposal.

NO

Is material a spent material, or a sludge or by-product listed in 40 CFR 261.31 or 261.32 that is reclaimed (this provision does not apply to materials reclaimed at the plant site and then reused within the original process in which they were generated).

YES

Material is a hazardous waste for purposes of the hazardous waste management regulations.

NO

Has the waste or mixture been excluded from the lists in Subpart D or 40 CFR 261.3 in accordance with 40 CFR 260.20 and 260.22.

YES

Material is not a solid waste.

NO

Material is not a solid waste.

Is material a spent material, sludge, or by-product that is accumulated speculatively.

NO

Is material a spent material, sludge, or by-product that is accumulated for recycling without sufficient amounts being recycled during a one-year period.

YES

Material is not a solid waste.

NO

Commercial chemical products listed in 40 CFR 261.33 are regulated as hazardous wastes when they are abandoned by being disposed of or when burned or incinerated. In addition they are proposed to be regulated when used in a manner constituting disposal or when burned for energy recovery when these activities are not their ordinary use.
FIGURE 3
HAZARDOUS WASTES THAT ARE RECYCLED AND ARE REGULATED UNDER THE PROPOSED HAZARDOUS WASTE MANAGEMENT SYSTEM

The waste is a hazardous waste (See Figure 2)

Use constituting disposal

Burning wastes or waste-derived fuels for energy recovery, or using wastes to produce a fuel.

Reclamation

Speculative Accumulation

Accumulation without sufficient amounts of stored material being recycled.

Is material excluded under §261.6(b).

YES

Has the Regional Administrator decided on a case-by-case basis that persons managing the material should be regulated (§261.6(b) (1)(i)-(v) and (b)(2)

NO

Material is not regulated under the hazardous waste management system.

Material is subject to the special requirements of 40 CFR 261.5.

Is material generated by a small quantity generator as defined in 40 CFR 261.5.

YES

Material is subject to regulation under the hazardous waste management system.

NO
Despite its intuitive appeal, this type of provision is open to several serious objections. First, it is not clear whether "sold for value" would cover situations where the recycler incurs certain out-of-pocket costs to obtain materials (such as transportation or marketing costs) and then is compensated—or where materials are sold for a price that reflects the value of only some of them.

Second, this provision would fail to ensure that the purchased materials would be recycled and would lead to dissimilar regulatory coverage of the identical material at a single facility. The proof is that in many of the damage incidents involving recyclers, the recycling facility had purchased waste materials. In addition, in some cases, the facility was also given—or was paid to accept—the very same kind of material that it had also purchased (for example, a spent solvent).

Third, the value provision may in some cases discourage recycling. On occasion, recyclers accept quantities of material that are too small to be recycled economically unless they are accompanied by some payment. (This is another example of how the provision does not always reflect marketplace realities.) Recyclers may not profit greatly by these arrangements, and will discontinue them if they incur the value provision's regulatory penalty for being paid to accept these small lots.

The fourth and most telling objection to the value provision is the difficulty of enforcement. The provision would require the Agency to evaluate the bona fides of complicated, numerous, and diverse financial transactions—which may intrude significantly into companies' legitimate business affairs. The Agency is not equipped to do this. In addition, it is easy to disguise whether payments are being made, and the unscrupulous may well be tempted to evade regulation in this way.

For all these reasons, the Agency has decided to reject an approach based on whether a material is sold for value. We do, however, solicit comments on this approach, particularly on whether this kind of scheme could be implemented and enforced successfully.

D. Materials Burned To Recover Energy

The Agency has concluded that the statute gives EPA the authority to regulate burning of hazardous waste to recover energy, and that we should exercise this authority. In most cases, such burning is environmentally identical to burning the same material in an incinerator and could pose a parallel or greater risk of environmental dispersal of hazardous waste.
Further, a number of facilities blend hazardous wastes into fuels and then sell these fuels to unsuspecting residential and other municipal users who burn them under conditions which may harm humans and the environment. Two of the most notorious of these facilities—Quanta, Inc., and B & I Oil Corp. (the latter company pleaded guilty to criminal violations of New Jersey's hazardous waste regulations)—produced fuels containing PCBs, phenolic compounds, chlorinated solvents, and other chlorinated hydrocarbons. These compounds not only are very toxic and hard to destroy, but when burned at low temperatures for short residence times (as in residential boilers) can form chlorinated dioxins and dibenzofurans, phaeogene, and hydrochloric acid.

EPA's existing regulations require that sludges and wastes listed in 40 CFR 261.31 and 261.32 that are to be burned as fuels or used to produce fuels be accumulated, manifested, transported, and stored under the applicable requirements of Parts 262 through 265. These regulations do not control the actual burning of these materials, however.

Today's proposal, insofar as it relates to waste-derived fuels, is intended principally to establish jurisdiction for eventual regulation; it does not seek to establish all aspects of an ultimate regulatory regime. We are, for example, proposing to continue the present exemption for actual burning of hazardous wastes in boilers for legitimate energy recovery until we complete on going analyses of the environmental consequences of burning hazardous wastes in boilers. Once we have completed these studies, we plan to substantively regulate burning for energy, particularly in those areas that appear to present a potential for substantial harm to human health and the environment.

Presently, we are studying whether there should be interim controls—that is, controls before we propose a comprehensive regulatory regime for actual burning—on other aspects of hazardous waste-derived fuel management. Possible options under active consideration include requiring blenders, marketers, and certain users of hazardous waste-derived fuels to notify EPA of their activities, to keep records of the amounts and types of hazardous waste-derived fuels they are producing or burning, and (for blenders) to affix a label to all hazardous waste-derived fuels they produce, indicating that the fuel contains a hazardous waste. A manifest for certain transactions involving hazardous waste-derived fuels is another possibility. These actions are not part of the present proposal, but may be taken as separate regulatory actions.

We are also proposing to regulate, under certain circumstances, the storage and ancillary management of hazardous wastes before the wastes are burned. We are convinced controls are needed for hazardous wastes sent to fuel blenders who do not ultimately burn the wastes. This is the recycling situation posing the greatest risk of improper storage, overaccumulation, faulty tracking, and the like, as already explained. Consequently, we are proposing that hazardous spent materials, sludges, and listed byproducts, and nonfuel commercial chemical products, sent to these blenders be subject to Subtitle C regulation, and the blenders be subject to regulation as storage facilities.

We are less sure of whether storage standards are needed for hazardous wastes being burned by the person generating them, or being sent directly from a generator to an ultimate user. Although we are proposing to exempt conditionally other recycling practices fitting this pattern because of the reduced risk of overaccumulation or faulty tracking, fuels may present a special case due, for example, to additional concerns that ultimate users be notified of what they are burning. We also are concerned that proper records be kept for federal and state regulatory authorities, and for communities.

In light of our uncertainty, we are proposing today to leave essentially unchanged the current regulatory regime for hazardous wastes burned by their generator, or sent from a generator to a person who ultimately burns them. This scheme calls for regulation of sludges and wastes listed in 40 CFR 261.31 and 261.32, and for 40 CFR 261.5(b). While we may alter this part of the proposal later, we think maintaining the status quo is the least confusing way to proceed until we decide on a comprehensive regulatory strategy to control burning of hazardous waste-derived fuels.

EPA is therefore proposing today to assert jurisdiction over spent materials, sludges, listed byproducts, and commercial chemical products (and related materials) listed in 40 CFR 261.33 where any of these materials are burned as fuels, used to produce fuels, or contained in fuels—the jurisdictional prerequisite to eventual regulation in this area (see Section VI. D. of this part of the preamble). We are also proposing for the time being to continue to exempt the actual burning of these materials from regulation. We also are proposing to regulate most storage of spent materials, sludges, listed by-products, and commercial chemical products that are not themselves fuels and are listed in 40 CFR 261.33, where any of these materials are used to produce fuels. The only exception will be where the person who operates the storage facility also generates the material, or burns the waste-derived fuel itself. In these cases, we are proposing provisionally to maintain the status quo by regulating only sludges and wastes listed in 40 CFR 261.31 and 261.32.

V. New Definitions Relating To Burning of Hazardous Waste

The identity of the combustion unit in which secondary materials are burned is highly relevant in EPA's developing regulatory regime for burning of hazardous secondary materials. We are proposing in 40 CFR 260.10 to amend the definition of "incinerator", and to add definitions of "boiler" and "industrial furnace", to distinguish among these devices.

A word of background as to why we are amending and adding these terms. EPA's existing rules establish a class of facilities subject to regulation under Subpart O of Parts 264 and 265—thermal treatment devices—of which incinerators are a subset. Incinerators are currently defined on the basis of their purpose—if the primary purpose of a device is thermal destruction of hazardous waste, the device is an incinerator (see 40 CFR 260.10, definition of "incinerator"). We meant for this definition to prevent provision between regulated facilities (thermal treatment devices, principally incinerators) and heat recovery units (primarily boilers).
Although the existing definition of incinerator focuses on the purpose for which a device is used—the Agency did not intend to classify facilities solely on the basis of purpose. Rather, we intended that incinerators be distinguishable from boilers in order that the class of facilities subject to the standards for incineration be identifiable. The purpose for which a device is operated was used to indicate whether the device is an incinerator or a boiler. This distinction, however, has proven difficult to implement because the reference to “purpose” in the regulation introduced an unintended element of subjectivity.

We accordingly are proposing a revised definition of incinerator that avoids the use of purpose to identify incinerators—so that facilities will no longer be able to escape regulation by claiming to have a primary purpose of recovery. The regulation as is now is based by focusing on the physical character of the unit and not on its claimed purpose.

Thus, the proposal defines an incinerator as a controlled-flame combustion device in which the combustion chamber and any heat recovery section are not of “integral design”, i.e., formed into a single manufactured unit such that there occurs significant radiant heat transfer as opposed to convective heat recovery. This occurs, for example, when the combustion chamber and heat recovery section are joined by ducts that carry the flue gas to heat recovery sections. Thus, waste heat recovery units added to an incinerator cannot exempt it from regulation as a hazardous waste treatment facility.

Incinerators—including those burning secondary materials and recovering energy or material—are normally subject to regulation under Subpart O of Part 264 and 265. (The major exception is for incinerators that are “industrial furnaces”, a term explained below.)

Boilers, in contrast, ordinarily are not subject to regulation under Subpart O, but rather may be regulated under today’s proposed regulations applying to recycling facilities. “Boilers” also are defined on the basis of design instead of purpose. Under the proposed definition, they must have: [1] provision for heat recovery, and [2] combustion chamber and heat recovery sections that are of “integral design”, i.e., that are formed physically into one manufactured or assembled unit. In addition, the unit must accomplish significant heat recovery in the combustion chamber section by means of radiant heat transfer.

The key distinction between boilers and incinerators is that boilers achieve heat transfer within the combustion chamber itself, generally by exposing the heat recovery surface to the flame. In contrast, heat transfer does not ordinarily occur in the combustion chamber of an incinerator. Rather, combustion gases are transferred elsewhere in the device, where heat transfer may occur.

There may be situations where incinerator operators design or retrofit their devices to avoid regulation by achieving minimal heat transfer in the combustion chamber. The regulation consequently requires that a “significant” percentage of the thermal input to the unit be recovered in the combustion chamber by radiant heat transfer.

In determining what constitutes “significant” radiant heat transfer, the Agency considered the design of boilers that have only one surface (or side) of the combustion chamber with boiler tubes that “see the flame,” i.e., that experience radiant heat transfer. This is essentially the minimum design that would meet the integrated design criterion and represent a bona fide boiler. (The Agency is aware of typical “package boilers” that meet this design.)

In such a boiler, one may assume for purposes of simplification that the one boiler wall with exposed boiler tubes receives from one sixth to one fourth of the heat released. A typical heat recovery efficiency for such a boiler might be 75 percent (i.e., 75 percent of the heat content of fuels fed to the boiler is actually recovered). Thus, viewed as a percentage of total heat recovered, the radiant portion represents 21 to 33 percent of the total. Since radiant heat recovery is, in fact, the more efficient portion of the total recovery, it probably represents a slightly higher portion of the total.

Thus, the benchmark the Agency intends to use in judging “significant” radiant heat transfer in the combustion chamber is 25 to 35 percent of the total heat recovered in the unit. This is consistent with industry estimates of the lower range of radiant heat transfer that occurs in typical boilers. We specifically solicit comments, however, as to the accuracy and appropriateness of this benchmark.

The proposed regulations make one further distinction among combustion devices. There are combustion devices designed as incinerators or boilers that are used as integral components of manufacturing processes to recover materials or energy, not to destroy wastes. Examples are smelting furnaces, cement kilns, and blast furnaces. These units—termed “industrial furnaces”—are normally considered to be engaged in recycling activities when burning secondary materials, so will not be regulated as incinerators (even if they are not of integral design).

The proposed definition of industrial furnace specifically designates certain devices as industrial furnaces, namely cement kilns, aggregate kilns, lime kilns, phosphate kilns, blast furnaces, smelting furnaces, combustion devices used in the recovery of sulfur values from spent sulfuric acid, methanol reforming furnaces, and pulping liquor recovery furnaces. The proposal also allows for the Agency to add devices to the list, by rulemaking, on the basis of considering several criteria. When adding to the list of industrial furnaces, we will consider these criteria together. Therefore, a particular device need not satisfy all of the criteria to be designated an industrial furnace if it satisfies one or more of them.

These criteria have been selected because they describe those aspects of industrial furnaces that distinguish them from hazardous waste incinerators.

Thus, a flame combustion device may be designated as an industrial furnace if it is designed and used primarily to accomplish recovery of material or energy, such as a secondary smelting furnace that recovers usable metal from scrap, or methanol reforming units. A device also may be designated an industrial furnace if it is used to burn spent materials, sludges, or by-products as ingredients in a production process. Similarly, where these secondary materials are used as effective substitutes for raw materials in a device that uses raw materials as principal feedstocks, the device could be an industrial furnace. These last two criteria are used to describe materials that serve essentially as raw materials and therefore are not appropriately subject to regulation under RCRA (See Section VI. E. of Part 1 of the preamble)

A device that burns raw materials to make a material product (such as a cement kiln or aggregate kiln) may also be designated as an industrial furnace.

Finally, in determining whether a device should be listed as an industrial furnace, the Agency will consider whether the device is commonly used in a manufacturing process.

The Agency is continuing to investigate the design of these latter three devices, as well as their precise role in the sulfuric acid, methanol, and pulping manufacturing processes in order to assure that they are properly classified as industrial furnaces.
VI. Discussion of Specific Provisions of the Revised Definition of Solid Waste

A. Proposed § 261.2(b): Purpose and Scope

It is necessary to define solid waste because of statutory draftsmanship ("hazardous waste" being a subset of "solid waste") (see RCRA Sections 1004(6) and 1004(27)). However, the proposed term, "solid waste," does not limit the Agency's jurisdiction under these purposes of Subtitle C and has no other provisions is not limited to "hazardous waste" (see RCRA Sections 3007, 3013, and 7003 of RCRA. The Agency's jurisdiction under these provisions is not limited to "hazardous waste" (RCRA Sections 3007, 3013, and 7003 of RCRA).

B. Proposed § 261.2(a)(1)

It is necessary to define solid waste because of statutory draftsmanship ("hazardous waste" being a subset of "solid waste") (see RCRA Sections 1004(6) and 1004(27)). However, the proposed term, "solid waste," does not limit the Agency's jurisdiction under these purposes of Subtitle C and has no other provisions is not limited to "hazardous waste" (see RCRA Sections 3007, 3013, and 7003 of RCRA. The Agency's jurisdiction under these provisions is not limited to "hazardous waste" (RCRA Sections 3007, 3013, and 7003 of RCRA).

C. Proposed § 261.2(a)(2)(i): Wastes That Are Used in a Manner Constituting Disposal

The first category of secondary materials considered to be solid wastes when recycled and when destined for recycling are secondary materials used or reused in a manner involving direct placement on the land. Examples are the direct use of recycled materials for land reclamation, as dust suppressants, as fertilizers, and as fill material. In the Agency's view, these practices are virtually the equivalent of unsupervised land disposal, a situation RCRA is designed to prevent. In fact, the Agency regards the direct use of these materials as fertilizers to be a form of land treatment subject to the standards of Subpart M of Parts 264 and 265. (See Background Document for Permitting Standards for Land Disposal Facilities, Response to Comments, July 26, 1982, p. 193.)

The many damage incidents resulting from wastes being used in a manner constituting disposal bear out the Agency's concern. This type of recycling activity has also been a particular concern of the Congress. The September 1979 report of the Subcommittee on Interstate and Foreign Commerce on hazardous waste disposal (Committee Print 96-1FC 31, 96th Cong., 1st sess., 1979) describes three damage incidents involving wastes used in a manner constituting disposal (id. at 4, 12-13, 17, 24, 41, and 53-54). This report indicated that these uses should be subject to regulatory control and criticized the Agency's proposed regulations for not adequately tracking this type of recycled material (id. at 41-42, 53-54).

These references to damage incidents reflect not only Congress' concern but also the need to EPA's Subtitle C regulations to cover this type of activity. The recent report of the House Committee on Energy and Commerce likewise voices special concern about this type of recycling and would mandate Agency action in this area. (See H.R. Rep. No. 97-570 at 22-23.) A provision mandating Agency action was later adopted by the full House.

The proposed provision applies when a material is used essentially "as-is" (for example, a sludge used directly as fill material) or where the material is mixed with another substance without any appreciable chemical change ("simple mixing"). An example of the latter is the notorious incident where waste containing dioxin (TCDD) was mixed with waste oil and then used as a dust suppressant at a Missouri horse arena.

16 See 43 FR 58946, 58950, and 58954 (December 18, 1978) where the Agency initially proposed the concept of use constituting disposal.

17 A number of industrial commenters likewise conceded the legitimacy of Subtitle C jurisdiction over uses constituting disposal, or indicated that if the Agency indeed possesses Subtitle C jurisdiction over recycling, then jurisdiction appropriately can be exercised over uses constituting disposal. See comments of the American Paper Institute, August 26, 1980, pp. 12-15, 19, and 21; and of the Chemical Manufacturers Association, August 15, 1980, pp. 34-35, and 31. The Environmental Defense Fund, in its comments, likewise generally supported regulating this type of recycling activity. We think these comments contain some acknowledgment that activities virtually tantamount to unsupervised land disposal of recycled wastes are within our proper jurisdictional purview.

We add that if a boiler or an industrial furnace is used to destroy wastes, the unit is being used as an incinerator and is subject to regulation as such.
killing livestock, and seriously injuring an exposed child.

