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R-2918 Valparaiso, FL [Amended]

By removing the present time of designation and using agency and substituting the following:

Time of designation. Intermittent, 0600-0100 local time daily; other times by NOTAM 6 hours in advance.

Using agency. U.S. Air Force, Commander, Armament Division, Eglin AFB, FL.

R-2919A Valparaiso, FL [Amended]

By removing the current boundaries, time of designation and using agency and substituting the following:

Boundaries. Beginning at lat. 30°28'00" N., long. 86°23'00" W.; to lat. 30°28'00" N., long. 85°58'00" W.; to lat. 30°24'00" N., long. 85°56'00" W.; to lat. 30°19'15" N., long. 85°56'00" W.; to lat. 30°22'00" N., long. 86°08'00" W.; to lat. 30°25'00" N., long. 86°22'26" W.; to the point of beginning.

Time of designation. Intermittent, 0600-0100 local time daily; other times by NOTAM 6 hours in advance.

Using agency. U.S. Air Force, Commander, Armament Division, Eglin AFB, FL.

R-2919B Valparaiso, FL [Amended]

By removing the present time of designation and using agency and substituting the following:

Time of designation. Intermittent, 0600-0100 local time daily; other times by NOTAM 6 hours in advance.

Using agency. U.S. Air Force, Commander, Armament Division, Eglin AFB, FL.

R-2919C Valparaiso, FL [New]

Boundaries. Beginning at lat. 30°22'00" N., long. 86°08'00" W.; to lat. 30°19'15" N., long. 85°56'00" W.; to lat. 30°11'00" N., long. 85°56'00" W.; thence 3 nautical miles from and parallel to the shoreline to lat. 30°15'00" N., long. 86°06'15" W.; to the point of beginning.

Designated altitudes. 8,500 feet MSL to unlimited.

Time of designation. Intermittent, 0600-0100 local time daily; other times by NOTAM 6 hours in advance.

Controlling agency. FAA, Jacksonville ARTCC.

Using agency. U.S. Air Force, Commander, Armament Division, Eglin AFB, FL

Issued in Washington, DC, on December 22, 1987.

Shelomo Wugalter,

Acting Manager, Airspace-Rules and Aeronautical Informaiton Division.

[FR Doc. 88-252 Filed 1-7-88; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 223

Sale and Disposal of National Forest Timber; Periodic Payments, Downpayments, and Market-Related Contract Term Additions

AGENCY: Forest Service, USDA.

ACTION: Notice; extension of public comment period.

SUMMARY: On November 6, 1987, at 52 FR 43020, the Forest Service published a notice of proposed rulemaking to implement periodic payments required by the Federal Timber Contract Payment Modification Act. Many timber sale purchasers and trade associations have requested additional time to prepare comments on this proposed rule, primarily because of ongoing efforts by the Forest Service and timber industry to develop an updated standard timber sale contract to submit for public comment. Another reason is that they may need additional time to analyze the several other proposed changes to policy and regulations governing Forest Service timber sales open for comment concurrently. The original comment period ended January 5, 1988. To permit these purchasers and the general public a reasonable opportunity to submit their comments, the public comment period is hereby extended by 45 days to February 19, 1988.

DATE: Comments now must be received on or before February 19, 1988.

ADDRESS: Send written comments to F. Dale Robertson, Chief (2400), Forest Service, USDA, P.O. Box 96090, Washington, DC 20090-6090.

FOR FURTHER INFORMATION CONTACT: David M. Spores, Timber Management Staff, (202) 447-4051.

Dated: December 30, 1987.

George M. Leonard,

Associate Chief.

[FR Doc. 88-284 Filed 1-7-88; 8:45 am]

BILLING CODE 3410-11-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 261

[SWH-FRL-3283-4]

Identification and Listing of Hazardous Waste; Amendments to Definition of Solid Waste

AGENCY: Environmental Protection Agency.

ACTION: Proposal Rule and request for comment.

SUMMARY: On July 31, 1987, a panel of the District of Columbia Circuit Court of Appeals ruled 2-1 that the Environmental Protection Agency (EPA) had exceeded its statutory authority by regulating, or claiming authority to regulate, certain recycled hazardous secondary materials. *American Mining Congress* v. *EPA*, 824 F.2d 1177. This notice provides the Agency's interpretation of the court's opinion, and describes the portions of the rules unaffected by the opinion and remaining in force. This notice also proposes amendments to the rules required by the court's opinion. In general, the Agency is proposing to exclude from regulation certain in-process recycled secondary materials in the petroleum refining industry, and certain other sludges, by-products, and spent materials that are reclaimed as part of continuous, on-going manufacturing processes.

DATES: EPA will accept public comments on the proposal until February 22, 1988.

ADDRESSES: The public docket for this rulemaking is located at Room LG-100, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. The docket number assigned to this notice is F-87-SWRP-FFFFF. Persons who wish to comment on the notice should place the docket number on their comments, and provide an original and 2 copies. The EPA RCRA docket is open from 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding Federal holidays. To review docket materials, the public must make an appointment by calling (202) 475-9327. A maximum of 50 pages may be copied from any regulatory docket at no cost. Additional copies cost $0.20 per page.

FOR FURTHER INFORMATION CONTACT: For general information, contact the RCRA/Superfund Hotline toll free at (800) 424-9346 (in Washington, DC, call (202) 382-3000). For information on specific aspects of today's notice, contact Michael Petruska, Office of Solid Waste (WH-562B), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, (202) 475-8551.