On the other hand, a material blended so that it is significantly changed chemically or biologically (i.e., the new material is chemically or biologically distinct from the original material being blended) does not count as a waste—and the recycling activity would not be regulated—even if the product then is placed on the land. An example is fly ash used as an ingredient in cement.\(^{18}\) The Agency believes this outcome is satisfactory in most cases but is concerned about not regulating fertilizers made from toxic metal-containing sludges and by-products (where these materials are significantly changed in the process). (Fertilizers using such materials as the sole or virtually sole ingredient, or using such materials in virtually unaltered chemical form would, however, be regulated under the proposal.) The Agency is gathering information on waste-derived fertilizers and may alter this part of the proposal after assessing this information.

The regulation, however, does cover residues of waste treatment processes applied to the land (even though the wastes may have undergone a chemical change as a result of treatment). Examples are waste stabilization processes where the stabilized material is then used as fill. Assuming the stabilized material is a hazardous waste, the waste remains subject to regulation. The Agency is convinced that these waste treatment operations are not production processes and can therefore be regulated as waste management, and that the treated material remains subject to regulation as a solid waste.

Finally, the regulation applies to commercial chemical products (and related materials) listed in 40 CFR 261.33 that are not ordinarily used by being applied to the land. This provision is intended to close an unintended gap in regulatory coverage. Under the existing regulations, commercial chemical products must be "discarded" (or intended for discard) before they can be wastes, and use in a manner constituting disposal is not deemed to be a form of discard (see 40 CFR 261.2 (e)). The Agency does not normally intend to regulate the recycling of these materials, since such recycling simply restores these materials to usable condition, and in a large sense simply continues their normal use (see 45 FR 76540-541, November 25, 1980). However, use of these materials in a manner constituting disposal is not analogous to their normal use, unless they ordinarily are meant to be used by being applied to the land.

We consequently are proposing to define these materials as wastes when they are recycled in this way.

\[D.\text{Proposed } \S 261.6(a)2(ii) \text{ and } 261.6(b)(1)(v): \text{Wastes That Are Burned to Recover Energy, Are Used to Produce Fuels, or Are Contained in Fuels}\]

This provision indicates that spent materials, sludges, listed by-products, and any commercial chemical products (and related materials, such as off-specification variants and spill residues) listed in 40 CFR 261.33 that are not themselves fuels, are solid wastes when they are burned as fuels, used to produce fuels, or contained in fuels. EPA's reasons for asserting jurisdiction over these materials have been described in Section IV. D. above.\(^ {19}\) To see the actual extent of proposed regulatory coverage, this provision should be read together with proposed § 261.9 (b)(1)(v). We are proposing to continue temporarily the present exemption for actual burning for energy recovery (proposed § 261.6 (b)(1)(v)) pending completion of the studies described in Section IV. D. above. We also reiterate that burning in incinerators (that are not industrial furnaces) is considered to be incineration and is regulated under Subpart D of Parts 264 or 265, whether or not energy or materials also are recovered. Such incineration is not affected by the exemption in proposed § 261.6 (b)(1)(v).

The exemption does cover burning for energy recovery in units whose principal purpose is energy or material recovery, rather than waste destruction—namely boilers and industrial furnaces. (These terms were explained in Section V. above.) For certain wastes, the exemption also applies to storing and transporting these materials before burning. These wastes are those that are hazardous only by reason of exhibiting a characteristic and are not sludges, and

are used as a fuel or used to produce a fuel(a) by the person generating the wastes, (b) by a fuel blender who burns the fuel it blends, or (c) by a person ultimately burning a waste-derived fuel. Thus, anyone who—prior to the burning or blending—manages sludges or hazardous wastes listed in 40 CFR 261.31 or 261.32 would be subject to the Subtitle C regulations.

As we stated in Section IV.D. above, the scope of this exemption is designed to preserve the status quo, pending a further proposal for regulatory controls on hazardous wastes prior to their being burned as fuels. Thus it is likely that this provision will change to some extent before promulgation. In light of our current uncertainty, however, we do not feel it appropriate to propose changes in the regulatory status of these wastes.

We also note that otherwise-exempt fuel-producing facilities (i.e., those burning or blending non-sludge wastes that are hazardous only by reason of exhibiting a characteristic) are subject to regulation as storage facilities on a case-by-case basis (see Section III.B. of Part II of the preamble). They also remain subject to the turnover notification provision described below.

Processing or blending facilities producing fuels from other persons' spent materials, sludges, listed by-products, and § 261.33 commercial chemical products that are not themselves fuels is also subject to regulation as storage facilities when they do not use these fuels themselves. Generators sending hazardous wastes to these facilities must comply with the requirements of 40 CFR Part 262, and transporters carrying wastes to these facilities are subject to the requirements of 40 CFR Part 263. As we explained earlier, the risk of improper storage—especially overaccumulation—before fuel production or burning is significant at facilities producing fuels from other persons' materials for someone else's use, and we therefore are proposing to regulate under these circumstances.

Only listed by-products burned as fuels are considered to be solid wastes in proposed § 261.2(a)(2)(ii). This is designed to avoid regulating certain commercial fuels that may technically be by-products and which exhibit a characteristic of hazardous waste. The Agency would prefer to include all by-products, except those that are clearly commercial fuels. Therefore, the Agency solicits comments identifying by-products that are legitimate commercial fuels and questions specifically whether we could include all other by-products (such as distillation bottoms) burned as fuels as wastes once we excluded these...
named commercial fuels. Spent materials and sludges, on the other hand, appear to be waste-like whenever used to produce fuels, and are so classified.

The inclusion of commercial chemical products and other materials listed in 40 CFR 261.33 that are not themselves fuels closes an unintended gap in EPA's current regulations, and parallels the similar inclusion in this proposal of commercial chemical products used in a manner constituting disposal. Burning of these materials as fuels and using them to produce fuels is not at all analogous to these materials' normal use. We consequently are proposing to define these materials recycled in these ways as solid wastes. We intend to regulate their storage at a facility using them to produce fuels (as well as their prior generation and transport) when that facility is not the generator or is not burning the waste-derived fuel containing these materials. These materials were present at many of the damage sites involving improper storage by producers of waste-derived fuel, pointing up the need to exercise regulatory authority.

To give an example, Generator A generates several unlisted ignitible spent organic chemicals. That it blends and burns in its boilers as fuel. These chemicals are hazardous wastes but are not subject to regulation before blending because they are being blended by the original generator, and are not listed in 40 CFR 261.31 or 261.32. The actual burning also is exempt, since it occurs in a boiler.

E. Proposed §§ 261.2(a)(2)(iii), 261.2(c)(1), and 261.6(b)(1)(i) and (ii): Wastes That Are Reclaimed

1. The Proposed Provisions. These provisions are among the most important in the proposed regulations. Read together, they say that spent materials, listed sludges, and listed by-products that are reclaimed are solid wastes, except where these materials are reclaimed at the plant site and returned to the original process in which they were generated. (See proposed § 261.2(a)(2)(iii).) However, these materials are subject to regulation during storage and transportation only:

- Where reclaimed by a person other than the generator and when the reclaimed material will be used ultimately by a person other than the reclamer; or
- Where reclaimed or otherwise processed in surface impoundments, or stored in surface impoundments before reclamation elsewhere; or
- Where accumulated for over a year without sufficient amounts being reclaimed (see proposed § 261.2(a)(2)(v) explained in Section VI.G. of this part of this preamble); or
- Where reclaimed on a case-by-case basis (see proposed § 261.6(b)(2), explained in Section III. B. of Part II of this preamble).

These provisions are directed at the type of operation that has caused most of the recycling damage incidents—the unrelated reclamer (i.e., a reclamer who is not the generator of the material) reclaiming material for another person's use. This type of operation cannot guarantee an end market for its reclaimed materials, and so runs the risk of poisoning or overaccumulating waste inventory. This risk has been borne out again and again in the damage cases, the most well-known being the Chem-Dyne and Stilinem facilities, which accepted sludges and other spent organic chemicals for reclamation (and fuel production) with disastrous consequences. Indeed, all of the 20 Superfund interim priority sites involving recyclers were unrelated reclaimers reclaiming materials or blending them as fuels for a different person's use.

These provisions apply to all spent materials, but only to listed sludges and listed by-products—to avoid including sludges and by-products routinely processed to recover usable products as part of normal commercial practice. Although some of those materials may be wastes, the Agency wishes to consider them individually before asserting jurisdiction, since many of them also have product-like aspects.

The basis for exempting (conditionally) hazardous wastes reclaimed by their generator or reclaimed for the reclamer's subsequent use is that by exerting continuing control over these materials, the generator or reclamer/user is treating them in a way that ensures their end disposition. In fact, our investigation of recycling activities confirms that such operations have not caused the harms associated with the risk of overaccumulation.

These reasons do not apply, however, when hazardous wastes are reclaimed or processed in surface impoundments or are stored in other impoundments before being reclaimed. Surface impoundments containing hazardous waste pose a particular threat of contaminating ground water and have always been one of the chief concerns of the hazardous waste management program. (See generally, the Background Document to Subpart K Interim Status Standards, April 28, 1980.) Not only is containment without a liner system usually impossible, but wastes are present as liquids or are constantly in the presence of liquids. This creates the situation most conducive to forming leachate. In addition, the collected liquids in an impoundment will form a pressure head, causing downward dispersion of the leached contaminants. Since most impoundments are lined, and because many are underlain by permeable soils, the potential for downward seepage of contaminated fluids into ground water is high. In fact, incidents of ground water contamination from impoundments have been reported in nearly all states. Thirty-eight of the first 180 Superfund interim priority list sites involve leaching from unsecured surface impoundments.

Surface impoundments also can contaminate surrounding soil and surface water by directly releasing the contaminated liquid via washout, overtopping, or dike breakage. Volatilization of organic contaminants also can pollute air in areas surrounding the impoundment.
These potential dangers are all present when wastes are reclaimed in surface impoundments or stored in impoundments before reclamation. In fact, reclamation in surface impoundments is very similar to a use or reuse constituting disposal: both involve direct, uncontrolled placement of waste in the land. We thus are not exempting this activity from regulation. (However, since the concern here is waste management in surface impoundments, the hazardous wastes are not automatically subject to regulation when they are removed from the impoundment to be used, reused, or reclaimed.)

By using the language "reclaimed or otherwise processed" in proposed § 261.2(c)(1)(i) and (ii), the Agency means to cover virtually all management activities occurring in surface impoundments involving material recovery for subsequent use, reuse, or additional reclamation, or involving processing designed to make the impounded material amenable for recovery.

The following examples show how the provisions operate with respect to surface impoundments:

- Generator A has a listed wet emission control sludge that is dewatered in a surface impoundment. The settled sludge is then dredged and used as an ingredient in manufacturing cement.

The sludge is a solid waste and is subject to regulation when it is dewatered in the impoundment. The recovery and processing of the sludge in the impoundment meets the "reclaimed or otherwise processed" standard of the proposed rule. This result conforms well with the language of RCRA, since dewatering is conducted to recover the entrained solids for future use—i.e., to make the sludge "amenable for recovery", in the language of the statutory definition of treatment.

The sludge is not a solid waste once it is removed from the impoundment because it is being used as an ingredient, not reclaimed. (This concept is expanded in the following subsection.) This sludge could be a waste, however, if it accumulates, after being removed from the impoundment, for over a year without a sufficient amount being used (see proposed § 261.2(a)(2)(v), described in Section C, below).

- Generator B generates a listed wastewater treatment sludge by precipitating metals from wastewater collected in a surface impoundment. The sludge is then dredged and shipped to a secondary smelter for metal recovery.

The smelter is not smelting for its own subsequent use. The sludge is a solid waste and is subject to regulation when in the impoundment for the same reason as the previous example. In addition, the sludge remains a solid waste when sent to the secondary smelter because it is being reclaimed by a person other than the generator for use by a person other than the reclaimer.

2. The Meaning of "Reclamation". The Agency has defined "reclamation" in proposed § 261.2(c)(1) to constitute either regenerating waste materials or processing waste materials to recover usable products. Regeneration processes involve removing of contaminants or impurities so that the material can be put to further use. Examples are spent solvent and other spent organic chemical reclamation (ordinarily a regeneration process), spent catalyst regeneration, and most secondary metal reclamation, including secondary smelting (recovery of usable metal from otherwise unusable material). 38

In thus defining reclamation operations to involve solid wastes, the Agency is following closely the various statutory definitions that indicate unequivocally that recovering usable material from otherwise unusable material constitutes solid waste management, and that the materials from which resources are recovered are solid wastes. Thus, one aspect of solid waste management is "resource recovery," which involves "the recovery of material or energy from solid waste" (Sections 1004(30) and 1004(22), emphasis added. Similarly, a "recovered material" (Section 1004(19)) includes material or by-products that "have been recovered or diverted from solid waste" . . . . To the same effect, see Sections 1004(7), (18), (23), (24), and (29).

This provision is perhaps not as encompassing as it may appear. First, as described in the next subsections, activities involving use or reuse of the materials are not deemed to constitute reclamation. Second, reclamation conducted at the plant site where the reclaimed material is returned to the original process also is outside the scope of the definition. Operations where a generator reclaims his own materials, or where a reclaimer reclaims for his own use, also are outside the scope of the regulation. In addition, most reclamation activities do not involve hazardous wastes and so are unaffected by this provision. 39

The limitation of the regulation to listed sludges and listed by-products also reduces the scope of the reclamation provision. By examining whether a particular type of sludge or by-product is a waste when reclaimed, the Agency will have an opportunity to determine if reclamation of the individual sludge or by-product should be viewed as a waste management or process. At the same time, the Agency believes it important to have the means to regulate particular sludges and by-products that are to be reclaimed.

3. The Distinction Between "Use" and "Reclamation". Proposed § 261.2(c)(1) contains an important clarifying clause indicating that three types of activity involving the use or reuse of spent materials, sludges, or by-products do not constitute reclamation:

- First, using materials as ingredients to make new products, without distinct components of the materials being recovered as end-products. Examples are zinc-containing sludges used as ingredients in fertilizer manufacture, and chemical intermediates (for instance, distillation residues from one process used as feedstocks for a second process). 40 This exception does not apply when the spent material, sludge, or by-product is itself recovered or when its contained material values are recovered as an end-product. For example, a metal containing sludge is

38 Metal-containing scrap comprises the great majority of reclaimed materials. See National Association of Recycling Industries, Recycling Resources: Priorities for the 1980's, indicating that over 80 percent of the materials recycled by its members are scrap metal. Scrap is not usually considered hazardous. Generators can determine this on the basis of their knowledge of the material (see § 262.11(c)(2)). Thus, most secondary metal reclamation is not affected by this provision.

39 Another example, which occurs often in the chemical industry, is using spent sulfuric acid as an ingredient in producing sulfuric acid. In this operation, spent sulfuric acid is introduced as a feedstock where it is burned to derive sulfur as SO2. This process does not constitute reclamation because the spent sulfuric acid is neither regenerated (impurities are not removed from the spent sulfuric acid to make it reusable) nor recovered (acid values are not recovered from the spent acid). It is being used as an ingredient.
processed to recover its contained metal values, the process constitutes reclamation, and the sludge, if listed, is a hazardous waste.

- Second, using the materials as substitutes for raw materials in processes that normally use raw materials as principal feedstocks; this exception does include those situations where material values are recovered from these substitute materials. Examples are sludges or spent materials used as substitutes for ore concentrate in primary smelting. The Agency does not consider the process to constitute reclamation, in spite of the recovery or regeneration step, because the materials literally are being used as alternative feedstocks. This is not the case when the same materials are recovered in secondary processes (such as secondary smelting). These processes are waste-based, so that the materials being recovered are not substituting for raw materials, when the distinction is reflected in the clear delineation of primary and secondary processes. Secondary processes involving recovery or regeneration thus are defined as reclamation.

- Third, using the materials as substitutes for commercial products in particular functions or applications. An example is spent pickle liquor used as a phosphorus precipitant and sludge conditioner in the processes to constitute reclamation. This does not regenerate or recover the pickle liquor. Rather, the material is being used (actually reused, since pickle liquor is a spent material) to substitute for other commercial products.

In these three cases, the materials are being used essentially as raw materials and so ordinarily are not appropriate candidates for regulatory control. Moreover, materials are used to manufacture new products, the processes generally are normal manufacturing operations (although not when these materials are combined into fuels). The Agency is reluctant to read the statute as regulating actual manufacturing processes. However, we are somewhat concerned that in the first of these cases the proposed leaves unregulated certain processes that could constitute waste management. Processes where secondary materials are the predominant (or even the sole) ingredient are conceivable examples, particularly where the process operator is paid to take the materials. In addition, processes using spent materials may be more logical candidates for regulation because spent materials (having already fulfilled their original use) are more inherently waste-like than by-products and sludges. We have not been able to reduce these ideas to a quantifiable regulatory standard, however, and solicit further comment on this point.

**Examples**

- Generator A generates an ignitable spent solvent that it sends to reclainer R, who reclaims the solvent for resale to the general public. The spent solvents are solid wastes in A's hands and in R's and are subject to regulation. Solvent reclamation meets the definition of reclamation since it is a regeneration process, and is subject to regulation since A is not reclaiming its own materials, nor is R reclaiming for its own use.

- Generator B generates a spent solvent that it reclaims itself; the reclaimed solvent is sent back to the original process from which it was generated.

The spent solvent is a solid waste but is not subject to regulation because B is reclaiming his own materials. The spent solvent could be regulated, however, if it accumulates for over a year without a sufficient amount being reclaimed (see proposed § 261.2(a)(2)(v), described in Section G., below), and also could be regulated on a case-by-case basis (see proposed § 261.6(b)(2), described in Section III. B. of Part II of this preamble).

- Generator C generates an emission control dust (a sludge) that it sends to a secondary smelter for metal recovery.

The smelter then sends the recovered metal to an unrelated refiner for processing. The emission control dust is a solid and hazardous waste if it is listed in §261.31 or §261.32 and would be subject to regulation. The smelting process recovers metals from the dust as an end-product, and the smelter is not engaging in reclamation for its own use.

- Generator D generates the same emission control dust that is sent to a cement manufacturer for use.

The dust is not a waste because it is being used as an ingredient to make cement and is not being recovered or regenerated.

## Exception for Materials Reclaimed at the Plant Site and Returned to the Original Manufacturing Process

There is one further exception to the reclamation provision. Reclamation can sometimes be part of a closed-loop recycling step, where reclaimed materials are recycled back into the initial production process. This type of recycling is really an adjunct to the original process, and as such it represents a situation where the recycling activity may not fall within the Agency's jurisdiction. An example is wastewater recycled to the original process after being purified in an impoundment.

To allow for these cases, we do not consider spent materials, listed sludges, and listed by-products as solid wastes—even if reclaimed or processed in impoundments—where they are reclaimed at the plant site and then returned to the manufacturing process from which they were generated for further use. Similarly, the same materials are not wastes if they are stored (even if stored in impoundments) and reclaimed at the plant site, and the reclaimed material is then returned to the original manufacturing process. (The exclusion would not apply, however, if the reclaimed material is later used in a different process—even if under the generator's control—since this goes beyond the Agency's conception of closed-loop recycling.) The material need not be returned to the exact production step in which it was generated, so long as it is returned to the original process.

The term "plant site" means essentially the same thing as "on-site," namely, the same geographically contiguous property, as well as non-contiguous parcels owned by a single person and connected by a private right-of-way. In addition, the plant site includes contiguous property divided by rights-of-way, whether or not the entrance and exit between parcels is a cross-roads (compare the definition of "on-site" in 40 CFR 260.10). The limitation regarding means of egress in the definition of on-site is not relevant in determining whether a recycling operation is a closed-loop.

The Agency's proposed definition of a closed-loop process hinges essentially on the proximity of location of the reclamation operation, plus return of the material to the original process. There may be better ways to distinguish when reclamation is integrally tied to a production process, such as the length of time materials accumulate before being reclaimed. The Agency solicits

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32 It should be noted, with respect to surface impoundments, that an impoundment would not be regulated under this provision only if all of the material in it that could be a hazardous waste is recycled back to the original production process. Seepage impoundments and impoundments from which wastewaters are both discharged and recycled consequently would remain subject to regulation. In addition, an impoundment still could be regulated if sufficient amounts of material accumulated within it are not recycled within a year of accumulation (see Section G., below).
The Agency does not mean to include in this category materials actually recycled by other generators, such as fly ash. Because of their known recycling potential, these materials generally are not deemed immediately to be solid wastes. For example, the generator is accumulating them without a known market. Instead, these materials will be considered solid wastes if insufficient amounts are recycled (see the following section). A rather narrow qualification to this is that generators must have some feasible way of recycling the material. An example would be an emission control dust used as an ingredient in an industrial process. If a generator is accumulating the dust with no feasible means of sending it to a user and no other immediately feasible means of recycling it, the generator would be deemed to be accumulating the material speculatively.

The regulatory status of § 261.33 commercial chemical products, off-specification variants, spill residues, and container residues under this provision, as well as under the next provision—accumulation without sufficient amounts being used, reused, or reclaimed—requires a bit more explanation. As described earlier, commercial chemical products are presently regulated as hazardous wastes when discarded or intended for discard, and not when recycled or intended for recycling (see 45 FR 78540). Commercial chemical products that are being stored with recycling potential and with a legitimate expectation of recycling, therefore, are not intended for discard and thus are not subject to this provision. (As already explained, however, we are proposing to define certain commercial chemical products destined for recycling by burning to recover energy or by direct land placement as solid wastes under other provisions of the revised definition.)

If, however, a recycling market does not develop and one is not expected within a reasonable time period, or if insufficient amounts of these materials are being recycled, we would consider these commercial chemical products as being stored for discard, and thus subject to regulatory control. We are not setting any time period for determining when these commercial chemical

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6. The Status of Reclaimed Products. The Agency also has added language to § 261.3(c)(2) (the “derived from” rule) to indicate that commercial products reclaimed from spent materials, listed sludges, and listed by-products—e.g., a reclaimed solvent—are not wastes and are not subject to regulation under RCRA. This proposed addition merely clarifies the existing regulations and does not represent a change in regulatory approach. However, this principle does not apply to reclaimed materials that are not ordinarily considered to be commercial products, such as wastewaters. These materials rarely are dealt with as products moving in commerce, and are often discharged, and so reasonably can be considered to remain wastes. In addition, we wish to make clear that waste-derived fuels are not products reclaimed from a hazardous waste and thus remain wastes. Our claim of jurisdiction over these materials is made explicit in proposed § 261.2(a)(2)(ii).

We also caution that waste materials do not become products if they are merely processed minimally—e.g., operations that leave materials unfit for use without further processing. For instance, a hazardous sludge remains a waste when it is dewatered and sent to a metal reclaimor or used in a manner constituting disposal. Similarly, a spent solvent that is processed by removing rocks and other debris, and then sent to be distilled, remains a waste.

F. Proposed §§ 261.2(a)(2)(iv) and 261.2(c): Wastes That Are Accumulated Speculatively. The next category of solid wastes is materials that are accumulated speculatively. Proposed § 261.2(c)(2) defines these as materials with recycling potential, that are accumulating with a legitimate expectation of eventual recycling but have never been recycled or cannot feasibly be recycled. An actual example is a generator that has accumulated emission control dust from steel production (Hazardous Waste K061) for over eight years without being able to find a feasible means of recycling it, despite legitimate efforts. Over 40,000 tons are now piled in the open in an abandoned quarry near a drinking water source.

The Agency believes strongly that these types of materials are wastes, at least until a means of recycling is found. To hold otherwise simply invites unregulated accumulation of materials under the guise of being held for recycling. For this reason, the provision applies to all spend materials, sludges, and by-products. The Agency does not mean to include in this category materials actually recycled by other generators, such as fly ash. Because of their known recycling potential, these materials generally are not deemed immediately to be solid wastes, even if a generator is accumulating them without a known market. Instead, these materials will be considered solid wastes if insufficient amounts are recycled (see the following section). A rather narrow qualification to this is that generators must have some feasible way of recycling the material. An example would be an emission control dust used as an ingredient in an industrial process. If a generator is accumulating the dust with no feasible means of sending it to a user and no other immediately feasible means of recycling it, the generator would be deemed to be accumulating the material speculatively.

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products would become wastes. However, we do expect persons storing these materials to have appropriate documentation or information to support their claim that these materials have recycling potential and that the materials are accumulating for eventual recycling (see Section I. of this part of the preamble on record-keeping provisions).

As indicated above, we are not proposing a time period for determining when these commercial chemical products would become wastes. We instead would retain the existing standard indicating that these materials are wastes when intended for discard. Although a subjective standard of this type does not provide absolute certainty, alternatives appear to have greater problems. For example, if we set a time period that would define when commercial chemical products would become wastes, we believe persons might have to keep records of all commercial chemical products they use or keep in inventory in order to comply with the regulations. The Agency does solicit comment on this point; in particular, we ask commenters to address the following questions: (1) whether a time period should be set for commercial chemical products being stored for recycling before they are defined as wastes; (2) what are the maximum and average lengths of time that commercial chemical products are stored before recycling; (3) how and where (i.e., with normal inventory) are these commercial chemical products stored; and (4) how many hours (on the average) would be required to keep appropriate documentation to ensure that the commercial chemical products are recycled if a time period were set.

G. Proposed §§ 261.2(c)(2)(v) and 261.2(c)(3). Materials That Accumulate Without Sufficient Amounts Being Used, Reused, or Reclaimed

A major recurring circumstance in the damage incidents involving recyclers is the accumulation of materials for extended periods before recycling, leading to eventual overaccumulation and improper storage. Accordingly, proposed § 261.2(a)(2)(v) defines as a solid waste any spent material, sludge, or by-product accumulated over time without sufficient amounts being used, reused, or reclaimed. (See the previous section’s discussion of the regulatory status of § 261.33 commercial chemical products that accumulate without sufficient amounts being recycled.) This provision is not limited to listed sludges or listed by-products, since the material’s status as a waste turns on the amount recycled over time, not on the material’s inherent character. The provision also applies both to a generator’s own materials that it plans to recycle itself and to materials accumulated by reclaimers for their own eventual use.

Proposed § 261.2(c)(3) defines materials with known recycling potential to be overaccumulated—and thus solid wastes—when they accumulate at a site for over a year without at least 75 percent (by volume) being recycled. Under this provision, the amount of material turned over in a year is critical, not the total amount accumulated at the end of the year. Thus, if A starts with 100 units, and during the year generates 300 more units, but recycles 75, none of the material is a solid waste even though 325 units remain at the end of the year. Of course, in the following year A would have to recycle (or transfer to a different site for recycling) 75 percent of the 325 units present at the beginning of that year. The time period can be computed according to a calendar, fiscal, or inventory year, whichever is appropriate for the person accumulating. We note that this approach could allow essentially a free year to accumulate where a generator starts a year with little or no waste, since the generator would have to recycle little or no material during the year to meet the test. (We solicit comments as to whether some controls are needed as to when the one-year period begins.)

The Agency has not decided whether the specified percentage of turnover should apply on a material-by-material basis, or on another basis, such as to: (1) All materials of the same class (i.e., all solvents, e.g., or all still bottoms); or (2) All materials to be recycled in the same way (i.e., all materials held for burning to recover energy); or (3) All materials of the same class to be recycled in the same way (i.e., all solvents held for burning to recover energy).

Our initial preference is for this last option, but we solicit comments on all of these alternatives, and ask that commenters suggest how these alternatives can be expressed in regulatory language.

The Agency nevertheless recognizes that some persons may be unable to recycle sufficient amounts of material in a given year but could do so if given additional time. Accordingly, the Agency offers a procedure (in § 261.2(c)(3)(ii)) that the person accumulating the material can use to notify the Regional Administrator of the circumstances. Although it need not follow any specified format, the notification would have to describe what kind of material is involved, how much is being stored, how it is being stored, how and when it is expected to be recycled, and why this expectation is reasonable. The Regional Administrator could then—on the basis of the submitted information—that the material is not a solid waste, or could request further information from the notifier. Once the material has accumulated for over a year without sufficient turnover, it becomes a waste unless the Regional Administrator decides otherwise.

The ultimate standard for the Regional Administrator’s finding is whether a large portion of the accumulated material is reasonably likely to be recycled in the next year. Factors to be considered are the notifier’s past history of recycling the material (including any contractual arrangements for recycling), relevant market factors, the character and quantity of material being accumulated, and how it is being stored.

For example, assume generator A has an emission control dust that he ordinarily sells as an ingredient in fertilizer. In a given year, however, he is unable to turn over 75 percent because the fertilizer manufacturer has gone out of business. Generator A believes he can find an alternative user in the next three months. Under these circumstances, the Regional Administrator could find legitimately that the material may be recycled and need not be managed as a waste.

There also may be extreme situations where a material can accumulate for a second year without 75 percent turnover and still possibly not be considered a waste. We thus have allowed (in § 261.2(c)(3)(ii)(B)) the person accumulating to present a second petition to the Regional Administrator containing the same information described above. The Regional Administrator could use this information to determine again whether the material is reasonably likely to be recycled. To submit the petition, however, the person accumulating must have recycled at least 50 percent of the total accumulated material. For example, assume that on day one A has 100 units of potentially recyclable material, recycles 50 percent in the first year, and successfully petitions the Regional Administrator. During the first year, A generates 200 more units of material. Thus, if A fails to recycle 75 percent of the 250 accumulated units, he would have to recycle at least 125 units to petition a second time.
The Agency believes that a two-year grace period is sufficient. Materials accumulating up to three years without 75 percent turnover are therefore solid wastes, with no further opportunity for petition (proposed § 261.2(c)(9)(ii)(C)).

Once materials are considered to be solid wastes under this provision, all of the accumulated materials are wastes. The materials remain wastes in the hands of the accumulator until 75 percent are turned over in a given year. Of course any part of that accumulation is physically segregated from the rest and sent to recycling, that part is no longer automatically considered to be hazardous waste under this provision. For example, if a recyclable listed distillation residue “overaccumulates” under this provision—so that the total accumulated is more than 75 percent—then it is sold to an asphalt manufacturer as an ingredient in asphalt production, that 10 percent is not a waste once it is sent to the asphalt manufacturer. (The material would remain a waste, however, if it were eventually sent to a reclamer, and would be subject to regulation if that reclamer was reclaiming for another person’s use.)

The Agency considered exempting from this provision situations where a generator accumulates its own non-listed by-products in tanks or containers for its own subsequent use or reuse (but not subsequent reclamation). It could be argued that materials a generator retains for its own use do not differ from materials sent to an unrelated person, since the generator is controlling the material until its end disposition. In addition, the risk of protracted, uncontained accumulation is reduced with materials accumulated in tanks or containers. We have decided against including this exemption at the present time. These materials pose the potential to cause substantial harm if overaccumulated, and the provision safeguards against this risk. In addition, we do not believe that accounting for the volume of unlisted by-products being used constitutes a substantial administrative burden, since in assessing compliance, we contemplate that tracking can be tied to normal inventory practice.

If materials stored before blending, processing, or burning as fuels would be deemed to be stored before use.

intended use, the type of vessels the materials are stored in, duration of storage, and volume of materials being stored.

The Agency acknowledges that the turnover-notification provision is complicated in description. However, it safeguards against overaccumulation of materials without recycling, while creating a strong incentive to turn over accumulated materials. It also ensures that the Regional Office will be alerted to possible problem operations. Persons accumulating materials may incur some expense when accounting for their materials, but the turnover period is tied to normal inventory practice and involves keeping track only of relative in-flow and out-flow, not of each specific unit of material.

The Agency still has a number of questions about this type of provision. The first is whether further controls are necessary to provide regulatory control over facilities accumulating material for their own recycling. Another is whether the one-year time period is too long to allow substantial amounts of material—e.g., a 20,000 ton-pile of a hazardous emission control dust—to accumulate unchecked. The Agency would appreciate comment on these questions, as well as on questions of this provision’s enforceability and feasibility.

H. Proposed § 261.2(g)(3): Spent Materials, Sludges, and By-Products To Be Listed as Solid Wastes

As explained above, certain recycling activities are deemed to constitute waste management only if the sludge or by-product being reclaimed, or (in the case of by-products) being burned as a fuel or used to produce a fuel, is also listed. The sludges and by-products are the same sludges and by-products listed as hazardous wastes in 40 CFR 261.31 and 261.32. Proposed §261.2(a)(3) states that the Administrator also may list particular materials as solid wastes without regard to the mode of recycling. Thus, if a material is listed under this provision, it is a solid waste and a hazardous waste no matter how it is recycled, and would be subject to regulation under the

provisions of proposed §261.6. The reasons for this provision is to provide a safeguard to cover situations where a secondary material being recycled is inherently waste-like and the recycling activity potentially poses substantial environmental risk, but the material is not otherwise defined as a solid waste.

The most likely examples would be particular secondary materials being used as ingredients or as commercial product substitutes. As we stated above, secondary materials ordinarily function more like raw materials or products than wastes when used or reused in these ways (see Section V.E.3.), and so are not ordinarily defined as wastes. There are exceptions, however. The listing provision in the revised definition would cover these exceptions by listing the particular material as a solid waste, the listing functioning in essence as a caveat to the general principles regarding use and reuse.

Spent materials, sludges, and by-products could be listed as solid wastes under § 261.2(a)(3) if they meet two conditions. First, the material would have to be waste-like. To be waste-like, the material, on a nationwide basis, would ordinarily have to be disposed of or incinerated, rather than recycled. The justification is that materials that are ordinarily thrown away are inherently waste-like. (See 45 FR at 33093, May 19, 1980, citing legislative history.) Alternatively, the material would be waste-like if (1) it contained toxic constituents listed in Appendix VII of Part 261 not ordinarily found in significant concentrations in the raw materials or products for which it was substituting, and (2) these toxic constituents were not used, reused, or reclaimed during the recycling process.

Second, to be listed, the material would have to pose a potentially substantial threat to human health and the environment when recycled in ways not already defined as waste management. This condition is relevant in determining whether a waste-like material is a solid waste since it sheds light on whether the purpose of recycling is ancillary to a central purpose of disposal. Potential dangers posed by the practice are also relevant in determining whether there is any need to assert control over the practice.

The Agency is proposing today to list as solid wastes certain dioxin and dibenzofuran-containing wastes that we are also proposing to list as hazardous wastes in another proposed regulation appearing in the Proposed Rule section of today’s FR. As we explain there in more detail, these wastes typically are
disposed of, and are extremely toxic, so that unregulated recycling (including use and reuse) is potentially hazardous. They contain hazardous constituents that are not ordinarily present in raw materials or products, and are not recyclable. Accordingly, we are proposing to list them as solid as well as hazardous wastes in order to control all means of recycling. (We are including the relevant regulatory language in this rule, rather than in the proposed dioxin waste listing, so that all the proposed regulations on recycling are in one place.)

We note that we do not expect to invoke this provision very often, since ordinarily the recycling situation is of concern (for example, reclamation by a person who did not generate the material), not the type of material involved. We also solicit comments on whether § 261.2(a)(3) should apply when materials are used as chemical intermediates by the generator of the materials at the site where the materials are generated. It can be argued that this type of use is close to use of raw materials in the same production process.

I. Proposed § 261.2(d): Record-keeping Provisions

No formal record-keeping requirements are imposed as part of the definition of solid waste. However, in many cases some type of records will be needed to substantiate that a particular material is not a solid waste under the definition or is a waste not subject to regulation. For example, a generator may need to document that a material is sent to a different person to be reused rather than reclaimed, or that accumulated materials are being turned over sufficiently during a year.

The Agency accordingly has proposed §261.2(d), requiring persons to keep whatever records (or alternative means of substantiation) are appropriate to document their claim that they are not managing a solid waste or that their wastes are exempt from regulation because they are being recycled in a particular way. The burden of proof rests with the person handling the material, so that failure to provide proof means that the person will be considered to be managing a solid waste or be subject to regulation. An analogous situation is a tax audit, where taxes rather than in the appropriate records or substantiation to support their claimed deductions. (Indeed, the Agency interprets present §261.6 as putting the burden of proof on the entity claiming to be exempt from regulation because of its recycling activities, in accord with the general principle that the party asserting an affirmative defense has the burden of proof.)

The Agency is seriously considering a requirement that persons who recycle 75 percent or more of their accumulated materials send a short annual letter to the Regional Administrator identifying themselves, their accumulated materials, and the percentage and volume recycled during the past year. The Agency is concerned that without such a requirement, it will never be able to identify potential problem facilities for follow-up inspection. The Agency solicits comments on whether it should adopt such a requirement.