SUPPLEMENTARY INFORMATION:

Outline of Today's Notice

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I. Background

On July 31, 1987, a panel of the United States Court of Appeals for the District of Columbia Circuit held in a 2–1 decision that the RCRA statutory definition of solid waste contained in section 1004(27) of RCRA limited the Agency's authority over hazardous secondary materials destined for recycling to materials that are "discarded". *American Mining Congress* v. *EPA*, 824 F. 2d 1177 (D.C. Cir. 1987). More specifically, the court held that the Agency has exceeded its authority insofar as it classified certain in-process streams in the petroleum refining and primary smelting industries as RCRA solid wastes. Today's notice sets out the Agency's interpretation of the portions of its existing rules requiring modification in light of the court's opinion. The Agency is proposing the changes that are necessary to conform the existing rules to the court's mandate, and is seeking public comment on those changes.

II. Analysis of the Court's Opinion

A. The Agency's Interpretation of the Court's Opinion—General

The Agency views the court's opinion as applying to the "agency's authority to regulate secondary materials reused within an industry's ongoing production process" as solid waste. 824 F. 2d at 1178. *See also id.* at n.3, describing as "the central issue—whether EPA's interpretation that the term 'discarded material' encompasses materials destined for recycling in an on-going production process is contrary to the statute".

The facts described in the opinion involved two particular types of in-house recycling practices in the petroleum refining and mining (primary smelting) industries. Petroleum refineries often take oil-bearing byproducts and sludges from the refining process, and return these materials, either by direct reinsertion into the petroleum refining process or (more normally) return to an oil recovery system ("slop oil") after which recovered oils are returned to the petroleum refining process. These byproducts and sludges are sometimes hazardous (for example, API separator sludge and DAF Float from petroleum refining, both listed hazardous wastes, are sometimes recycled in this way), and, if so, would be classified as hazardous waste under the Agency's existing rules because they are used to produce fuels. The primary smelting industries also frequently recover additional metal values from sludges and byproducts generated in the primary smelting process. This recovery can involve direct return to the smelting process, or recovery in other unit operations. 824 F. 2d at 1181. To the extent these activities involve sludges and byproducts on the lists of hazardous wastes from non-specific and specific sources (§§ 261.31 and 261.32) and the activity occurs outside of a closed-loop reclamation system, they are classified as solid wastes under the existing EPA rules the court considered in its decision.

The court held that "by regulating in-process secondary materials, EPA has acted in contravention of Congress' intent." 824 F. 2d at 1193. *See also id.* at n.26 ("we decide that EPA exceeded its statutory authority in regulating in-process secondary materials"). The court reasoned that by defining solid waste by using the phrase "other discarded material", Congress intended that only secondary materials that were in some sense thrown away, abandoned, or disposed of could be solid wastes. The court acknowledged that certain types of recycling activities remain within the Agency's authority, because they involve a form of discarding. *E.g., Id.* at n.14 (describing used oil recycling activities). *Id.* at 1191 and n.20 (describing a metal reclamation operation storing metal-bearing materials in open piles, and a pesticide drum reused as a trash container).

Consequently, the Agency intends to amend its existing rules to state clearly that the rules do not extend to on-going manufacturing operations, particularly those like the refining and smelting processes that were before the court which are characterized by continuous extraction of material values from an original raw material. 824 F. 2d at 1181. The court's opinion also compels exclusion of certain types of reclamation processes that closely resemble on-going production activities, and the Agency proposes to amend its rules to exclude these activities as well. As will be explained more fully below, secondary materials being recycled in these ways are not being "discarded" under the court's interpretation of the term.

The court's decision does not affect the Agency's authority to regulate as hazardous wastes those secondary materials recycled in ways where the recycling activity itself is characterized by discarding as defined by the court. That is, manufacturing processes (or other types of recycling) involving an element of discard which do not involve secondary materials passing through a continuous, on-going manufacturing process remain within the Agency's jurisdiction. We explain below more specifically how we view these concepts as applying to the present rules.

B. Portions of the Existing Rules Affected by the Court's Opinion

For the most part, EPA's existing rules already distinguish between on-going, in-house types of manufacturing activities and waste management. Indeed, this was the Agency's avowed purpose throughout the involved and protracted series of rulemakings leading to the current solid waste definition. *See, e.g.,* 50 FR at 617 (January 4, 1985). Accordingly, the existing rules specifically exclude the following secondary materials from jurisdiction: hazardous secondary materials that are used directly as ingredients in manufacturing processes to make new products (provided the secondary materials aren't being reclaimed); hazardous secondary materials that are used directly as effective substitutes for commercial products; hazardous secondary materials reclaimed in closed-loop processes; and particular individual types of hazardous secondary materials involved in on-going types of recycling activities—black liquor from the paper industry, spent sulfuric acid used to produce virgin sulfuric acid, and certain closed processes characterized by reclamation followed by return of the reclaimed feedstock to a manufacturing process. See 40 CFR 261.2(e) and 261.4(a)(6)–(8).

In addition, and significantly, the current rules state that byproducts and sludges being reclaimed are not solid wastes unless specifically listed. The

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listing process designates these secondary materials as solid wastes after considering specific factors bearing expressly on the question of whether the reclamation activity involves a continuous, on-going process. See § 261.2(c)(3) and 50 FR a 640–41 (January 4, 1985).

The Agency's current rules, however, state that when hazardous secondary materials are used to produce fuels or are contained in fuels, both the secondary materials and the resulting fuels are solid wastes. The court held that true in-process oil-bearing materials in the petroleum refining industry were not solid wastes when continuously reused in the refining process. Such activity, in the court's view, involves continued recovery of hydrocarbon values from crude oil, and the oil-bearing residuals, therefore, are not discarded materials. Consequently, the Agency proposes to change its existing rules to state that oil-bearing secondary materials from the petroleum refining process so recycled are not solid wastes, provided there is no other element of discard or disposal characterizing the recycling activity.

The opinion also dealt with recycling operations in the primary smelting industry. The existing rules classify these recycling activities as reclamation processes because they involve recovery of material values contained in the secondary materials as end products (for example, the recovery of lead from primary lead emission control dusts). These reclamation processes may or may not involve solid waste. Thus, in promulgating the existing rules, the Agency noted that many of these reclamation operations would not involve RCRA solid wastes as they could be considered on-going processing of the original ore concentrate. 50 FR at 640–41. Yet the Agency also indicated that certain other reclamation operations involving sludges and byproducts are not part of an on-going production process and involve elements of discard. Such operations could involve, for example, discontinuous and unrelated processes, infrequent reclamation, or disposal through storage on the land. *Id.*

Because the Agency was unable to develop a self-implementing narrative standard accounting for all of these relevant factors, the final rules state that hazardous sludges and byproducts are solid wastes when they are to be reclaimed *only* if the sludges and byproducts are listed by the Agency in 40 CFR 261.31. and 261.32 on a case-by-case basis. See § 261.2(c)(3). The existing rules direct the listing determination to be based on a consideration of the factors contained in the preamble to the final rules relating to whether the sludges and byproducts are utilized in on-going, continuous manufacturing processes. *Id.*

To bring the Agency's rules on reclamation into conformance with the court's opinion, EPA is proposing to amend the rules to indicate with more particularity the bases for designating sludges and byproducts as solid wastes, and to ensure that materials reclaimed in true on-going manufacturing processes without any element of discard are not considered to be solid wastes. To make this change, the Agency is proposing to list by rule rather than by explanatory preamble the relevant factors for determining whether to designate these materials as solid wastes when they are to be reclaimed, and to indicate in the rule that the ultimate jurisdictional test is whether these materials are being utilized in an on-going continuous manufacturing process.

The court did not overturn the Agency's jurisdiction over material recovery when not characterized by on-going, continuous production processes. For example, the Agency believes that the following recovery situations could involve the disposal of byproducts and sludges in operations that are not on-going, continuous production processes. In such circumstances, the Agency could retain jurisdiction under the court's opinion:

1. Spent potliners, containing high concentrations of cyanide, could be disposed of through storage prior to potential recovery of cryolite values (as fluoride) but not for any recycling of the cyanide. This reclamation step is ancillary to the main process (aluminum production), since fluoride is not returned to the process to be recovered as a product (rather, it is a component in the potliner), and the potliners themselves are dissimilar to raw materials used originally. The lack of cyanide recycling indicates a waste treatment objective.

2. A wastewater treatment sludge is generated in an impoundment. It is unfit for recovery until it is dewatered. It can be eventually recycled to the smelting process. The sludge must be reclaimed before it can be returned to the process, and is accumulated initially in a manner unlike normal raw materials (raw materials are not customarily stored underwater), and in a manner tantamount to land disposal (see RCRA section 3004(k)). The court's opinion indicates such circumstances may involve RCRA solid wastes. The court specifically refers to similar recovery scenarios as involving solid wastes at 824 F.2d n. 20.

3. Wastewater treatment sludges from a non-smelting process, containing high concentrations of toxic constituents that are not found in ore concentrates and that are not destined for recovery, are disposed of by transfer to a primary smelter for metal recovery. It is possible for such circumstances to give EPA jurisdiction given the element of discard and the lack of an on-going, continuous production process. Moreover, toxic constituents would be discarded, because they are not recycled.

C. Other Regulations Dealing With Recycling Activities

EPA's remaining regulations dealing with recycling activities clearly involve elements of discard as construed by the court. None of these activities consist of on-going manufacturing involving continuous extraction of material values. The court's opinion, therefore, does not require modification of these provisions in the solid waste rules. Thus, the Agency expects the regulated community to continue to comply with the applicable regulations. We explain below the relationship of the court's decision to each class of activity.

1. *Use Constituting Disposal.* Current EPA regulations state that secondary materials applied to the land or used to produce products that are placed on the land are solid wastes (products produced therefrom are also solid wastes). If the solid wastes are listed, or exhibit a hazardous waste characteristic, they are hazardous wastes. See 40 CFR 261.2(c)(1). Examples of uses that constitute disposal include the use of hazardous sludges as road-base material or as dust suppressants and the use of a waste-derived fertilizer placed on the land. These recycling activities meet the court's definition of discard because the use activity is also land disposal.

Hazardous wastes disposed of through uses constituting disposal invariably contain toxic constituents which do not further the use and which are discarded by disposal when the wastes are placed on the land. For example, the dioxin found in Times Beach, Missouri was from used oil mixed with a dioxin-containing byproduct disposed of on the land through use as a dust suppressant. Another example is the disposal of cadmium through the use of the waste-derived fertilizers produced from waste K061.

These recycling activities are not on-going manufacturing processes. When

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solid wastes are placed on the land, there is no continuous stream of manufacturing process, but rather there is final disposal of the wastes. Accordingly, the Agency believes that this class of activity is properly within its authority and is unaffected by the court's opinion. Therefore, no rule change is necessary, and the Agency is not reopening this portion of the rule to public comment.