Part II: Standards for Managing Hazardous Wastes That Are Recycled

I. The Agency’s Existing Standards for Managing Hazardous Wastes That Are Recycled and the Agency’s Rationale for the Proposed Revisions

In the Agency’s existing regulations, the requirements for recycled hazardous wastes are the same as those that apply to generators, transporters, or storers of any hazardous waste (see 40 CFR 261.6). The rationale is that these wastes present essentially similar hazards when they are transported or stored before their end disposition, whether recycling or disposal. Accordingly, certain hazardous wastes to be recycled are regulated up to, but not including, their recycling.36

In rethinking the definition of solid waste, the Agency considered the possibility of less stringent substantive management standards for persons who recycle hazardous wastes. Such materials could be expected to be handled somewhat more responsibly than ordinary wastes, given their value as reusable commodities, in addition, since our policy is to encourage recycling, we would be willing to ease the standards, provided no substantial threat is posed to human health and the environment.

However, the Agency concluded that such relaxation is not now advisable. In the first place, certain types of facilities recycling hazardous wastes repeatedly have mishandled these wastes, causing extensive damage—thus refuting the argument that these wastes necessarily are handled more responsibly. Second, and more important, the Agency does not now have the technical information necessary to determine which management standards should remain unchanged and which should be streamlined or eliminated. Given these materials’ demonstrated potential for harm, as well as legal requirements of an adequate record for rulemaking, we believe that the current substantive standards should remain in place, at least for the present.

Accordingly, the existing substantive standards will continue to apply to persons who generate, transport, and store hazardous wastes before recycling (subject to several exceptions discussed below). Recycling facilities (as opposed to generators and transporters) also will continue to be subject to the notification requirements of Section 3010. In addition, recycling facilities that are ineligible for interim status will have to obtain a storage permit to legally store the wastes they take in. (See Section VI. of this Part for further discussion of the eligibility of recycling facilities for interim status.)

However, the Agency is also in the process of gathering additional information to develop modified regulatory standards for hazardous waste storage facilities. Thus, under Executive Order 12291, the Agency is analyzing the RCRA storage standards to determine which management standards are most appropriate for which types of wastes. We expect to complete this analysis soon, and we will begin to repropose these standards as appropriate.

To provide regulatory relief, we are also considering the development of substantive permitting standards for certain classes of facilities that would be essentially self-implementing or would reduce the amount of required interaction with a permit writer. Coupled with these standards would be simpler procedures for obtaining permits for these classes—procedures that would allow all members of an appropriate class that handle similar types of wastes or manage wastes in a particular manner to submit a short permit application to an EPA Regional Office. The application would indicate that a facility is a member of the class and that it will be in compliance with the applicable permitting standards when the permit is issued. The Regional Office would then provide public notice of the permit application, and a hearing would be available, if requested. This procedure would streamline the existing application process for both applicants and the Agency and would still provide for the public participation required by RCRA.
II. An Overview of the Proposed Regulations

Section 261.6 of the existing regulations contains the special requirements for hazardous wastes that are beneficially used, reused, recycled, or reclaimed. Section 261.6(a) of the existing regulations excludes from hazardous waste regulation those recycled wastes (non-batch agreements) that are hazardous only because they exhibit a hazardous waste characteristic. Section 261.6(b) of the existing regulations indicates that persons engaged in recycling operations are subject to regulation if they handle a hazardous sludge or a waste listed as hazardous in 40 CFR 261.31 or 261.32. This paragraph further specifies the management standards those persons are subject to when the wastes are beneficially used, reused, recycled, or reclaimed.

The proposed amendment to § 261.6 eliminates the current distinction between listed wastes and wastes exhibiting a characteristic. Amending the potentially overbroad features of the solid waste definition renders this distinction unnecessary. The substantive standards for generators and transporters of recycled hazardous wastes, which are identical to those in the existing regulation, have been moved to proposed § 261.6(c). The standards for facilities that store wastes that are to be recycled (again, substantially identical to those in the existing regulation) are now found in proposed § 261.6(d).

There are also a number of conceptually new provisions. To avoid possibly stigmatizing the hazardous wastes that are recycled; we are proposing a new § 261.6(a) which redesignates these wastes as "regulated recyclable materials." We are also proposing a new § 261.6(b), which conditionally exempts certain types of regulated recyclable materials from regulation.

As discussed in Section III.D. in this part of the preamble, we are proposing to regulate materials that are used in a manner constituting disposal, including the actual recycling phase. Therefore, the standards for those materials that are used in a manner constituting disposal are found in proposed § 261.6(c).

In addition, certain regulated recyclable materials, and certain types of facilities managing these materials, are subject to regulatory standards.

However, public announcements—via newspaper and radio—of intent to issue a permit to a recycling facility will continue to mention hazardous waste (for example, a "hazardous waste permit to recycle regulated recyclable materials").

Eliminating reference to "hazardous waste" in the public notice would substantially undermine the meaningful opportunity for public participation in the RCRA permit-issuing process (under amended Section 7004(b)(2)).

B. Proposed § 261.6(b): Exemptions

This section exempts from regulation certain categories of regulated recyclable materials and persons handling them.

1. Proposed §§ 261.6(b)(1) and (ii), 261.6(b)(2), and 261.6(b): Exemption of Hazardous Wastes Reclaimed by the Person Who Generates Them, or Reclaimed by a Person Other Than the Generator For That Person's Subsequent Use. These exemptions already have been discussed in Part I of the preamble. They exempt from regulation regulated recyclable materials (i.e., hazardous wastes) being reclaimed by the person generating them, or reclaimed by a person other than the generator for that person's subsequent use. The exemptions apply from the time the waste is generated until it is reclaimed. Thus, if A generates a hazardous spent solvent and sends it to B who reclaimed it and then uses the reclaimed solvent, the waste is not subject to regulation in A's or B's hands.

As discussed in Section VII.E. of Part I, there are four qualifications to these exemptions. First, these exemptions do not apply when the materials are being reclaimed or otherwise processed in surface impoundments or stored in surface impoundments prior to reclamation. Second, they do not apply when spent batteries are being reclaimed. Third, sufficient amounts of the materials must be reclaimed during a one-year period, as provided in § 261.2(c)(3). This qualification guards against the risk of overaccumulation.

Fourth, and finally, the Regional Administrator may regulate these materials on a case-by-case basis upon discovering that the materials are being stored or accumulated in a manner injurious or potentially injurious to

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public health and safety. (See § 261.6(b)(2).) To meet this standard, the Regional Administrator must find that the materials (or their toxic constituents) are not being contained, or that incompatible materials are being accumulated or stored together. (See § 261.6(g)(1).) Relevant factors in making this determination are the type and quantity of material accumulating, the mode and length of accumulation, and the type of hazard posed by the site. For example, if during an inspection of an otherwise exempt reclamation operation, the Agency’s compliance assistance officers find that materials are being stored in large quantities in leaking drums or that a site poses a danger of fire or explosion, these observations could become the basis for a finding that the facility should no longer be exempt from regulation.

The case-by-case regulatory provisions function as a safety valve, allowing the Agency to regulate individual unsafe reclamation operations, while maintaining an otherwise appropriate exemption. Indeed, the Agency routinely conditions general exemptions by providing for regulation of individual operations causing environmental harm. 40

Proposed § 261.6(g)(3) sets out applicable procedures. 41 Upon deciding that a particular location is to be regulated, the Regional Administrator will issue a notice to the person storing the material stating why the material is considered to be improperly contained (for instance, because contaminated runoff from a pile of the material is seeping into surface water or ground water). If the person is accumulating the material as a generator (i.e., the material is reclaimed or blended within 90 days and is being held in tanks or containers), the notice will require compliance with the provisions of § 262.34. The notice becomes final within 30 days, unless the person accumulating requests a hearing, in which case a public (non-evidentiary legislative) hearing will be held. A final order, appealable to the Administrator, will be issued after the hearing. If the person is storing the material, the notice will require him to apply for a storage permit within 90 days of being notified. 42 Permit applications normally have six months to submit a Part B permit application. (See 40 CFR 122.22(b)(2).) We are specifying a shorter time period because facilities subject to § 261.6(g) ordinarily will be causing actual harm or have the potential to cause harm. The person can challenge the determination that he is storing a hazardous waste, either in comments filed with his permit application or in the public hearing on either a draft permit or the decision to deny the application. 43

The Agency believes this provision safeguards against unsafe operation and possible abuses by otherwise exempt facilities. The Agency solicits public comment on these points, as well as on the proposed procedures.

2. Proposed § 261.6(b)(4)(iii): Exemption of Regulated Recyclable Materials Used for Precious Metal Recovery. The Agency also is proposing to exclude from regulation those regulated recyclable materials from which precious metals are reclaimed. These materials also are excluded from regulation when stored and transported before reclamation.

By "precious metal reclamation," we mean to include any reclamation operation recovering gold, silver, iridium, palladium, platinum, rhodium, ruthenium (or any combination of these). 44 Examples are certain electroplating wastewater treatment sludges, solutions and sludges from electroplating and heat-treating operations, and certain silver-bearing scrap and silver-containing photographic films and solutions. Generally, the value of the metal in these materials is so great that they will not be mishandled. Indeed, many of these materials are never disposed of because of their value. 45 However, the Agency is conditioning this exclusion to allow a case-by-case determination that particular problem facilities storing or accumulating wastes containing precious metals can be regulated before reclamation. The basis for this, and the applicable procedures, are the same as those in proposed § 261.6(g)(1) and (3). 46 To guard against the risk of overaccumulation, we are also subjecting these facilities to the turnover notification requirements of § 261.4(c). 47

In addition, we are proposing to make a conforming amendment to the listing description of certain wastes listed in 40 CFR 261.31 (Hazardous Wastes F007—F012) to remove the existing exclusion for precious metal solutions and sludges. This exclusion will be redundant in light of the proposed exclusion in § 261.6(b) (and also would not allow case-by-case regulation as discussed above).

Finally, the wastes from precious metal reclamation are considered to be hazardous whenever the material being reclaimed is a hazardous waste (i.e., a regulated recyclable material). (See 40 CFR 261.30 (the so-called residue rule.) The usual example is metal reclamation from spent cyanide solutions or sludges listed as wastes F007—F012. Precious metals also can be reclaimed from electroplating wastewater treatment sludges (Hazardous Waste F006).

This result is soundly based in fact, since all the hazardous constituents (usually cyanides and possibly toxic metals) in the material being reclaimed remain in the waste solutions and sludges after the precious metals are recovered. Thus, the waste residues from precious metal reclamation of regulated recyclable materials are presumptively hazardous. If the material being reclaimed is a listed hazardous waste, the waste residues from reclamation remain hazardous unless the Agency has taken action to exclude them under 40 CFR 260.20 or 260.22 (and they do not exhibit a characteristic of hazardous waste). If the material being reclaimed is a waste that exhibits a hazardous characteristic, the waste residues remain hazardous unless they no longer exhibit that characteristic.


46 The Chemical Metals Industries facility, a Superfund interim priority site, engaged primarily in precious metal reclamation (under batch tolling agreements) but still mishandled the materials it received. By conditioning the exclusion, the Agency has a means of bringing such a facility into compliance with regulatory standards.
agreement is a contractual arrangement between a generator and a reclaimer. While retaining ownership of the materials, the generator sends them to another person for reclamation; the reclaimed portion is then returned to the generator/owner.

For such materials to be exempt, the proposed regulation specifies that: (1) they must be sent to the reclaimer within 180 days of generation, (2) the reclaimer must reclaim them and return the reclaimed material within 90 days of receiving them, and (3) the reclaimer may not commingle the materials being reclaimed under a batch tolling agreement with materials generated by any other person. The reclaimer also must be paid according to the amount of non-materials returned as the amount of material returned increases.

Batch tolling agreements satisfy the Agency's concern that materials will be tracked properly and moved safely from the generator to the reclaimer, and that they will be stored safely before reclamation. In addition, discrepancies will be discovered, since failing to deliver a shipment to the reclaimer or delivering a nonconforming shipment is a breach of the agreement. For these reasons, a manifest requirement is unnecessary.

The batch tolling agreement also guarantees that the reclaimed material will have an end market, so that each batch of material sent to a reclaimer will be reclaimed and not allowed to overaccumulate. In this respect, such agreements are very similar to a generator reclaiming its own material. The regulatory requirements that material be sent to a reclaimer within 180 days of generation and that the reclaimed material be returned to the generator within 90 days after the reclaimer receives the materials likewise safeguard against overaccumulation.

The conditions for payment provide a strong incentive for the reclaimer to store material properly, since any material lost in storage costs the reclaimer money. The requirements that the generator retain ownership of the material and that the material be commingled by the reclaimer further ensure safe storage, since the generator will be evincing a strong interest (indeed, creating a legal obligation) in receiving back the reclaimed portion of the material it sends to the reclaimer. (We also expect that a generator who retains ownership will scrutinize the handling practices of reclaimers because his ownership guarantees his continuing legal responsibility for the materials.)

For all of these reasons, therefore, we believe that regulated recyclable materials reclaimed under batch tolling agreements should be exempt from regulation. We also have provided that generators or facilities that mishandle materials being accumulated or stored under batch tolling agreements can be regulated on a case-by-case basis, according to the standards and procedures contained in proposed § 261.6(g) (1) and (3).

Batch tolling agreements, as defined in the proposed regulation, exist now. (Examples are in the public docket.) Thus, the proposed regulation will not disrupt on-going commercial practice. In addition, we do not expect this proposed exclusion to significantly alter the scope of regulatory coverage. Few, if any, reclamation facilities conduct all of their business under such arrangements. Thus, we do not believe that many reclamation facilities will be exempt from regulation as a result of this proposed exclusion. We do expect, however, that it will promote these agreements, a desirable result in light of the environmental safeguards they incorporate.

Finally, the Agency is aware of certain arrangements where the reclaimer retains title to the waste being reclaimed, leases the reclaimed material to a user, and then receives back the spent materials which it reclaims and re-leases. This is a batch tolling agreement where the reclaimer rather than the user retains title. The Agency interprets the exemption for batch tolling to cover these arrangements as well, since they provide the same assurances for tracking and handling as the more usual batch arrangement, due to the continued retention of title. (This type of batch tolling arrangement was complimented during the House of Representatvie's debate on H.R. 6307 for providing environmental safeguards. See 128 Cong. Rec. H 6740 (daily ed. Sept. 8, 1962), remarks of Rep. Florio.)

4. Proposed § 261.6(b)(14): Temporary Exemption of Regulated Recyclable Materials Being Burned as Fuels, Biodegraded to Produce Fuels, or That Are Contained in Fuels.

This provision has already been described in detail in Sections IV. D. and VI. D. of Part I of the preamble. In essence, it states the following:

1. Recovering energy by burning spent materials, sludges, and listed by-products (and § 261.33 materials that are not themselves fuels) is exempt from regulation when these materials are burned in unregulated boilers or industrial furnaces. This exemption is temporary and will be amended following completion and assessment of the technical studies described earlier.

2. Spent materials, sludges, and listed by-products (and § 261.33 materials that are not themselves fuels) are subject to regulation when used to produce fuels by persons who did not generate them and who are not themselves burning the fuels containing these materials. In these situations, the materials are subject to regulations under Parts 262-265. Non-exempt fuel-producing facilities thus are subject to regulations as storage facilities.

3. Sludges and hazardous wastes listed in 40 CFR 261.31 or 261.32 would be subject to regulations when they are to be burned or used to produce fuels, as they are under the existing regulations. These wastes would be subject to regulation whether or not they are managed by facilities producing fuels from them for their own subsequent use, or by facilities that ultimately burn these wastes. We may re-propose and alter this part of the proposal.

4. Storage and ancillary activities by facilities would be provisionally exempt if: (1) facilities produce fuels for their own subsequent use from non-sludge wastes that are hazardous solely because they exhibit a characteristic (i.e., non-listed spent materials), or (ii) facilities ultimately burn these wastes or waste-derived fuels containing these wastes. These facilities remain subject to the turnover-notification requirements of § 261.2(c)(3) however. In addition, they can be regulated on a case-by-case basis as storage facilities or as generators under the provisions and procedures of § 261.6(g).

The actual burning of these materials also is subject immediately to case-by-case regulation. The proposed regulation (§ 261.6(g)(2)) thus provides that persons burning these materials as fuels in unregulated boilers or industrial furnaces can be regulated on a case-by-case basis under the Part 264 Subpart O regulations applicable to incinerators. The grounds for regulating are that the materials are being burned in a manner insufficient to protect human health and the environment, based upon the toxicity and quantity of stack emissions. Relevant factors in making this determination include the content and mass of the waste feed, operating conditions of the unit, and potential of stack emissions to pose a health hazard. For example, if the Regional Administrator discovers that a boiler is
burning large quantities of solvents at low temperatures and with short residence times, and that stack emissions indicate presence of toxicants (all of which are instances have occurred in the damagc incidents involving improper burning in boilers), the unit could be regulated under the Subpart O regulations.

5. Proposed § 261.6(b)(3)(vii): Temporary Exemption of Recycled Used Oil. The Used Oil Recycling Act of 1980 requires EPA to determine whether used oil is a hazardous waste and to report to Congress the basis for that determination. This Act also requires EPA to promulgate regulations that protect human health and the environment from the hazards associated with recycled oil and to tailor the regulatory scheme so that recovering or recycling used oil is not discouraged.

The Agency intends to regulate certain recycled used oils as hazardous wastes. We also are developing the tailored management requirements contemplated by the statute. Until the specific regulations are completed, however, the Agency is deferring any regulation of recycled used oils that exhibit a characteristic of hazardous waste. (Used oil that is a hazardous waste to the extent released, remains subject to regulation as any other hazardous waste.)

To regulate now would make little sense when the Agency is working on a specially tailored regulatory scheme and would well conflict with congressional intent by discouraging used oil recycling.

This exemption does not apply when a hazardous waste is mixed with used oil and the resultant mixture is recycled. The most usual case is placing the mixture on the land—e.g., when a listed waste from on-line production is mixed with used oil, and the mixture is used as a dust suppressant. In this case, the Agency is regulating the hazardous waste that is mixed with the used oil, not the used oil component of the mixture. The recycling activity would be regulated as a use constituting disposal.

6. Proposed § 261.6(b)(1)(vii): Exemption of Used Batteries Returned to a Battery Manufacturer for Regeneration. Used batteries sometimes are returned intact to battery manufacturers to be regenerated by replacing the drained electrolyte or replacing one or more bad cells. This could be subject to Subtitle C regulation under the proposed solid waste definition, since it constitutes reclamation of a spent material by a person other than the generator (used batteries may be hazardous wastes because of acid and metal content). However, the Agency believes the practice prevents minimal environmental risks and is very similar to recycling commercial chemical products, an activity not ordinarily regulated (see 45 FR at 78540, November 25, 1980). This practice is not subject to the turnover-notification provision for the same reason. Accordingly, we are proposing today to exempt from Subtitle C regulation used batteries returned to a battery manufacturer for regeneration.

C. Proposed §§ 261.6(a) and (d): Specific Management Standards for Generators, Transporters, and Storers of Hazardous Wastes That Are Recycled.

These proposed provisions are the, analogues to the present § 261.6(b) and provide the specific management requirements for recycled hazardous wastes. As an organizational change, the Agency has placed the generator and transporter requirements (proposed § 261.6(d)) and the storage requirements (proposed § 261.6(d)) into different paragraphs of this section.

As discussed above, the Agency, for the most part, is retaining its current management standards for regulated recyclable materials. Thus, these materials (unless subject to a Part 266 standard) will continue to be regulated through the conclusion of their storage. Persons managing them will be subject (in some instances) to Section 3019 of RCRA and in all cases to the provisions of Parts 262–265, as well as Parts 122 and 124 for storage facilities requiring a permit.

Specifically, generators and transporters are subject to requirements of Parts 262 and 263. We are not requiring RCRA notification from these persons (see amended Section 3010(a)), since we believe the Part 262 and Part 263 requirements (such as obtaining an identification number) satisfy the objectives of the notification provision. Generators accumulating regulated recyclable materials in tanks and containers for less than 90 days are subject to the provisions of § 262.34, provided they comply with the substantive conditions of that provision.

Facilities storing regulated recyclable materials are subject to the standards contained in Subparts A–B of Parts 264 and 265, and to the technical standards of Subparts F through L of the same parts (depending upon the manner of storage—in tanks, containers, piles, or impoundments). The permit requirements and procedures of Parts 122 and 124 also apply (see proposed § 261.6(d)).

D. Proposed § 261.6(e): Management Standards for Hazardous Wastes Used in a Manner That Constitutes Disposal.

The standards for regulated cyclable materials used in a manner that constitutes disposal appear in § 261.6(e). We believe that these materials should be regulated at all stages of management. This includes the recycling phase, since recycling that constitutes disposal is virtually tantamount to unsupervised land disposal.

We are proposing, for the time being, to regulate these activities under the land treatment or landfill regulations of Parts 264 and 265. (These are the two Subparts that are most analogous to uses constituting disposal.) The risk of irrevocable environmental contamination from unregulated placement of hazardous wastes on the land is obvious. In addition, we indicated in our land disposal regulations that waste constituents cannot be contained indefinitely, and so are likely to migrate to ground water at some time. Predictions as to when and what the rate will be are very difficult. (See 47 FR at 32293, July 26, 1982.) We indicated that in protecting ground water, any statistically significant increase at the compliance point in ground water background levels of the

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50 Batteries also are recycled to recover contained lead values. This practice prevents environmental risks different from regnerating used batteries and is subject to a set of special management standards (see Section III D. 3. of this part of the preamble).

51 Amended Section 3010(a) allows the Agency to make notification optional when it amends a Part 261 regulation "Identifying additional characteristics of hazardous waste or listing any additional substances as hazardous waste..." In spite of this language, the Agency believes the clear intent of the provision is to give the Agency authority to make notification optional whenever it amends Part 261 to bring additional persons into the hazardous waste management system, not just when additional characteristics or listings are promulgated; we are so interpreting the statutory language.
Part 261 Appendix VIII constituents is sufficient to trigger compliance monitoring (40 CFR 264.91(a)(1)) and possibly corrective action. In light of the uncertainties of predicting waste migration, and the need for action if there is even a small increase in the concentration of hazardous constituents in ground water, there ordinarily will be some need for immediate regulation of this recycling activity.

At the same time, we recognize that using constituting disposal is unique situations different in practice (though possibly equivalent in risk) from waste management at ordinary land disposal facilities. Thus, uses constituting disposal can be regarded as a type of activity that does not fit precisely the description of any of the specific Subparts of Part 264 or 266. In our land disposal regulations, we indicated that we were considering promulgating separate regulations to address these types of waste management units. These regulations would consist of general environmental performance standards similar to those contained in 40 CFR § 267.10. (See FR 32281.) We believe that ultimately developing such general standards probably is suitable for regulating uses constituting disposal, because of the situation-specific nature of the activity. We accordingly solicit comments as to whether we should proceed along these lines.

In any case, the immediate impact of these provisions is likely to be minimal. Public comments and the Agency's own investigations indicate that most materials recycled in this manner are at present excluded from regulation by the 1980 statutory amendments. The principal examples are utility wastes and wastes from phosphate mining and processing.52 We are studying these wastes and their management. It may be that special standards (other than those proposed today) will prove appropriate for these wastes, should any be subject to regulation as hazardous wastes.

The proposed rules also cover the regulated recyclable materials before they ultimately are recycled to the land. Thus, the materials must be carried to the use location by a Part 263 transporter. In addition, the manifest system must track these materials to the use location. (See proposed § 261.6(c).) The owner or operator of the facility using the materials must then comply with the provisions for using the manifest (40 CFR 224.71 or 253.71) and for dealing with manifest discrepancies (40 CFR 254.72 or 255.72).

Without these requirements, there would not be the arrangement for use constituting disposal to ensure proper tracking of materials from the point of their generation to the point of their use. In fact, a user or generator might well not know if a shipment has been misdirected, particularly if the material involved is being shipped in large volumes via repeated movement (as in a land reclamation situation).

If a generator stores materials that will be used by a different person in a manner constituting disposal, the generator must still comply with applicable storage standards. The generator is not relieved of storage responsibilities because the end use is approved; nor are owners or operators of intermediate storage facilities exempt from regulatory control (i.e., storage facilities whose owners or operators do not ultimately use the waste).53 (See proposed § 261.3(f).)

E. Proposed §§ 261.6(f) and Subparts C and D of Part 266.

Proposed § 261.6(f) serves as a cross-reference to the special management standards in Part 266. The Agency intends to use Part 266 for regulatory standards that differ from those in Parts 264 or 265—in other words, for tailored management standards. Eventually, we hope to develop Part 266 standards for many types of recycling activities. At present, we are proposing two: for materials reclaimed under non-batch tolling agreements and for spent lead-acid batteries that are reclaimed.

1. Proposed §§ 261.6(f)(1) and 266.20

Regulated Recyclable Materials Reclaimed Under Nonbatch Tolling Agreements. We have developed special management standards for regulated recyclable materials reclaimed under non-batch tolling agreements. A nonbatch tolling agreement is a contract between a generator and a reclaimer. Under this contract, the generator physically transfers waste material to a reclaimer, who then returns reclaimed material to the generator by a specified deadline. It differs from the batch tolling agreement (discussed in Section III. B. 4. of this part of the preamble) in that (1) the generator does not retain ownership of the material sent to the reclaimer and (2) the reclaimer is not paid in proportion to the amount of reclaimed material returned. Instead, the generator

52 Used oil, which often is used directly on the land, will be regulated under a separate set of regulations. See Section III.B. of this part of the preamble.

53 The Agency is aware of at least one damage incident caused by improper storage of wastes prior to their use constituting disposal. See Damages and Treates Caused By Hazardous Materials Sites, supra, p. 44.

is simply guaranteed the return of a reclaimed material. (Contracts also may call for the waste and the reclaimed material to meet particular specifications.)

Nonbatch tolling agreements appear to satisfy all of the Agency's objectives in requiring a manifest system for generators, transporters, and facilities. As explained earlier, the agreement itself ensures proper tracking of materials from the generator to the reclaimer. We accordingly are eliminating any manifest requirements for generators, transporters, and facilities reclaiming wastes under these agreements. However, persons handling wastes under these agreements must be able to show that they actually are doing so by keeping copies of the agreement. (See the discussion of proposed § 261.2(d) in the first part of today's preamble.)

We are also proposing to eliminate the general waste analysis requirements of 40 CFR sections 264.13 and 265.3 for managing materials under these agreements. Under those provisions, an owner or operator who treats, stores, or disposes of any hazardous waste must obtain a chemical or physical analysis of a representative sample of the waste and must develop and follow a written analysis plan that describes the procedures to obtain the analysis. This requirement is to ensure that the facility has all the information necessary to properly treat, store, or dispose of the waste.

However, the nonbatch tolling agreement already serves the same purpose because the materials sent to the reclaimer ordinarily must meet physical specifications to enable the reclaimer to return suitable reclaimed material to the generator. Thus, the materials will be analyzed by the reclamation facility or other appropriate party, whether or not regulations apply.

We do not believe, however, that existence of the nonbatch tolling agreement satisfies any of the technical standards for storing or properly handling the material. Indeed, materials stored under such agreements have been mishandled at a number of the recycling facilities involved in damage incidents. (See Appendix B.) Unlike batch tolling, nonbatch tolling agreements neither guarantee an end market for the materials, nor provide incentives for safe storage.

We thus are proposing to retain all of the technical requirements. However, the Agency solicits comments on whether further requirements could be reduced or eliminated. For each suggested elimination or reduction, we...
request the commenter to explain how the nonbatch tolling agreement ensures that the policy underlying that affected requirement would be satisfied.

2. Proposed §§ 261.6(f)(2) and 266.30: Management Standards for Spent Lead-Acid Batteries Being Reclaimed. The final category of materials for which the Agency is proposing a tailored management standard is spent lead-acid batteries that are hazardous wastes and are being reclaimed. Reclaiming these batteries involves recovering the lead they contain by first cracking or breaking the casings and then smelting the lead plates that were inside. We are proposing to regulate these spent batteries only when they are stored by persons who reclaim them. Spent batteries thus would be subject to regulation when stored by battery crackers and smelters. (Including smelters who subsequently refine the recovered lead). However, they would not be regulated when accumulated by generators, or when stored by persons who do not also reclaim them, or transport them. The basis for these distinctions is set out below.

a. Regulation of Spent Batteries Stored by Reclaimers. Spent batteries have been mishandled while being stored by all types of reclamation facilities—by integrated smelter-refiner operations as well as by independent battery crackers and smelters (see Appendix B). Thus, we have no justification for distinguishing among these facilities for regulatory purposes. In this respect, the provisions proposed for these facilities differ from those proposed today for other types of reclamation facilities. In the case of those other facilities, the Agency—based in part on the lower level of risk—is proposing not to regulate generators reclaiming their own wastes or facilities reclaiming for their own subsequent use. However, many battery reclaimers do not store batteries before reclaiming them, as they do in their current regulations. These reclaimers transfer the batteries directly from the delivery truck to the battery-breaking equipment.

The batteries sometimes remain on the truck for several hours, sometimes up to several weeks. We ordinarily do not consider this temporary holding to constitute storage. This holding time usually is short because it is expensive for transporters to keep their delivery trucks off the road. We expect to propose soon a clarifying regulation indicating that temporarily holding hazardous wastes on bona fide transport vehicles does not constitute storage. The proposed time limit for such holding probably will be 14 days. Under the current proposal, therefore, battery reclaimers (and similarly situated persons) need not obtain a storage permit unless they take the batteries off the truck and store them at a separate area before reclamation.

We acknowledge that some questions remain as to the efficacy of regulating storage of spent batteries before reclamation. Most of the environmental damage from battery reclamation has been caused by disposing of wastes from the reclamation process rather than by storing batteries before reclamation. Existing regulations already apply to disposing of process wastes. We also recognize that risks from improper storage are reduced with the increased use of automated battery shredding equipment.

Nevertheless, the damage from improper storage by battery reclaimers indicates some need for regulation. We also can envision potential problems arising from storing spent batteries. For example, a facility could pile batteries in leaking containers in the open, spilling metal-contaminated acid. Reclamation facilities also can receive damaged batteries with the possibility of harm if storage is unsafe.

We consequently are proposing to regulate spent battery reclaimers who store these batteries. At the same time, we solicit comments on alternative regulatory approaches, such as a class permit for battery reclaimers directed narrowly to containing releases of hazardous waste occurring both during storage and during treatment (battery breaking). A second alternative is to limit the quantity of batteries that a reclamation facility can store at one time without having to obtain a storage permit.

We also would like commenters to address the following questions: (1) What are the maximum and average lengths of time that reclaimers store spent lead-acid batteries before reclamation? (2) How are these spent batteries transported? (3) What risks of environmental damage are associated with the reclamation process itself?

b. Exclusion of Spent Batteries from Regulation When Accumulated by Persons Other than Reclaimers or When Transported. We are proposing to exclude spent batteries from regulation when they are accumulated by persons other than reclaimers or when they are transported. This exclusion is needed because an excessive (and unnecessary) regulatory burden is likely to result if Subtitle C standards are extended back to cover activities before storage by reclaimers.

Generator and transporter requirements do not appear necessary, since there are other incentives outside RCRA and other regulatory constraints that ensure that these materials both arrive at their intended destination and are not improperly managed during this phase of the management cycle. First, these spent batteries are a valuable commodity, and customarily are reclaimed; therefore, the Agency can be assured that these materials ordinarily will arrive at their intended designation. Second, acid spillage during transport is unlikely because the Department of Transportation currently regulates these batteries during their transportation under 49 CFR Part 122. Under these regulations, batteries must be properly packaged, labelled, etc., to prevent hazards during transport. (Such spillage also would constitute illegal hazardous waste disposal.) Finally, as indicated by both the independent battery crackers and the integrated smelter-refiners, reclamation operators pay for each battery on a weight basis. Therefore, to increase their profit, generators and transporters are encouraged to deliver batteries full of acid.

We also think it unnecessary to regulate storage of these batteries by
retailers, wholesalers, or local service stations that receive spent batteries from consumers. These types of establishments rely heavily on maintaining good public relations with the consumer, and thus have an added incentive to manage their wastes properly. We also are reluctant to impose Subtitle C regulations on establishments of this type (particularly when a recycling activity is involved), unless there is a compelling environmental need. No such need is apparent in the case of stored spent lead-acid batteries. We also are proposing not to regulate the storage of spent lead-acid batteries at immediate collection centers. Many of these centers are small establishments—e.g., scrap yards or salvage dealers—that receive many different types of scrap metal (including spent batteries), segregate it, classify it into the various grades, and send it off to be smelted and refined. We estimate that there may be thousands of these establishments. We believe that these facilities are unlikely to present a significant hazard to human health and the environment because they ordinarily do not store large quantities of these batteries for long periods. Therefore, we are proposing not to regulate spent batteries when accumulated at these intermediate collection centers. However, we believe that we need to investigate these facilities further. If after this analysis we conclude that regulatory control of these facilities is necessary, we will propose appropriate regulations.

In summary, the Agency is today proposing to regulate spent lead-acid batteries only when stored before reclamation at battery cracking, battery cracking-smelting operations, or battery cracking-smelting-refining operations. Spent batteries stored by these persons would be subject to the requirements contained in Parts 264 and 265. These include: (1) the administrative requirements of Subparts A through E; minus those regulations pertaining to the manifest requirements and waste analysis (since the batteries' composition is known) and (2) the technical standards of Subparts F through I, (depending on the manner of storage). The permit requirements of Parts 122 and 124 also apply.

IV. Standards Applicable to the Various Activities Constituting Waste Management Under the Proposed Definition of Solid Waste

This section of the preamble reviews which regulatory standards apply to the activities defined in § 261.2 as waste management.

Persons engaging in uses constituting disposal. 

Regulated recyclable materials reclaimed under proposed § 261.6(c) (generators and transporters), 261.6(d) (storage facilities), and 261.6(e) (uses constituting disposal). Persons handling wastes being reclaimed by someone other than the generator or by someone who subsequently uses the reclaimed material are regulated under proposed § 261.6(c) and 261.6(d). In the case of hazardous wastes that are listed in 40 CFR 262.31 and 262.32 or are hazardous sludge, persons managing these wastes prior to burning or blending are also regulated under proposed §§ 261.6(c) and 261.6(d) Any wastes listed under proposed § 261.2(a)(3) also would be regulated under these provisions.

Persons accumulating materials speculatively likewise are subject to the standards in proposed §§ 261.6(c) and 261.6(d). These materials are deemed immediately to be solid wastes. Generators who accumulate these materials for less than 90 days in tanks and containers are subject to the provisions of 40 CFR 262.34. Storage for longer periods (or for any length of time in piles or impoundments) must satisfy the applicable storage standards. The standards applicable to materials that are accumulated without sufficient amounts being recycled require further explanation. Under the proposed definition, it is not determined whether these materials are regulated recyclable materials until 90 days have passed. The person accumulating these wastes also may petition the Regional Administrator for a determination that the materials he is accumulating are not solid wastes.

In the Agency's view, persons accumulating these materials are storage facilities when a year elapses without sufficient turnover of the material. Thus, they are subject to the standards contained in proposed § 261.6(d). These persons should not be considered generators, or have the benefit of the generator accumulation provision (§ 262.34), because they already have held the material for well over 90 days.

We do, however, interpret these provisions as allowing a six-month period for a facility either (1) to come into compliance with the applicable requirements (i.e., the storage standards in proposed § 261.6(d), and the requirement to submit permit applications—both Part A and B applications for facilities ineligible for interim status), or (2) to ship all the materials to another Subtitle C facility. This is analogous to Section 3010(b) of RCRA, which provides that Subtitle C regulations become effective six months after promulgation—to allow regulated entities lead time to come into compliance.

The Agency believes a similar principle applies when a material becomes a solid waste after held for a year without sufficient turnover. In this situation, the applicability of regulatory requirements is not certain until the year has passed, just as the applicability of regulatory requirements is uncertain until a regulation is promulgated. Because of this uncertainty, the person accumulating the material may not have had, and cannot reasonably be expected to have had, sufficient opportunity to come into compliance with the regulatory requirement. 58

V. Possible Inclusion of a Variance Provision

The Agency considered including a variance provision in these regulations to cover processes that do not appear to be waste-based but that nevertheless fall under the revised definition of waste management. However, we decided that such situations, if they exist, can be dealt with by using the rulemaking provisions and procedures of § 260.20 of the regulations. In fact, informal rulemaking, which would accord relief on a case-by-case basis is the most appropriate mechanism. If a petitioner can show that its process should not be considered waste management, all similar processes should be accorded the same regulatory status at that time.

58 These facilities also would have to file a notification within 90 days after the accumulated material becomes a regulated recyclable material. As an incidental matter, the six-month period described above is a good time to apply to the Regional Administrator, under proposed § 261.6(c)(1)(ii), for a determination that the accumulated material is not a solid waste. The time it takes for the Regional Administrator to make this determination is another reason to allow a six-month lead time to come into compliance.
We do not think that a variance provision to exempt individual facilities (or generators or transporters) from particular regulatory requirements is appropriate. We believe that petitioners for this type of variance would argue that their facility performs a certain activity properly and so should not be regulated. This type of claim is properly made in the permitting process, where the existing Part 264 (or Part 260) standards provide flexibility to accommodate individual situations. If the form of relief requested is justifiable on a classwide basis, a rulemaking petition can be filed. Consequently, we are not including a variance provision in the proposed regulation. We solicit comments on this approach, however.