2. *Burning for Energy Recovery and Use of Hazardous Secondary Materials to Produce Fuels.* Current EPA rules state that when hazardous secondary materials are used directly as fuels or used to produce fuels, both the hazardous secondary material and any fuel produced from these materials are solid wastes, and, if hazardous, hazardous wastes. See 40 CFR 261.2(c)(2). As indicated above, the court held that these provisions could not lawfully apply to conventional in-process petroleum refining activities occurring at petroleum refineries characterized by continued extraction of material values from crude oil. Thus, secondary hazardous materials from petroleum refining that are used to produce fuels by introducing them into the petroleum refining process would no longer be classified as solid wastes (assuming there is no element of discard relating to this type of recycling as explained in section III.A. below).

The Agency does not view the opinion as affecting any other aspect of the rules relating to burning. As with the use constituting disposal provisions, burning processes for energy recovery often involve disposal of waste through incineration, a classic form of waste management activity. In these processes, hazardous secondary materials are disposed of by burning and releasing the constituents (potentially indiscriminately) into the air. Congress equated burning for energy recovery and incineration when promulgating section 3004(q) of RCRA as part of the 1984 amendments. (See H.R. Rep. No. 198, 98th Cong. 1st Sess. 39–40.) The court did not overturn regulation of such burning activities but only on-going manufacturing activities. When a generator takes its spent sovlent from a degreasing operation and burns it in its boiler, for example, it is not engaged in an on-going manufacturing process, but rather is disposing of a waste from one process (e.g., solvent from degreasing) by burning it in a second unrelated process. Similarly, when a plant takes hazardous still bottoms that are unsuitable for direct use as a chemical intermediate and burns them to recover residual energy, the hazardous constitutents are disposed of as wastes by destruction, just as if they were incinerated. Moreover, the manufacturing utility of the material has come to an end, and the manufacturing activity has concluded. In sum, an energy recovery step is not typically an integral part of the basic manufacturing process, but rather is ancillary and involves disposal of solid waste.

Accordingly, with the exception of in-house recycling activities in petroleum refining, the Agency does not view any of its rules related to burning for energy recovery and the use of hazardous secondary materials to produce fuels as being affected by the court's opinion. The Agency therefore only proposes to amend the rules insofar as they affect the petroleum refining industry.

One further issue involving burning merits discussion. Under the Agency's current rules, some forms of burning do not involve recycling at all. When burning occurs in a boiler or industrial furnace for the dominant purpose of destruction, the activity is classified as incineration. Not only are these incinerated materials solid wastes, but the act of incineration is presently subject to regulation under Subpart O of Parts 264 and 265. See 40 CFR 264.340(a)(2) and 265.340(a)(2). Obvious factors bearing on whether burning is for the purpose of destruction, and so is presently subject to regulation as incineration are: (a) Whether the operator of the device is paid to burn wastes and the percentage of income derived from burning wastes as opposed to producing a product; (b) whether the wastes are selected to meet specifications related to a recycling purpose or rather are simply solicited and accepted indiscriminately; (c) the energy value of the wastes (if burning is for energy recovery); (d) how much energy or material value each waste contributes to the recycling purpose; (e) whether each waste burned is as effective for the claimed recycling purpose as the raw materials normally processed in the device; and (f) whether the toxic constituents in the waste contribute to the recycling objective or are simply being destroyed. Other factors are discussed at 50 FR 638 (January 4, 1985) and 52 FR 17013 (May 6, 1987). Persons burning the waste have the burden of showing that each waste burned is burned for a legitimate recycling purpose and not for destruction. 40 CFR 261.2(f).

3. *Reclamation.* (a) Reclamation Involving Spent Materials. Reclamation activities under the Agency's rules are of two types: regeneration of materials or materials recovery therefrom. See 40 CFR 261.1(c)(4) and 261.2(c)(3). As discussed earlier, this has always been the area of recycling most difficult to classify because certain reclamation activities involve on-going production activities, while others are forms of waste management.

The Agency's rules deal with the problem of classification by differentiating among the types of materials being reclaimed. (See Table 1 in § 261.2(c)(3).) The exact classification is between secondary materials which are previously used, and are used up and no longer usable ("spent materials"), and previously unused residual materials ("sludges and byproducts"). As explained in section II.B. above, sludges and byproducts are more likely than spent materials to be involved in on-going manufacturing operations. The existing rules thus classify sludges and byproducts as solid wastes on a case-by-case basis based on factors which distinguish on-going manufacturing from waste management. Spent materials requiring reclamation, on the other hand, are not directly usable in on-going manufacturing processes, because, by definition, they are no longer usable and must first be restored to a usable condition. There is no continued utilization of material values, though there may be potential for recovery of something usable from a used up or spent material. Thus by definition, these materials are no longer available for use in continuous, on-going manufacturing processes, and as such, are disposed of from these processes even if the reclamation activity occurs at the site of generation (with one exception discussed below).

Of course, when a generator actually disposes of a spent material by sending it to an unrelated reclaimer, the spent material is a solid waste. See 824 F. 2d at n. 14. Examples of waste disposal activities for spent materials include spent solvent reclamation, used oil re-refining, or recovery of spent catalyst.

The only exception to this principle is where the reclamation operation involves closed, continuous processes where reclaimed materials are returned directly to the initial manufacturing process and the entire operation is connected with pipes or other comparable means of conveyance, and there is no element of disposal involved (such as storage in an impoundment). The Court's opinion requires exclusion from regulation in this situation because there is no removal from an on-going process and the court's decision holds that no materials can be considered to be discarded. The Agency proposes to

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change its existing rules to exclude such situations.

(b) Reclamation Involving Sludges and Byproducts. As discussed in section II.B. above, the current EPA rules indicate that listed sludges and byproducts are solid wastes when they are reclaimed (in other than closed-loop systems as defined in the rules). This listing determination is based on consideration of a range of factors which evaluate the question of whether the materials remain in an on-going, continuous manufacturing process.

As noted previously the Agency proposes to amend these rules to indicate that the Agency lacks authority to regulate secondary materials reclaimed in this manner, and to indicate explicitly what the relevant factors are in making this determination.

4. *Speculative Accumulation.* The Agency's rules state that hazardous secondary materials that are not solid wastes for any other reason become solid wastes when they are accumulated without being recycled for one year without 75 percent of the material being recycled during the one year period. See 40 CFR 261.2(c)(4). Petitioners did not challenge this provision in the *American Mining Congress* litigation. The Agency has concluded that situations satisfying the speculative accumulation criteria involve elements of discard since the materials have been disposed of, are not part of an on-going production process, and are not being (and are unlikely to be) recycled. Secondary materials disposed of through storage for this length of time without recycling simply cannot be characterized as in-process materials. The Agency does not believe this provision requires alteration, but requests comment on this interpretation.

It should be noted that the rules provide a variance allowing persons accumulating speculatively to demonstrate that they are not storing solid waste. 40 CFR 260.31(a). This provision accommodates those unusual situations where there is prolonged storage without recycling but the material being stored might legitimately be considered not a solid waste. 50 FR 652–54 (January 4, 1985). There have been no applications for a variance under this provision since the rule was adopted, supporting the soundness of the existing one year 75 percent test.

5. *Inherently Waste-like Materials.* Section 261.2(d) states that those types of secondary materials listed by EPA after consideration of specified criteria are solid wastes regardless of how they are recycled. The only wastes that the Agency has so designated are the listed dioxin-containing wastes (F020–F023, F026, and F028). The factors the Agency is required to consider in designating secondary materials as solid wastes under this section address the element of discard necessarily involved in recycling these materials (*e.g.*, whether the material is typically discarded, or whether it contains unusual hazardous constituents not found in corresponding virgin material for which the secondary material substitutes which do not contribute to the recycling process, and whether the recycling process may pose a hazard to human health and the environment).

The court's opinion does not affect this provision. The factors upon which the Agency would base a decision are directly related to whether materials are being disposed of, thrown away or abandoned, *i.e.*, discarded. Materials must either be typically disposed of, or contain hazardous constituents which are disposed of by virtue of not contributing to the recycling process. The dioxins in the dioxin-containing wastes serve as an example. Accordingly, the Agency is not proposing to amend this provision and is not soliciting any comment on it.

D. The Opinion's Effect on Specific Issues

1. *Secondary Materials Discarded by Means Other Than Final Commitment to a RCRA Disposal Unit.* The court did not equate discard with final disposition in a RCRA disposal unit. Rather, the court held the term "discarded materials" includes materials abandoned, thrown away, or disposed of, and does not include secondary materials recycled in on-going, continuous manufacturing operations. Indeed, some of the court's definitional examples of discarded materials are secondary materials disposed of by means other than final commitment to RCRA disposal units—namely, used oil destined for recycling, waste piles involved in reclamation placed directly on the land, and recycled pesticide drums placed on the land. 824 F.2d n. 14 & 20.

Equating discard with final disposition in a RCRA disposal unit would not accord with industrial disposal practices and would be contrary to RCRA's purposes. Hazardous secondary materials are rarely, if ever, committed for final disposition to a RCRA disposal unit and then retrieved for recycling. Thus, to the extent the court identified specific discarded materials in certain recycling processes and uses, the court could not have intended discard to mean final disposition in a RCRA disposal unit.

RCRA's definition of the term "disposal" includes a broader range of activities with the potential for environmental releases than final commitment to RCRA disposal units. RCRA section 1004(3). Moreover, RCRA emphasizes the Agency's duty to regulate solid wastes involved in recycling activities by requiring the Agency to control the burning of hazardous wastes, the recycling of used oil, the use of waste as dust suppressants, the recycling and reuse of wastes by small quantity generators, and generally, any recycling involving placement of hazardous waste on the land. *Id.* at section 3004(g), 3014, 3004(l), 3001(d), and H. Rept. No. 198, 98th Cong. 2d Sess. 46.[1] Equating discard with final disposition in an RCRA disposal unit would render these specific congressional directives meaningless.[2]

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[1] The estimated volume of such hazardous wastes underscores the importance of distinguishing between discard and final disposition in a RCRA disposal unit. For example, EPA has estimated that over 2.5 million tons of used oil are recycled annually of which virtually none was previously committed for final disposal. (A few Superfund remedial actions resulted in small volumes of previously disposed used oil being recycled.) The Agency has also estimated that 440 million gallons of spent solvents are reclaimed annually (52 FR at 3756 (February 5, 1987)) none of which, to the Agency's knowledge, was previously thrown away in RCRA disposal units. An estimated one million tons of hazardous secondary material residues are burned annually or incorporated into fuels. 52 FR. 17,023 (May 6, 1987). EPA is unaware that any of this material was previously committed for final disposal in RCRA disposal units. In addition, the Fertilizer Institute indicated in public comments to the Agency's 1985 rulemaking on recycling that its members use upwards of 41,000 tons of byproducts and sludges as ingredients in fertilizers annually, many of which are hazardous wastes and none of which are first landfilled or otherwise committed for final disposition in RCRA disposal units.