VI. Eligibility of Owners or Operators of Recycling Facilities for Interim Status

It obviously is of great practical significance whether owners or operators of recycling facilities newly brought into the hazardous waste management system are eligible for interim status. The requirements for interim status are no different for recycling facilities than for any other hazardous waste management facility. They require: (1) that the owner or operator of a facility notify he is engaged in a hazardous waste management activity (if the Agency requires notification), (2) that he submit a Part A permit application in a timely manner, and (3) that the facility had been in existence on November 19, 1980. See § 122.23(a) and 45 FR 76630 (November 30, 1980), interpreting these requirements.

In general, the owner or operator of any facility that presently has interim status will continue to have such status if his recycling operations are now brought into the hazardous waste management system for the first time. If the owner or operator of a facility does not have interim status, he may qualify if he notifies the Agency, if he submits a timely Part A permit application. The company promptly notifies and files a Part A application. Does it have interim status?

The company does not have interim status. After November 19, 1980, it begins to reclaim a different person's spent corrosive materials. It was not handling this waste before November 19, 1980. The facility owner or operator notifies the Agency and submits a timely Part A permit application. Does the company have interim status?

The company does not have interim status. Although it has complied with the notification and application requirements, it was not "in existence on November 19, 1980" because on that date it was not treating, storing, or disposing of waste it now is recycling. (See 45 FR at 76633-634, which interprets the requirement that a facility be in existence on November 19, 1980.) Consequently, until the company obtains a storage permit, it must stop storing the waste before recycling.

3. The DEF Company does not have interim status. On November 19, 1980, the company was reclaiming an EP toxic spent material generated by a different person and storing that material before reclamation. It is now deemed to be engaged in hazardous waste management as a result of the amended definition of solid waste. The owner or operator of DEF notifies the Agency and promptly submits a Part A permit application. Does the company have interim status?

This company's facility meets all of the prerequisites for interim status. A facility is "in existence on November 19, 1980" if it was treating, storing, or disposing of a material on that date, and action by the Agency subsequently brings that material (or management activity) into the hazardous waste management system. This is the case in the example above. The company also has satisfied the other interim status requirements.

4. The XYZ Company does not have interim status. It was generating a hazardous distillation bottom on November 19, 1980, and then it obtained an EP toxic sludge for recycling. The sludge has accumulated for over one year without sufficient amounts being recycled, and so is a solid and hazardous waste under amended § 261.2(a)(3)(v). The company promptly notifies and files a Part A application in a timely fashion. Does it have interim status?

The company does not have interim status. Although the company has notified and filed a permit application, it was not in existence on November 19, 1980, because it was not then treating, storing, or disposing of a hazardous waste—but only generating a hazardous waste. (This result is the same if XYZ generated a hazardous waste on November 19, 1980, and subsequently began to store and recycle that same waste.) XYZ still was not treating, storing, or disposing of a hazardous waste on the critical date, and so its facility was not in existence on November 19, 1980.

Part III: Miscellaneous

I. Regulatory Impact

Under Executive Order 12291, EPA must judge whether a regulation is "major" and thus requires a Regulatory Impact Analysis. This proposed rule is not a major rule because it will not (1) have an effect on the economy of $100 million or more, (2) significantly increase costs or prices for industry, or (3) diminish the ability of U.S.-based enterprises in domestic or export markets.

This assessment is based on two EPA studies of the economic effects on the regulated community of the proposed changes to the definition of solid waste and accompanying management standards. The first of these studies is entitled "Impact on the Regulated Community of Possible Changes in the Definition of Solid Waste: Use, Reuse, Recycling, Reclamation." This study analyzed the net reductions and increases in regulation of establishments that recycle hazardous wastes if the current regulations defining solid waste and establishing management standards for recycled hazardous wastes were replaced by those proposed today.

This study identified 49 industrial categories which are involved in the recycling activities that will be affected significantly. We based our numerical...
estimates on 27 of these industrial categories. The number of establishments within the other 12 industrial categories could not be quantified within the scope of the study. Available information indicates strongly, however, that—under the proposed standards—there will be a net reduction in the regulatory impact of the establishments within these categories. According to the study, under the proposed regulations:

- Approximately 4,500 to 5,300 establishments would have their requirements under the hazardous waste management regulations reduced;
- At least 76 establishments that use or reuse materials otherwise considered hazardous wastes would be excluded from regulation;
- Approximately 230 to 350 establishments would have their requirements under the hazardous waste management regulations increased;
- Approximately 60 establishments that recycle hazardous materials would be newly subject to regulation.

These findings show a significant reduction in regulatory impact as a result of the proposed regulations. The most significant change would be the reduced regulatory impact on persons reclaiming materials that they generate (particularly spent solvents). These persons would not be subject to regulation under the proposed definition if they reclaim 75 percent of the material on hand at the beginning of a 1 year period. At present, they are subject to regulation immediately if they are reclaiming hazardous wastes or hazardous sludges. The regulatory impact on persons using or reusing listed hazardous wastes and hazardous sludges also would be significantly reduced. These regulated activities would not be regulated at all under the proposed regulation.

The proposed regulation increases the regulatory impact of facilities that reclaim hazardous wastes generated by others, or that process such wastes to make fuels. However, because this class or recycling operations has caused most of the damage incidents involving recycled hazardous wastes, we view this effect as appropriate.

The second study is entitled "Cost Impact Analysis for Proposed Changes in the Definition of Solid Waste and Management Standards for Wastes Which Are Used, Reused, Recycled, and Reclaimed." It analyzed what the proposed change will actually cost the regulated community. The study applies the appropriate unit cost estimates to the estimates developed in the first study to arrive at a net cost. These costs were adjusted to reflect only the volume-dependent variable costs and not the incremental fixed costs already incurred by the affected establishments.

The results of the study demonstrate that the proposed regulation will reduce compliance costs by an estimated $24.4 million (costs shown are the annualized after-tax cost savings). This figure represents the sum of increases and decreases in annualized costs for all affected establishments, including:

- An estimated decrease in costs of $24.7 million for establishments with reduced regulatory requirements, or for establishments that are released from the hazardous waste management regulations entirely; and
- An estimated increase in costs of $0.34 million for newly-regulated establishments or for those facing increased regulatory requirements.

Our analysis strongly suggests that for industries facing increased regulatory requirements under the proposed regulations, there would be no significant cost increases or other adverse effects on competition, employment, or investment.

Finally, it should be noted that many of the assumptions made in both reports were conservative. Thus, we believe that our estimates understate the reduced regulatory impact from the proposed changes. Moreover, a number of provisions presented unquantifiable effects for which we made no estimates at all, even though we know that costs will be reduced. Therefore, because this proposed amendment is not a major regulation, no Regulatory Impact Analysis is being conducted.

This proposed amendment was submitted to the Office of Management and Budget (OMB) for review, as required by Executive Order 12291.

II. Regulatory Flexibility act

Under the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., whenever an agency is required to publish a general notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the rule's impact on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). This analysis is unnecessary, however, if the Agency's Administrator certifies that the rule will not have a significant economic impact on a substantial number of small entities.

EPA and its contractor performed an analysis to determine whether the proposed changes in the definition of solid waste and the accompanying management standards will impose significant costs on small entities. The resulting report ("Cost Impact on Small Entities of Proposed Changes in the Definition of Solid Waste and Management Standards for Wastes Which Are Used, Reused, Recycled, and Reclaimed") indicates that in none of the industry categories would this rule have a "significant economic impact on small entities" (as this is defined under the criteria for a Regulatory Flexibility Analysis). Accordingly, I hereby certify that this proposed rule will not have a significant economic impact on a substantial number of small entities and therefore does not require a regulatory flexibility analysis.

III. Paperwork Reduction Act

The reporting or record-keeping (information) provisions in this rule will be submitted for approval to the Office of Management and Budget (OMB) under Section 3504(b) of the Paperwork Reduction Act of 1980, U.S.C. 3506 et seq. Any final rule will explain how its reporting or record-keeping provisions respond to any OMB comments.

IV. List of Subjects in

40 CFR Part 260

40 CFR Part 261
Hazardous materials, Waste treatment and disposal, Recycling.

40 CFR Part 264
Hazardous materials, Packaging and containers, Reporting requirements, Security measures, Surety bonds, Waste treatment and disposal.

40 CFR Part 265
Hazardous materials, Packaging and containers, Reporting requirements, Security measures, Surety bonds, Waste treatment and disposal, Water supply.

40 CFR Part 266
Hazardous materials.
Dated: March 21, 1983.

John W. Hernandez, Jr.,
Acting Administrator.

Appendix A

This Appendix sets forth the Agency's legal basis for asserting jurisdiction under Subtitle C and the implementing regulations over materials being recycled. Although the statutory definition of solid waste (Section 1004(27)) does not expressly address the question of whether a material being recycled or destined for recycling can be a solid waste, we believe that Congress did indeed intend that recycled materials can be solid wastes, and, if they are hazardous, that they can be regulated under the hazardous waste management regulations.

I. Recycled Materials Can Be "Solid Wastes" Under RCRA

Many commenters to the Agency's May 19, 1980 regulations argued that recycled materials cannot be wastes under RCRA, basing their claim largely on the phrase "other discarded material" in the statutory definition (a term nowhere defined in RCRA). They claim that this language means that a material must first be discarded, in the sense of thrown away or abandoned, before it can be a RCRA solid waste.

The Agency disagrees with this reading. It is quite clear from the text of other statutory provisions that recycled materials can be wastes. Perhaps the most pertinent provision is the definition of "hazardous waste management." This term (which is the title of Subtitle C) is defined as "the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous waste." (Section 1004(7)). The recycling activities of recovery, source separation (the selection of recyclable from non-recyclable items), and collection thus can involve hazardous waste.

Equally clear, a whole series of statutory definitions dealing with resource recovery indicate that this activity involves reclaiming material or energy from solid waste, demonstrating again that a material being recycled can be a waste. "Resource recovery" itself means "the recovery of material or energy from solid waste." (Section 1004(23) (emphasis added)). A "resource recovery facility" is "any facility at which solid waste is processed for the purpose of extracting, converting to energy, or otherwise separating and preparing solid waste for reuse." (Section 1004(24) (emphasis added)). A "resource recovery system" is a "solid waste management system which provides for collection, separation, recycling, and recovery of solid wastes, including disposal of non-recoverable waste residues." (Section 1004(23) (emphasis added)). A "recovered resource" is "material or energy recovered from solid waste." (Section 1004(2) (emphasis added)). Section 6002(c)(2) speaks of "systems that have the technical capability of using energy or fuels derived from solid waste * * * ." See also Sections 1004(18), (28), and (29) of all of which likewise presuppose a solid waste from which resources can be recovered.66

The repeated references to resource recovery throughout the statute; these references would be meaningless if solid wastes were never reclaimed or otherwise recycled. See, e.g., Section 1002(c) (2) and (3), 1003(1) and (5)-(8), 2003, 4000(c)(10), 4003 (5) and (6), 4005(a)(2)(A) and (d), 5001, 5002, and 6002(c)-(g).67

66 A number of commenters have argued that the statutory definition of "recovered material" (Section 1004(10) suggests by negative implication that materials "generated from, and commonly reused within, an original manufacturing process" are not solid wastes. The Agency disagrees. The plain language of the provision does not support the negative implication read into it by these commenters. Equally important, the legislative history indicates unequivocally that this provision was intended to apply to Federal procurement guidelines issued pursuant to Section 5002. See 35 Fed. Reg. No. 58-77, 92th Cong., 1st Session at 2. It is clear, therefore, that the provision does not have the broader meaning attributed to it by these commenters.

67 A number of commenters also found support in the House Report to RCRA for their argument that only discarded materials can be wastes. They pointed to the Report: "Although industrial and agricultural waste is reclaimed or put to new use and is therefore not a part of the discarded materials disposal problem the committee addressed." H.R. Rep. No. 94-1191, 94th Cong., 2d Sess. at 2.

The language is taken out of context. In fact, it applies only to non-hazardous solid waste. Throughout the report, it is clear when the committee refers to non-hazardous waste and hazardous waste. Indeed, these two types of waste often are referred to separately. See, e.g., H.R. Rep. at 1, 4, 5, 8, 12: "discarded materials and hazardous wastes." Congress intended a regulatory solution for hazardous wastes. Id. at 3, 4, 6-7. Statements made about non-hazardous wastes thus have little or no bearing on Congress' intent regarding hazardous waste.

Furthermore, the House Report indicates that "discarded materials" can indeed be utilized for recycling and be reclaimed. H.R. Rep. at 7, 12: "the state plan must provide that no state or local government shall prohibit such local community from entering into long-term contracts to purchase materials of the community to resource recovery facilities." ("resource recovery facilities cannot be built unless they are guaranteed..."

The commenters' argument that a material must first be discarded or thrown away before it can be a RCRA waste has also been rejected by the United States Court of Appeals for the D.C. Circuit in United States Brewers' Association, Inc. v. EPA, 600 F. 2d 974 (D.C. Cir. 1979), a suit challenging a beverage container recycling guideline issued by EPA under Section 1008(a)(1) of RCRA. The petitioners in that proceeding contended that beverage containers were not "solid wastes" until "discarded" and therefore that EPA had no authority under Section 1008(a)(1) to require that beverages be sold in returnable containers, or that a minimum deposit be charged on containers (to encourage their return for recycling). The Court of Appeals rejected this contention, saying that it flies squarely in the face of the explicit definition in the statute. Section 1008(a) directs EPA to publish guidelines for solid waste management programs, which are defined in Section 1004(30) expressly to include "planning or management respecting resource recovery and resource conservation,..." and "utilization of recovered resources."

In addition, 17 courts to date have exercised jurisdiction in imminent hazard actions under Section 7003 brought against recycling facilities (recyclers reclaiming wastes generated by a different person). Since the use of a supply of discarded material; see also H.R. Rep. at 13: "locating new markets for resources recovered from waste", and 43 (the) Committee has received much information on the importance of expanded and stable markets for the materials recovered from waste.

government's authority to bring an imminent hazard action depends upon the presence of "solid waste" or "hazardous waste" [see Section 7003(f)], these cases all stand for the proposition that materials destined for recycling can indeed be solid and hazardous wastes. See U.S. v. Midwest Solvent Recovery, Inc., 494 F. Supp. 130 (N.D. Ind., 1980) (spent solvents held by a reclamation facility are "chemical wastes" which are "solid wastes" or "hazardous wastes" as those terms are defined in Section 1004 of [RCRA], and that the chemical wastes so present are the objects of 'storage' and 'disposal' activity * * *.

494 F. Supp. at 142; U.S. v. Solvent Recovery Services of New England, 496 F. Supp. 1127 (D. Conn. 1980) (solvency reclaimer "accepted waste products (including chlorinated organic solvents) from industries in New England, processed those materials in order to recover usable chemicals, and returned the recovered chemicals to industry for reuse." 496 F. Supp. at 1130).

Finally, the House Committee on Energy and Commerce likewise reaffirmed, in recent action, that RCRA presently provides authority over hazardous wastes being used, reused, recycled, or reclaimed, and directed the Agency to exercise this authority more fully. (H.R. Rep. No. 97-570, 97th Cong., 2d Sess., at 16.) Although not part of the contemporaneous legislative weight, this report still carries "considerable weight as a kind of 'expert opinion' concerning the meaning and proper interpretation of the statute." U.S. v. Solvents Recovery Services of New England, 496 F. Supp. 1127, 1240 n. 18 (D. Conn. 1980). The full House of Representatives later adopted, by a wide margin, the provision reported by the Committee.

In sum, view of the statutory language, the holding in the Brewers' case, and the weight of the various Section 7003 actions, the Agency believes that solid wastes can be reclaimed, reused, or otherwise recycled, and that such recycling activities as material processing, source separation, and reclamation (termed "recovery" in the statutory definitions) involve solid wastes. 46

II. EPA Has Regulatory Authority Under Subtitle C To Regulate Hazardous Wastes That Are Recycled and to Regulate Hazardous Recycling Operations

1. A number of commenters made the further argument that even if recycled materials could be solid and hazardous wastes under RCRA, Congress did not intend that the Agency's Subtitle C regulatory authority apply to hazardous wastes that are recycled or to hazardous waste recycling activities. The argument is that the Agency's regulatory authority is limited to treatment, storage, and disposal of hazardous waste (and any incidental generation and transport incident thereto), and that waste recycling (of any kind) does not constitute treatment, storage, or disposal.

The Agency does not accept this argument, for a number of reasons. As shown above, Congress defined the term solid waste (and therefore hazardous waste) to include recycled materials. It is at odds with the whole thrust of Subtitle C to argue, as these commenters do, that Congress did not intend for these wastes to be regulated. Congress' "overriding concern" (H.R. Rep. No. 94-1491, 94th Cong., 2d Sess. at 3) ("H.R. Rep."), in enacting RCRA was to establish the statutory framework for a comprehensive system that would ensure the proper management of hazardous waste. Implementing this framework to Subtitle C and transport a cradle to grave management system, with regulatory control attaching to hazardous waste from the point of generation to the point of final disposition. A broad grant of regulatory authority over all enumerated aspects of waste management is necessary, and we believe intended, to effectuate this scheme.

Failure to regulate hazardous waste recycling would moreover leave open the very loophole Congress sought to close—unregulated disposition of hazardous waste—vitiating substantially the whole cradle to grave system. For example, hazardous wastes could be recycled by being placed directly on the land for land reclamation without regulatory control, contaminating soil and groundwater. Hazardous wastes could be stored insecurely for years before being reclaimed, with resulting environmental contamination. Wastes destined for recycling could be mishandled during transportation, or never arrive at their intended destination because of the lack of a manifest to track the waste. Indeed, all of these situations have occurred repeatedly, causing extensive damage. The Agency believes these are the very situations Congress meant to control in establishing the hazardous waste management system, and that the grant of regulatory authority in Subtitle C reaches these situations.

Congress' intent to regulate hazardous wastes which are recycled is borne out further by several of the damage incidents cited by Congress as justification for establishing a national hazardous waste management system. A number of incidents resulted from waste recycling activities, including an incident where wastes were stockpiled in the open prior to reclamation and leached toxic metals into public water supply wells (H.R. Rep. at 18); a similar incident where wastes destined for reclamation were improperly stored in lagoons and toxic metals seeped into an adjacent creek (id. at 17); and a final incident when a child was poisoned by contact with a pesticide drum being reused as a trash container (id. at 22). The Agency does not believe Congress would have referred to these incidents without intending that the described activity be regulated.

Congress also has continued to express a desire that recycled hazardous wastes be regulated. The Subcommittee on Interstate and Foreign Commerce issued a report of its oversight hearings on the Agency's proposed hazardous waste regulations (Committee Print 96-1FC 31, 96th Cong., 1st Sess. [September 1979]) (the "Eckhardt Report"). The report describes three damage incidents involving recycled hazardous wastes, and expressed the Subcommittee's view that these activities should be controlled and that the Agency possessed jurisdiction to exercise control.

(Eckhardt Report at 4, 12-13, 17, 24, 41-
The recent report of the House Committee on Energy and Commerce, as well as the substantive legislation it accompanies, likewise would mandate EPA’s regulations of hazardous waste recycling. In doing so, it stated unequivocally that the legislative change “clarifies” that “materials being used, reused, recycled, or reclaimed can indeed be solid and hazardous wastes and that these various recycling activities may constitute hazardous waste treatment, storage, or disposal.”

The Agency thus believes that Congress meant for it to regulate hazardous wastes which are recycled. The lack of an absolutely explicit directive in the statute (for instance “all persons reclaiming hazardous waste must obtain a permit”) appears to result from a factual misconception that hazardous wastes are rarely, if ever, recycled or amenable for recycling. H.R. Rep. No. 97-570, supra at 22.

2. Even if one disregards Congressional intent, and assumes that Congress meant that EPA regulate only the treatment, storage, disposal, and transportation of hazardous wastes, the wording of these provisions indicates that the Agency possesses authority to regulate most hazardous waste recycling (and all recycling operations that the Agency seeks to regulate or contemplates regulating), and transport and storage incident thereto. There is indeed no question that transportation and storage of hazardous wastes prior to recycling is covered by the definitions of “transportation” and “storage”, so that these activities can be regulated under Subtitle C.

The definitions of treatment and disposal provide regulatory authority over the major types of recycling activity the Agency actually seeks to regulate or contemplates regulating: resource recovery (termed ‘reclamation’ in the proposed definition), and recycling involving direct placement of residual materials or materials derived thereon from land or water or into the air.

a. Reclamation Operations Constitute Waste Treatment. Reclamation operations—that is, operations involving recovery of energy or material—meet the statutory definition of “treatment.” This term is defined in RCRA to include any method, technique, or process designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to render such waste amenable for recovery, amenable for storage, or reduced in volume. [Section 1004(34)].

One key part of this definition is the phrase “amenable for recovery.” The Agency interprets this language to mean that processes that make a waste or its contained values available for further use constitute treatment. This includes processes that recover material or energy resources. [1002(34)]. Subtitle C jurisdiction exists potentially until the material is available for reuse, or until energy has been recovered. For example, a spent chemical would be “treated” until material values were finally recovered. This interpretation not only is consistent with the literal sense of the words, but also with the definition of treatment as a form of activity in addition to, and more encompassing than, processing. (See Sections 1004(7), (28), and 26(C)—all dealing with waste management—where the terms ‘processing’ and ‘treatment’ are both included, indicating (to avoid redundancy) that treatment includes additional activities.)

“Treatment” also includes operations designed to reduce the volume of material. Where such a process is conducted incident to or as part of reclamation operations, there is thus another basis for regulating the process as waste treatment. The best example of such an activity is dewatering of slurges before their reclamation or use elsewhere. Dewatering is conducted to reduce the volume of sludge; in the words of the statute, it is a process designed to change the (waste’s) composition so as to render such waste reduced in volume.

Even if (contrary to the Agency’s view) one interprets the “amenable for recovery” language to mean that treatment occurs only up until the point reclamation commences, the Agency still would retain Subtitle C jurisdiction over all aspects of reclamation (and ancillary activities) that it seeks to regulate. Under this reading, storage, transportation, and processing preceding reclamation could be regulated.

These are the very activities which the Agency presently regulates (see existing § 260.6(b)), and which the Agency would regulate under today’s proposed regulation. Furthermore, where tanks, piles, or surface impoundments are used both to store and reclaim hazardous wastes, they are subject to regulation as storage facilities even through the reclamation phase of the operation would not be regulated. See generally, 46 FR at 2808 (second column) [January 12, 1983]. All of these facilities thus are subject to regulation under Subtitle C whether or not the actual processes of reclamation is subject to control.

b. Recycling Involving Direct Placement of Residual Materials on Land or Water, or Into the Air Can Be Regulated As Waste Disposal or Treatment. The other major types of recycling activity the Agency would regulate involve the direct placement of residual materials on the land or water (such as use of wastes for land reclamation or structural fill), or into the air (burning of these materials as fuel). We think reuse involving direct land or water application is fully encompassed by the statutory definition of disposal. “Disposal” means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including groundwaters. (Section 1004(3).)

Recycling involving direct placement on land or water meets the terms of this definition. The waste is placed on the land in a fashion, “so that such waste or any constituent thereof may enter the environment.” Environmental contamination by the waste or escaping waste constituents has resulted repeatedly from this type of recycling activity. The Agency, in fact, believes that in many cases this activity is the functional equivalent of unsupervised land disposal, an activity obviously within its jurisdictional purview. We therefore believe that this type of recycling activity can be regulated as waste disposal under the Subtitle C regulation.
The burning of residual materials as fuels, and production of fuels from these materials, likewise is potentially subject to regulation under Subtitle C. The Agency believes that this activity is a type of waste treatment, being designed to "change the physical, chemical, or biological character or composition" so as to render it less hazardous, amenable to energy recovery, or reduced in volume. (See also H.R. Rep. No. 97-570, supra at 12: "[p]roduction and burning of hazardous waste-derived fuels recovers energy from hazardous waste, and so constitutes hazardous waste treatment under the statute.") In addition, this activity is the environmental equivalent of incineration, a waste management technique regulated as hazardous waste treatment (see 40 CFR Parts 264 and 265, Subpart O). Consequently, this type of recycling also can be regulated under Subtitle C regulations.

**Conclusion**

In summary, the Agency believes that recycled materials can be hazardous wastes under RCRA, and that recycled hazardous wastes can be regulated under Subtitle C regulations. This conclusion is fully in accord with the statutory language and the legislative history. It is also in accord with the paramount policy objective of the statute to control management of hazardous wastes from point of generation to point of final disposition. The Agency's reading also has substantial support in judicial precedent. We thus conclude that we possess jurisdiction to regulate recycling of hazardous waste under Subtitle C and the implementing regulations.

**APPENDIX B—SUMMARY OF DAMAGE INCIDENTS RESULTING FROM RECYCLING OF HAZARDOUS WASTES**

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<thead>
<tr>
<th>Type of recycling operation, wastes present, damages caused, or hazards posed</th>
<th>Source of information</th>
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<tr>
<td>Superfund Inheritor Priority Site.</td>
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<td>Do.</td>
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<tr>
<td>Seymour Recycling Corp. (R.D. Ind.) (RCRA §7003 action); Superfund Inheritor Priority Site.</td>
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<td>Superfund Inheritor Priority Site (known as Burnt Fly Bag).</td>
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<td>U.S. v. Chem-Dyne, Inc. (§7000 action and Superfund action); Superfund Inheritor Priority Site.</td>
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Type of recycling operation, wastes present, damages caused, or hazards posed

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<tr>
<th>Source of information</th>
<th>Appendix B—SUMMARY OF DAMAGED INCIDENTS RESULTING FROM RECYCLING OF HAZARDOUS WASTES^1—Continued</th>
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17. The Lassen Greenhouse and Waste Oil Co. (located in Jefferon, Ohio) accepted waste oil and spent solvents for storage prior to use as fuels or for road oiling. Millions of gallons accumulated without being recycled, resulting in a substantial hazard. The building was damaged and the facility was closed when it became evident that storing the contaminated containers (including PCBs) was resulting in air pollution. Approximately $1.7 million has already been expended; additional funds are to be allocated.

18. This facility (located in Illinois) engaged in petroleum reclamation from waste oil, and also reclaimed metal hydroxide sludges, tetraethyl lead sludges, and waste oil processing. Specific contaminants found include trichloroethane, trichloroethylene, acetone, xylene, dimethyl sulfide, trimethylisilanol, and alcohols. The state eventually ordered the facility closed.

19. This facility (located in Tennessee) engaged in waste salvage and disposal operations involving improperly drummed and bundled metal reclamation of waste constituents that leaked or spilled appear to be chlorinated solvents. (2,3-Dichloropropene has also been found. Nuisance soil, ground, and surface water hunts have been contaminated.

20. The DeWey-Loftef, inc. (located in Nassau County, New York) was used in an oil reclamation and storage operation. PCBs contaminated oil was stored at the site. Ground and surface water contamination has been found to be contaminated with PCBs.

21. "(*.*) is a solvent and chemical recovery facility. Air pollution associated with the operation it also separates out and resells acids, caustics, and pollutants. Some on-going disposal occurs as well. Chemicals which have been present at the site include acetonite, benzene, kerosene, acetonitrile, ammonia, menthol, chlorinated solvents, cyanides, HCl, H2SO4, formaldehyde, PCBs, benzyltoluene, and caustics. The government's complaint alleges that damages and hazards include accumulation, improper storage, improper storage in underground bulk storage tanks, mislabeling, fire hazard, soil contamination, and possible waste contamination. A preliminary injunction has been entered ordering the facility to comply with certain of the interim standards for storage.

22. Improper use of specie solvent by this Ohio solvent reclamation operation led to contamination of ground and surface water and air. PCBs, trichloroethane, toluene, MEK, and xylenes are among the contaminants involved.

23. This Indiana scrap metal reclamation operation accepted steel drums containing flammable toxic materials. These drums were stored and handled improperly. Substance present include cyanides, caustics, asbestos, and PCBs. (These were stored together and have been, often in leaking drums. A large fire gutted portions of the facility, releasing toxic fumes and causing cyanide poisoning of firefighters. A continuing fire hazard and soil and water contamination threat remains.

24. Metal reclamation of "waste stockpiled raw materials." Leachate from these piles contaminated public drinking water supplies with metals, closing a number of wells.

25. This Indiana facility engages in solvent reclamation. Disposal of incoming materials and still bottoms also occurred. A large fire resulted. The wastes were abandoned before they reached Mexico. In most cases, the drummed wastes were unlabelled and resulted.

26. Radioactive mining wastes are used as foundation fill for residential dwellings in Montana.

27. Radioactive mining wastes are used as foundation fill for residential dwellings throughout Denver.

28. Air pollution from solvent reclamation operations.

29. The American Ecologists Recycle Research Corporation (located in Jefferson, Colorado) stores acid reclaims solvents, waste oil, fly ash, and other chemical wastes. Many of these materials are incompatible, including oxidizers and solvents, and cyanides and acids. The wastes were stored together and have been, often in leaking drums. A large fire gutted portions of the facility, releasing toxic fumes and causing cyanide poisoning of firefighters. A continuing fire hazard and soil and water contamination threat remains.

30. This Indiana facility engages in solvent reclamation. Disposal of incoming materials and still bottoms also occurred. A large fire resulted. The wastes were abandoned before they reached Mexico. In most cases, the drummed wastes were unlabelled and resulted.

31. The Chiovorek Metals Company (located in Tampa) is a secondary lead smelter reclaming lead from spent batteries. Ground water in residential drinking wells, and the public water system. The damage appears to be attributable to waste disposal as well as waste oil processing. Specific contaminants found include trichloroethane, trichloroethylene, acetic acid, xylene, dimethyl sulfide, sulfites, methanol, and alcohol. The state eventually ordered the facility closed.

32. Mercury-containing sludges generated by a number of different companies were sent to a Mexican reclaim facility for recovery. The wastes were abandoned before they reached Mexico. In most cases, the drummed wastes were unlabelled and resulted.

33. Drinking water was contaminated because of improper storage of organic solvents at a reclamation facility.

34. This facility (located in Hillsboro County, Florida) reclaims lead from spent batteries. Acid spillage from the same facility caused an explosion, spills/runoff, sewer/storm problems, and presence of incompatible wastes.

35. The Schuylkill Metals Company (located in Hillsboro County, Florida) reclaims lead from spent batteries. Acid spillage from the same facility caused an explosion, spills/runoff, sewer/storm problems, and presence of incompatible wastes.

36. Reclamation of tetraethyl lead sludges stored in ponds prior to reclamation. Damage is from air pollution and from fumes in transit.

37. Metal reclamation of "waste stockpiled raw materials." Leachate from these piles contaminated public drinking water supplies with metals, closing a number of wells.

38. Radioactive mining wastes are used as foundation fill for residential dwellings in Montana.

39. This Indiana facility engages in solvent reclamation. Disposal of incoming materials and still bottoms also occurred. A large fire resulted. The wastes were abandoned before they reached Mexico. In most cases, the drummed wastes were unlabelled and resulted.

40. Mercury-containing sludges generated by a number of different companies were sent to a Mexican reclaim facility for recovery. The wastes were abandoned before they reached Mexico. In most cases, the drummed wastes were unlabelled and resulted.

41. Damage resulted from burning waste oil and solvents as fuel in boilers and landfills of PCB-contaminated waste oil, coupled with improper tank and pond storage.

42. Tons of ash to be used as road building material were piled beside a roadway near Decatur, Alabama. Metal leaching from the fly ash appeared to have contaminated ground water and residential drinking wells in the vicinity.

43. This facility (located in Alabama) a reclamation facility for acid and metal-containing wastes, allowed over 10,000 drums to accumulate. Leakage from these drummed wastepots polluted surface water. A fire at the site injured two firefighters.

44. Use of cadmium-contaminated PTVF sludge as a fertilizer for farm land.

45. Waste oil contaminated with organics (including carbon tetrachloride) was used as a dust suppressant.

46. Use of cadmium-contaminated PTVF sludge as a fertilizer for farm land.

47. (*.*) engages in solvent reclamation and waste brokerage operations. Plant residues (to a lesser degree) are also reclassified at this plant. Hazards posed by the site include contamination of ground water and soil, noticeable odors, risks of fire, exposure to asbestos, releases of contaminated air, and release of incompatible wastes. The damage appears to be attributable to waste disposal as well as waste oil processing. Specific contaminants found include trichloroethane, trichloroethylene, acetic acid, xylene, dimethyl sulfide, sulfites, methanol, and alcohol. The state eventually ordered the facility closed.

48. This Kentucky facility engaged in solvent reclamation. Disposal of incoming materials and still bottoms also occurred. A large fire resulted. The wastes were abandoned before they reached Mexico. In most cases, the drummed wastes were unlabelled and resulted.

49. (*.*) is a reclaimed solvent distributor, storing material designated for reclamation in leaking drums. Some ongoing disposal occurred as well.

50. (*.*) is a reclaimed solvent distributor, storing material designated for reclamation in leaking drums. Some ongoing disposal occurred as well.

51. Use of cadmium-contaminated POTW sludge as a fertilizer for farm land.
APPENDIX B—SUMMARY OF DAMAGE INCIDENTS RESULTING FROM RECYCLING OF HAZARDOUS WASTES—Continued

51. (* * *) is predominantly a solvent reclamation operation. Solvents are stored in drums and tanks prior to reclamation. (* * * Do.

54. Hazard description/incident includes human health hazard, contamination of surface water, soil, and air, noticeable odors, fire/explosion, spills/run-off, and erosion problems.

57. Enviro-Chem, a hazardous waste recycling facility in Indiana, was investigated by State officials after an employee died in a construction accident. The facility was subsequently shut down. The site is on the National Priorities List and has been identified as a potential site for a Superfund cleanup.

62. The Silresim Chemical Corp. (located in Massachusetts) engaged primarily in solvent reclamation, but also accumulated many hazardous waste materials. The site eventually was abandoned leaving about 2,500-5,000 drums. $143,000 has been spent so far for cleanup.

67. A New Jersey facility recycling organic-lignin compounds, presently stores approximately 5000 drums in poor condition. A potential fire hazard also exists in the site and security is inadequate.

For the reasons set out in the preamble, it is proposed to amend Title 40 of the Code of Federal Regulations as follows:

PART 260—HAZARDOUS WASTE MANAGEMENT SYSTEM: GENERAL

1. The authority citation for Part 260 is 40 CFR 260.10 Definitions.

§ 260.10 Definitions.

"Boiler" means an enclosed device used controlling flame combustion and having the following design characteristics:

1. The unit has provision for heat recovery; and

2. The combustion chamber and heat recovery section are of integral design. The combustion chamber and heat recovery section are of integral design if formed physically into one manufactured or assembled unit. (A unit in which the furnace or combustion chamber and heat recovery sections are joined by ducts or connections carrying flue gas in not integrally designed); and

3. Significant heat recovery takes place in the combustion chamber section by radiant transfer of heat to the transfer medium.

"Incinerator" means an enclosed device used controlling flame combustion, and having a combustion chamber and heat recovery section, if any, that are not of integral design.

"Industrial Furnace" means any of the following devices that are integral to the operation of a manufacturing process:

1. The天使 citation for Part 260 is 40 CFR 260.10 Definitions.

"Boiler" means an enclosed device used controlling flame combustion and having the following design characteristics:

1. The unit has provision for heat recovery; and

2. The combustion chamber and heat recovery section are of integral design. The combustion chamber and heat recovery section are of integral design if formed physically into one manufactured or assembled unit. (A unit in which the furnace or combustion chamber and heat recovery sections are joined by ducts or connections carrying flue gas in not integrally designed); and

3. Significant heat recovery takes place in the combustion chamber section by radiant transfer of heat to the transfer medium.

"Incinerator" means an enclosed device used controlling flame combustion, and having a combustion chamber and heat recovery section, if any, that are not of integral design.
PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTES

3. The authority citation for Part 261 reads as follows:


4. In § 261.4, paragraph (b) is revised to read as follows:

§ 261.1 Purpose and scope.

(b)(1) The definition of solid waste contained in this Part applies only with respect to the regulations implementing Subtitle C of RCRA.

(2) This Part identifies only some of the materials which are solid wastes and hazardous wastes under Sections 3007, 3013, and 7003 of RCRA. A material which is not defined as a solid waste in this Part, or is not a hazardous waste identified or listed in this Part, is still a solid waste and a hazardous waste for purposes of these sections if:

(i) In the case of Sections 3007 and 3013, EPA has reason to believe that the material may be a solid waste within the meaning of Section 1004(27) of RCRA and a hazardous waste within the meaning of Section 1004(5) of RCRA; or

(ii) In the case of Section 7003, the statutory elements are established.