[2] More specifically, the statute and its legislative history mandate regulation of secondary materials not first committed for final disposal. Section 3004(q) commands explicitly that the Agency regulate burning of commercial chemical products which are not themselves fuels and which are not previously used, much less used and committed for final disposition. Section 3014(c) requires EPA to create an elaborate regulatory structure to prevent used oil which is a hazardous waste from being thrown away and to regulate recycled used oil, including in-house generator recycling. See section 3014(c) (B) (i) (II) ("recycles such used oil at one or more facilities of the generator * * * "). Section 3004(h) (2) indicates that the Agency may establish a different effective date for a prohibition from land disposal of a hazardous waste on the date when alternative protective *recovery* technology is available. This land ban applies to hazardous wastes not yet committed to final disposition in RCRA disposal units.

The legislative history to the waste as fuel provisions (section 3004 (q)) also states Congress intended to close "a major deficiency in the present Subtitle C regulations" which allows "10 to 20 million tons of * * * hazardous waste" to be burned annually. S. Rep. No. 284 at 36; H.R. Rep. No. 198 at 39 (using the figure 10 to 15 million tons). These directives, volume estimates, and enunciations of determination to close off regulatory loopholes would have no meaning if applied solely to the

Continued

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Accordingly, EPA does not read the opinion to indicate that secondary materials must first be committed for final disposition in RCRA disposal units before they can be solid wastes. Thus, aside from the types of closed processes discussed below, recycling activities involving the discarding of secondary materials may remain within the Agency's RCRA Subtitle C jurisdiction.

2. *On-Site Recycling Activities Involving Solid Wastes.* The court's opinion does not materially distinguish off-site from on-site recycling. As noted previously, on-site recycling activities may involve solid wastes under certain circumstances. The court found that materials remaining in a continuous on-going manufacturing operation are not discarded. The mere fact that recycling occurs on-site, however, or for that matter is conducted by the initial generator of a secondary material, does not necessarily mean that the activity is part of one on-going manufacturing operation. On-site or single generator recycling activities can continue to be characterized by elements of discard and so remain within the Agency's Subtitle C jurisdiction. The following examples make this point:

a. A degreasing operation disposes of a spent degreasing solvent, which is removed from the production process (*i.e.*, not in a closed process), taken to an on-site distillation unit, and regenerated. Here, not only is the spent solvent being disposed from the operation in which it is generated, but it is not part of a manufacturing process at all. There is no continued extraction of material values from a raw material, but rather it is a useless waste until restored through treatment to a usable condition.

b. A generator generates an ignitable byproduct which it blends with fuel oil and disposes of through burning in an on-site boiler. This activity does not involve materials passing through a continuous on-going manufacturing process. Rather, a byproduct of a waste generating process is being disposed of by burning.

c. A generator generates a hazardous wastewater treatment sludge which is eventually returned to the manufacturing process for metal recovery. The sludge is disposed of through storage in a surface impoundment prior to its return. The storage in a surface impoundment is disposal of solid waste because it involves placement on land with potential entry into the environment. Processes where such materials are generated and stored in underwater ponds or lagoons are not part of continuous on-going manufacturing processes and may involve disposal. Such sludges also must normally be reclaimed before they are reusable, a further indication of lack of process continuity. Impoundments, moreover, are not process devices, but rather function as wastewater treatment units.

The court's decision allowing for regulation of on-site recycling processes that involve discarding accords with the statute and its legislative history which likewise make clear that Congress contemplated and directly commanded the Agency to regulate many on-site recycling activities. For instance, the legislative history with respect to burning hazardous waste-derived fuels indicates that Congress intended that "the Administrator, in controlling the burning of waste and the emissions from facilities that burn such wastes, may not make distinctions solely on the basis of whether the facility is on the site of the generator or is an off-site facility." S. Rep. No. 284 at 38; the same language is in H.R. Rep. No. 198 at 41–42. The text of the statute itself refers (in the context of authorizing certain exemptions for facilities burning de minimis quantities of hazardous waste fuels) to regulation of "wastes * * * burned at the same facility at which such wastes are generated." RCRA section 3004(q)(2)(B).

The following provisions likewise indicate specifically that on-site recycling activities can involve hazardous wastes: section 3004(r)(2) (A) and (C) (generation and reinsertion on-site of oil-bearing wastes into the petroleum refining process at petroleum refineries classified as SIC 2911: a facility that refines crude oil); section 3014(c)(2)(B)(i)(II) (controlling used oil recycling activities at a used oil generator's facility); section 3004(q)(2)(A) (use of oil-bearing wastes "at petroleum facility at which such wastes were generated").

The Agency believes these provisions make clear that there is no automatic on-site/off-site distinction. The Agency notes, however, that the existence of on-site recycling is a relevant element in assessing whether a recycling process is really an on-going manufacturing activity or otherwise involves discarded materials. The Agency accordingly does not propose incorporating any such automatic distinction in its rules.