5. § 261.2 is revised to read as follows:

§ 261.2 Definition of solid waste.

(a) A solid waste is any discarded material that is not excluded by § 261.4(a). A “discarded material” is any material that fits one of the descriptions in paragraphs (a)(1) and (a)(2) of this section.

(1) Any garbage, refuse, sludge, or any other solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining, or agricultural operations or from community activities that is:

(i) Abandoned by being disposed of; or

(ii) Abandoned by being burned or incinerated; or

(iii) Accumulated, stored, or treated prior to— or in lieu of— paragraphs (a)(1) or (ii) of this section.

(2) Any of the following materials, when used, reused, or reclaimed in the following ways or accumulated, stored, or treated prior thereto:

(i) Any spent material, sludge, or by-product, or any material listed in § 261.33 that is not ordinarily used by being applied to the land, that is used or reused without essential change to its identity, or after simple mixing, in a manner that constitutes disposal;

(ii) Any spent material or sludge, or by-product listed in §§ 261.31 or 261.32, or any material listed in § 261.33 that is not itself a fuel, that is being burned for the purpose of energy recovery, or that is being used to produce a fuel, and any fuel that contains one or more of these materials;

(iii) Any spent material, any sludge listed in §§ 261.31 or 261.32, or any by-product listed in §§ 261.31 or 261.32, that is reclaimed (as this activity is explained in paragraph (c)(1) of this section). This provision does not apply, however, to materials reclaimed at the plant site and then reused within the original process in which they were generated;

(iv) Any spent material, sludge, or by-product that is accumulated speculatively (as this activity is explained in paragraph (c)(2) of this section);

(v) Any spent material, sludge, or by-product that is accumulated for use, reuse, or reclamation without sufficient amounts being used, reused, or reclaimed during a one-year period (as this activity is explained in paragraph (c)(3) of this section);

(3) Materials that meet the criteria stated in paragraph (a)(2)(i) of this section, and that are listed in paragraph (a)(3)(ii) of this section are solid wastes when used or reused:

(A)(1) The materials are ordinarily disposed of, burned or incinerated, or

(B) The materials contain toxic constituents listed in Appendix VIII of Part 261 and these constituents are not ordinarily found in raw materials or products for which the materials substitute and are not used or reused during the recycling process; and


(b) For the purpose of this section:

1. A “spent material” is any material that has been used and has served its original purpose;

2. “Sludge” has the same meaning used in § 260.10 of this chapter.

(3) A “by-product” is a material that is not one of the primary products of a production process and is not solely or separately produced by the production process.

(c) For the purposes of this section and § 261.6:

(1) A material is “reclaimed” if it is processed to recover usable products, or if it is regenerated. (Examples are recovery of lead values from spent batteries and regeneration of spent solvents.) However, a material that is used or reused in the following ways is not considered to be reclaimed:

(i) Used or reused as an ingredient (including use as an intermediate) in a production process to make a product (for example, sludges used as ingredients in cement production, or distillation bottoms from one process used as a feedstock in another process), provided that distinct components of the material are not recovered as separate end products (as in recovery of metals from metal-containing secondary materials); or

(ii) Used or reused as effective substitutes for raw materials in processes using raw materials as principal feedstocks (for example, sludges used as substitutes for ore concentrate in primary smelting); or

(iii) Used or reused in a particular function or application as an effective substitute for a commercial product (for example, spent pickle liquor used as a phosphorous precipitant and sludge conditioner in wastewater treatment).

(2) A material is “accumulated speculatively” if it is potentially usable, reusable, or reclaimable but is held without having any known market or disposition, or is held without having any feasible means of use, reuse, or reclamation. However, when a material that has been accumulated speculatively is removed from accumulation for use, reuse, or reclamation, it is no longer considered to be a solid waste for purposes of this paragraph.

(3) A material is “accumulated without sufficient amounts being used, reused, or reclaimed” if—during the calendar, fiscal, or inventory year period—the amount of material that is used, reused, reclaimed, or transferred to a different site for use, reuse, or reclamation does not equal at least 75 percent by volume of the amount of that material accumulated at the beginning of the period. However, paragraphs (c)(3)(i) and (ii) of this section provide certain exceptions to this principle. (In addition, materials excluded from regulation under § 261.6(b)(1)(vi)-(vii))
are not to be included in making this calculation:

(i) Spent materials, sludges, or by-products are not considered to be solid wastes under this paragraph if after being accumulated initially without sufficient amounts being used, reused, or reclaimed, they are removed from accumulation for use, reuse, or reclamation.

(ii) (A) If a material accumulates for one year without use, reuse, reclamation, or transfer of at least 75 percent of the accumulated volume, the Regional Administrator may determine that the accumulated material will not be a solid waste during the following year. To obtain this determination, the person accumulating the material must notify the Regional Administrator in writing, submitting the following information:

1. The name and address of the person required to notify and the address of the location of the accumulated material, if different.

2. A description of: (i) the material being accumulated, (ii) why the material would be a hazardous waste if deemed to be discarded (i.e., whether it is listed or exhibits a characteristic), (iii) the quantity accumulated at the date of notification, and (iv) the way the material is stored prior to use, reuse, reclamation, or transfer; and

3. A statement of: (i) what the notifier expects the disposition (use, reuse, reclamation, or transfer) of the material to be, (ii) why this expectation is reasonable (for example, because of past practice, market factors, or contractual arrangements), (iii) why the material has accumulated for over one year, and (iv) when the notifier expects the use, reuse, reclamation, or transfer to occur.

The Regional Administrator may then use this information to determine whether the material will not be a solid waste during the following year, or alternatively, may require further pertinent information from the notifier. Such a determination will be based upon the reasonableness of the notifier's expectation that the material will be used, reused, reclaimed, or transferred for these purposes, taking into account: the past practices, market factors, and contractual arrangements; the character and quantity of the material being accumulated; and the manner in which the material is being stored. The notifier must keep appropriate records to demonstrate why he reasonably expects the accumulated material to be used, reused, reclaimed, or transferred for these purposes.

(B) After the second year without use, reuse, reclamation, or transfer of at least 75 percent of the total volume accumulated at the beginning of that year, the Regional Administrator may again determine that the accumulated material will not be a solid waste during the following year. To do this, he must receive in writing the same information set out in paragraph (c)(3)(ii)(A) of this section from the person accumulating the material; and at least 50 percent of the total volume accumulated at the beginning of the year must have been used, reused, reclaimed, or transferred.

(C) If the material accumulates for a third year without use, reuse, reclamation, or transfer of at least 75 percent of the total volume accumulated at the beginning of that year, all material not actually used, reused, reclaimed, or transferred is a solid waste.

(d) Respondents in actions to enforce regulations implementing Subtitle C of RCRA who raise a claim that a certain material is not a waste, or is exempt from regulation, must demonstrate that there is a known market or disposition for the material, and that they meet the terms of the exclusion or exemption. In doing so, they must provide appropriate documentation (such as contracts showing that a second person uses the material as an ingredient in a production process) to demonstrate that the material is not a waste, or is exempt from regulation. In addition, owners or operators of facilities claiming that they are actually using, reusing, or reclaiming materials must show that they have the necessary equipment to do so.

6. Section 261.6 is revised to read as follows:

§ 261.6 Special requirements for regulated recyclable materials.

(a) Hazardous wastes that are used, reused, or reclaimed will be known as 'regulated recyclable materials.'

(b)(1) The following regulated recyclable materials are subject to regulation under Parts 262 through 268 or Parts 122 through 129 of this Chapter and are not subject to the notification requirements of Section 3010 of RCRA:

(i) Regulated recyclable materials that are reclaimed by the person generating them, provided that sufficient amounts of materials are reclaimed during a one-year period (as defined in §261.2(c)(3)). This exemption does not apply, however, when the regulated recyclable materials are stored in a surface impoundment prior to reclamation, or are reclaimed or otherwise processed in a surface impoundment. This exemption also does not apply to spent lead-acid batteries being reclaimed.

(ii) Regulated recyclable materials that are reclaimed by a person who subsequently uses the reclaimed material in his own operation, provided that sufficient amounts of materials are reclaimed during a one-year period (as defined in §261.2(c)(3)). This exemption does not apply, however, when the regulated recyclable materials are stored in a surface impoundment prior to reclamation, or are reclaimed or otherwise processed in a surface impoundment. This exemption also does not apply to spent lead-acid batteries being reclaimed.

(iii) Regulated recyclable materials utilized for precious metal recovery, provided that sufficient amounts of materials are reclaimed during a one-year period (as described in §261.2(c)(3)).

(iv) Regulated recyclable materials reclaimed pursuant to batch tolling agreements. For purposes of this paragraph, a "batch tolling agreement" is a contractual arrangement pursuant to which the person generating the material retains ownership of the material, possession of the material is
transferred within 180 days of generation to a reclaimer who reclaims that material and returns the reclaimed portion to the owner, reclamation and return of the reclaimed materials is completed within 90 days, the material is not commingled with that of any other person prior to or while being reclaimed, the reclaimer is paid according to the amount of reclaimed material returned to the owner, and the reclaimer is paid more as the amount of reclaimed material returned to the owner increases.

(v) Regulated recyclable materials (including any fuel produced from one or more of these materials) burned for energy recovery in an industrial furnace or in a boiler that is not regulated under Subpart O of Part 264 of this chapter. ('Industrial furnace' and "boiler" are defined in § 260.10 of this chapter.) This exemption does not apply when any of these materials are accumulated, treated, or stored prior to being used to produce fuels by a person who did not generate them and who is not using the fuel in its own operation, or when regulated recyclable materials that are sludges or are listed as hazardous wastes in §§ 261.31 or 261.32 of this chapter are accumulated, treated, or stored prior to burning as a fuel or prior to use to produce a fuel. This exemption also does not apply when these materials are accumulated prior to burning as a fuel or prior to use to produce a fuel without sufficient amounts being used during a one-year period (as defined in § 261.2(c)(3)).

(vi) Used oil that exhibits one or more of the characteristics of hazardous waste identified in Subpart C of Part 261.

(vii) Used batteries returned to a battery manufacturer for regeneration (used battery can be "regenerated" by addition of electrolyte, replacement of defective cells, or other minor processing).

(2) The Regional Administrator may decide on a case-by-case basis that persons accumulating, storing, or burning the regulated recyclable materials described in paragraphs (b)(1) (i)-(v) of this section should be subject to regulation under otherwise applicable provisions of this section or Subpart O of Part 264 of this chapter. The standard and procedures for this decision are set forth in paragraph (g) of this section.

(c) Generators and transporters of regulated recyclable materials are subject to the following requirements, unless the materials are regulated under Subparts C or D of Part 266 of this chapter, or exempted under paragraph (b)(1) of this section:

(i) Generators: Part 262 of this Chapter;
(ii) The method of accumulation or storage;
(iii) The length of time the materials have been accumulated or stored prior to being reclaimed;
(iv) Whether any contaminants are being released into the environment, or are likely to be so released; and
(v) Other relevant factors.

(2) The Regional Administrator may also decide on a case-by-case basis that persons who are burning regulated recyclable materials as fuels in boilers or in industrial furnaces are subject to regulation under Subpart O of Part 264 of this chapter. The basis for this decision is that the materials are being burned in a manner that is insufficient to protect human health and the environment based upon the quantity and toxicity of the stack emissions. In making this decision, the Regional Administrator will consider the following factors:

(i) The content and mass of the input;
(ii) The conditions under which the unit is operated;
(iii) The potential for stack emissions to pose a hazard to human health and the environment; and
(iv) Other relevant factors.

(3) The following procedures will be used in making the determination set forth in paragraphs (g)(1) and (g)(2) of this section.

(i) The Regional Administrator will issue a notice setting forth the factual basis for the decision. If the person is accumulating the regulated recyclable material as a generator, the notice will state that the person must comply with all applicable requirements of Part 262 of this chapter. The notice will become final within 30 days unless the person served requests a public hearing to challenge the decision. Upon such request, the Regional Administrator will hold a public hearing, and after the conclusion of the hearing, will issue an appropriate final order. This final order may be appealed to the Administrator.

(ii) If the person is accumulating the regulated recyclable material as a storage facility or burning the material in a unit subject to regulation under Subpart O of Part 264 of this chapter, the notice will state further that the person must obtain a permit in accordance with all applicable provisions of Parts 262 and 264 of this chapter. The owner or operator of the facility must apply for a permit within 60 days of notice. If the owner or operator of the facility wishes to challenge the Regional Administrator's decision, he can do so in his permit application, or in a public hearing held on the draft permit. The question of whether the Regional Administrator
Administrator’s decision was proper will remain open for consideration during the public comment period under §124.11 of this chapter and in any subsequent hearing.

9. Section 261.31 is amended by revising the hazardous waste listings F007, F008, F009, F010, F011, and F012 to read as follows:

§ 261.31 Hazardous waste from non-specific sources.

<table>
<thead>
<tr>
<th>Industry</th>
<th>EPA hazardous waste No</th>
<th>Hazardous waste</th>
<th>Hazard code</th>
</tr>
</thead>
<tbody>
<tr>
<td>Generic</td>
<td>F007</td>
<td>Spent cyanide plating bath solutions from electroplating operations.</td>
<td>(R, T).</td>
</tr>
<tr>
<td></td>
<td>F008</td>
<td>Plating bath sludges from the bottom of plating baths from electroplating operations where cyanides are used in the process.</td>
<td>(R, T).</td>
</tr>
<tr>
<td></td>
<td>F009</td>
<td>Spent stripping and electroplating bath solutions from electroplating operations where cyanides are used in the process.</td>
<td>(R, T).</td>
</tr>
<tr>
<td></td>
<td>F010</td>
<td>Quenching bath sludges from oil baths from metal heat treating operations where cyanides are used in the process.</td>
<td>(R, T).</td>
</tr>
<tr>
<td></td>
<td>F011</td>
<td>Spent cyanide solutions from salt bath or clearing from metal heat treating operations.</td>
<td>(R, T).</td>
</tr>
<tr>
<td></td>
<td>F012</td>
<td>Quenching wastewater treatment sludges from metal heat treating operations where cyanides are used in the process.</td>
<td>(R, T).</td>
</tr>
</tbody>
</table>

10. Section 261.33 is amended by revising the introductory text to read as follows:

§ 261.33 Discarded commercial chemical products, off-specification species, container residues, and spill residues thereof.

The following materials or items are hazardous wastes when they are discarded or intended to be discarded in a manner described in §261.2(a)(1), when they are burned for purposes of energy recovery in lieu of their original intended use, when they are used to produce fuels in lieu of their original intended use, and when they are applied to the land in lieu of their original intended use:

PART 264—STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES

11. The authority citation for Part 264 reads as follows:


12. In §264.1, paragraph [g][2] is revised to read as follows:

§ 264.1 Purpose, scope, and applicability.

(g) The owner or operator of a facility managing regulated recyclable materials described in §§261.6(b) or 261.6(f) of this chapter (except to the extent that requirements of this Part are referred to in Subparts C or D of Part 260 of this chapter).

PART 265—INTERIM STATUS STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES

13. The authority citation for Part 265 reads as follows:


14. In §265.1, paragraph [c][6] is revised to read as follows:

§ 265.1 Purpose, scope, and applicability.

(c) The owner or operator of a facility managing regulated recyclable materials described in §§261.6(b) or 261.6(f) of this chapter (except to the extent that requirements of this Part are referred to in Subparts C or D of Part 260 of this chapter).

PART 266—STANDARDS FOR THE MANAGEMENT OF SPECIFIC HAZARDOUS WASTES AND SPECIFIC TYPES OF HAZARDOUS WASTE MANAGEMENT FACILITIES

15. The authority citation for Part 266 reads as follows:

Authority: Secs. 1006, 2002(a), and 3004 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6905, 6912(a), and 6924).

16. In Part 266, Subparts C and D are added to read as follows:

Subpart C—Regulated Recyclable Materials Reclaimed Pursuant to Nonbatch Tolling Agreements

§ 266.20 Applicability and requirements.

(a) The regulations of this Subpart apply to generators and transporters of regulated recyclable materials being reclaimed pursuant to nonbatch tolling agreements, and to owners or operators of facilities that store regulated recyclable materials pursuant to nonbatch tolling agreements. For purposes of this Subpart, a “nonbatch tolling agreement” is a contractual arrangement pursuant to which the person generating the regulated recyclable material transfers the material to a reclaimer who returns reclaimed material to the person generating the material.

(b) Generators and transporters of regulated recyclable materials reclaimed pursuant to nonbatch tolling agreements are subject to the following requirements:

(1) Generators: Subparts A, C, D, and E of Part 262 of this chapter.

(2) Transporters: Subparts A and C of Part 263 of this chapter.

(c) Owners or operators of facilities that store regulated recyclable materials being reclaimed pursuant to nonbatch tolling agreements are subject to the following requirements:

(1) Notification requirements under Section 3010 of RCRA;

(2) All applicable provisions in Subparts A, B (but not §264.13 (waste analysis)), C, D, E (but not §§264.71 and 264.72 (dealing with use of the manifest and manifest discrepancies)), and F through L of Part 264 of this chapter;

(3) All applicable provisions in Subparts A, B (but not §265.13 (waste analysis)), C, D, E (but not §§265.71 and 265.72 (dealing with use of the manifest and manifest discrepancies)), and F through L of Part 265 of this chapter;

(4) All applicable provisions in Parts 122 and 124 of this chapter.

Subpart D—Spent Lead-Acid Batteries Being Reclaimed

§ 268.30 Applicability and requirements.

(a) The regulations of this Subpart apply to persons who reclaim spent lead-acid batteries that are regulated recyclable materials (“spent batteries”). Persons who generate, transport, or collect spent batteries, or who store spent batteries but do not reclaim them are not subject to regulation under Parts
262-266 or Parts 122-124 of this chapter,
and also are not subject to the
requirements of Section 3010 of RCRA.

(b) Owners or operators of facilities
that store spent batteries prior to
reclaiming them are subject to the
following requirements:

(1) Notification requirements under
Section 2010 of RCRA;

(2) All applicable provisions in
Subparts A, B (but not § 264.13 (waste
analysis)), C, D, E (but not §§ 264.71 or
264.72 (dealing with the use of the
manifest and manifest discrepancies)),
and F through L of Part 264 of this
chapter;

(3) All applicable provisions in
Subparts A, B (but not § 265.13 (waste
analysis)), C, D, E (but not §§ 265.71 and
265.72 (dealing with use of the manifest
and manifest discrepancies)), and F
through L of Part 265 of this chapter;

(4) All applicable provisions in Parts
122 and 124 of this chapter.