3. *Precious Metal Reclamation.* Under the Agency's rules, secondary materials being reclaimed for their precious metal content are classified as solid wastes in the same way as other secondary materials being reclaimed: spent materials so reclaimed are always wastes, and sludges and byproducts so reclaimed must be specifically designated as such (by listing) to be wastes. The court's ruling does not change this classification system. The opinion did not refer specifically to precious metal reclamation, and normal precious metal recycling operations are not characterized by continuous on-going manufacturing processes, but rather involve elements of discard in the sense that materials are disposed of from an industrial process. These operations involve an independent reclaimer procuring waste materials generated by another person from another industry and recovering metal values therefrom. An example is recovery of precious metals from electroplating wastes. This is not one continuous process, but two unrelated ones, with the electroplater disposing of his wastes. This type of operation is analogous to used oil recycling operations described in n.14 of the court's opinion. Specifically, the court noted that when a generator sends used oil to be recycled at a different facility, the generator is discarding the oil by sending it to be recycled by a different party. The generator was disposing of the material by giving up control over it. Similarly, when precious metals in wastes from one industry are eventually recovered by another industry's process, the generator is also discarding these materials.

Accordingly, the Agency does not propose to amend the existing rules relating to classification of secondary materials destined for precious metal reclamation. The Agency notes that precious metals reclamation is subject to a set of special, reduced standards at 40 CFR Part 266, Subpart F. Further, EPA has received a petition from the International Precious Metals Institute (IPMI) requesting an exemption from the manifest requirements. EPA requests comment on this petition from any interested party.

4. *Scope of Closed-Loop Exclusion.* The Agency's existing rules provide that hazardous secondary materials that are reclaimed in closed-loop systems are excluded from being solid wastes. (See 40 CFR 261.2(e)(1)(iii).) A closed-loop system is one where secondary materials are returned for reclamation (i.e., for contained material values to be recovered from them) as feestock to the primary process which generated them without first being reclaimed. Secondary materials reclaimed in tanks and then returned to the original process as feedstock are also excluded when the system is connected entirely by pipe.

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nearly non-existent practice of buring hazardous secondary materials that are committed to final disposition in RCRA disposal units.

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(See 40 CFR 261.4(a)(8).) The court's opinion does not affect these provisions. Accordingly the Agency proposes no changes to this Section.

III. Amendments to Conform to the Court Decision

A. Amendments Concerning Petroleum Refining

1. *Use of Oil-Bearing Residuals from Petroleum Refining in the Refining Process.* The court held that the Agency had exceeded its authority in regulating on-going fuel production activities in the petroleum refining industry. These activities involve situations where crude oil is refined, and oil-bearing residues from that refining process are returned for further refining as part of one continuous and on-going process. The oil-bearing residues are sometimes reinserted directly into the petroleum refining process, but more often are placed in a centralized recovery system ("slop oil system") where oil is recovered and returned to the petroleum refining process. Materials so recycled, the court held, are not discarded and so cannot be solid wastes.

In light of this holding, EPA is proposing to exclude from jurisdiction petroleum refining residues that are recycled in this manner. The salient elements of the exclusion are:

- The oil-bearing residue must be generated and reinserted onsite;
- It must be inserted into the petroleum refining process; and
- The process must be on-going and continuous, and not be characterized by any elements of discard.

We believe these conditions accurately reflect the Court's holding for the following reasons.

a. *On-site.* The Agency is proposing to limit this amendment to situations where the oil-bearing residue is generated and reinserted onsite because interpreting the court's holding as excluding from the solid waste definition all hazardous oil-bearing secondary materials brought to a petroleum refinery from off-site would have the unintended and improper effect of rendering a statutory provision, RCRA section 3004(r)(3), without meaning. This provision exempts from the hazardous waste fuel warning label requirement "fuels produced from oily materials resulting from normal petroleum refining, production, and transportation practices" where the oily materials are reintroduced into the petroleum refining process under enumerated circumstances. This provision differs from section 3004(r)(2) as it applies to oily materials brought to a refinery from off-site. 50 FR 28715 (July 15, 1985). Since Congress refers, in section 3004(r)(1), to such materials as potential "hazardous wastes identified or listed under section 3001" (*i.e.*, a subset of solid waste), the Agency must include such materials within the solid waste definition. The Agency also notes this reading does not suffer from the problem of circularity that concerned the court in that the provision applies to "oily materials", not to wastes. Applying the court's reasoning, these materials are not part of an on-going, continuous petroleum manufacturing process, but rather have been disposed of, 824 F.2d at n.14. These materials are, therefore, solid wastes.

Finally, with respect to section 3004(r)(3), under the Agency's current rules, solid wastes that are indigenous to a manufacturing process cease to be solid wastes when they are returned to that process for recycling. 50 FR 600 (January 4, 1985); 50 FR 49167 (Nov. 29, 1985); 52 FR 16989–99 (May 6, 1987). This would also be the case for the oil-bearing materials mentioned in section 3004(r)(3). Consequently, when such materials are reinserted into the petroleum refining process, they would cease to be solid wastes.

b. *Reinsertion Must be Into a Refining Process.* The court directed the Agency to exclude from the solid waste definition those secondary materials passing through a continuous petroleum refining process. Petroleum refining processes are those primarily producing gasoline, kerosene, lubricants and fuel oils from crude petroleum through distillation of crude oil or intermediates (gas oils, naptha, etc.), cracking and other processes (this description paraphrases the SIC 2911 definition). Accordingly, the Agency proposes to exclude secondary materials reinserted into these ongoing refining processes.

However, use of oil-bearing hazardous residues in a non-refining process does not fit the court's description of an on-going manufacturing process. Rather, such operations resemble the activities involving used oil mentioned in footnote 14 of the opinion, which the court indicated were examples of discarding. There, used oils were taken, reclaimed (i.e., some contaminants were removed) in a process different than the one that generated them, and used as fuels. Similarly, when oil-bearing hazardous residues are taken to a non-refining process—for example a process that uses simple settling to remove bulk solids and water—the process is exactly analogous to the one involving used oil except that a different type of oil-bearing material is involved.

c. *There Must Be No Element of Discard Involved.* The Agency also proposes that to be excluded from jurisdiction, hazardous secondary materials from petroleum refining must be returned to the refining process in a way that involves no element of discard as the court construed the term. For example, secondary materials stored in a surface impoundment would be within the solid waste definition because they have been disposed of. By placing the material on the land in a way that contaminants can be released into the environment, the practice meets the definitions of disposal in RCRA sections 1004 and 3004(k). The court also characterized such recycling practices involving placement on the land (whether for storage or end disposition) as disposal and indicated that the materials so managed were solid wastes. 824 F.2d at n.20. And as discussed earlier, recycling activities may involve disposal through storage. Thus, if secondary materials are stored underwater in lagoons or ponds, such materials have been disposed of and are RCRA solid wastes. Indeed, the impoundments themselves are wastewater treatment units, not steps in a manufacturing process. Under today's proposal, petroleum refining oil-bearing hazardous secondary materials are solid wastes if they are disposed of through storage before recycling. Units in which the materials are stored consequently would continue to be regulated units. However, as stated earlier, when such materials are removed from such units and reinserted into the petroleum refining process, they would cease to be solid wastes.

2. *Petroleum Coke Produced With Oil-Bearing Hazardous Secondary Materials From Refining.* The Agency proposes to exclude from the solid waste definition oil-bearing secondary materials from petroleum refining used to produce petroleum coke at a refinery, provided there is no element of discard involved in the recycling practice as explained above. This activity is also characterized by on-going utilization of hydrocarbons contained in the original crude oil and so comes within the scope of the court's opinion.

Such secondary materials are not excluded if they are disposed of through storage preceding reintroduction to the coking process. The Agency also notes that failure to exclude secondary materials so disposed of would render RCRA section 3004(q)(2)(A) meaningless. This provision applies only when petroleum refinery wastes are converted into coke at the facility at which they are generated, i.e., a petroleum refinery. If the Agency were to exclude from jurisdiction secondary

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materials disposed of through storage, there would be no materials to which this provision would apply. In addition, the legislative history to this provision indicates special concern for, and directs regulation of petroleum refining wastes stored in impoundments before being used in the coking process. S. Rep. No. 284 at 39.

3. *Changes in Regulations.* The Agency is thus proposing two regulatory exclusions from the solid waste definition. The first exclusion is for secondary materials which are generated on-site and reinserted into the petroleum refining process (which language should be understood to include initial reinsertion to the slop oil system followed by reinsertion into actual refining processes) at conventional petroleum refineries provided the materials are not disposed of through storage in a manner involving placement on the land before being so recycled (or are not disposed by being accumulated speculatively before eventually being recycled). As noted previously, such storage is disposal (a type of discard), and the impoundment is a regulated unit. Indigenous oil-bearing sludges removed from the impoundment and reinserted in the process would, however, cease being solid wastes upon reinsertion.

The second proposed regulatory change involves oil-bearing hazardous secondary materials from petroleum refining which are used to produce petroleum coke at the refinery generating the material. This exclusion likewise would not apply when disposal through storage (involving placement on the land), precedes recycling or when the secondary materials are accumulated speculatively.

B. Proposed Changes in Scope of Reclamation Provisions

As previously discussed, the Agency's existing rules indicate that hazardous spent materials being reclaimed are always solid wastes. But sludges and byproducts are only solid wastes if they are specifically and affirmatively designated as solid and hazardous wastes through the listing process. 40 CFR 261.2(c)(3). The factors used by EPA to justify listing a sludge or byproduct destined for reclamation as solid wastes are currently not set forth in the rule, but rather in the explanatory preamble. These factors are:

> How frequently the material is recycled on an industry-wide basis, whether the material is replacing a raw material and the degree to which it is similar in composition to the raw material, the relation of the recovery practice to the principal activity of the facility, and whether the secondary material is managed in a way designed to minimize loss—all of which show that the material is handled as a commodity. (See 50 FR at 641; Janaury 4, 1985.)

Consideration of the factors is for the purpose of determining whether the normal means of reclaiming the sludge or byproduct resembles a continuous, on-going production process. *Id.*

The rules for spent materials, in the Agency's view, are for the most part unaffected by the opinion because spent materials are no longer useful, and so, by definition, are not involved in a continous production process and are disposed of. These discarded wastes must be treated before they can be put back to use. (section III. C. of this preamble describes one exception to this general principle.)

With regard to sludges and byproducts, the Agency's existing rules for reclaimed sludges and byproducts already resemble the standard set out in the court's opinion. Yet to make the rules more clearly consistent with the court's opinion, the Agency proposes to amend the rules to indicate that the object in designating sludges and byproducts as solid wastes via listing is to distinguish true on-going manufacturing processes from discontinous waste management activities characterized by elements of discard.

To do so, we are proposing to make two changes in the existing rules. The proposal makes explicit in the regulation itself the factors used to designate reclaimed sludges and byproducts as solid wastes, and the proposal indicates that the ultimate standard in making a decision is whether reclamation of the material is part of a continous on-going manufacturing process. The factors the Agency would consider in making this determination are the same as those described in the preamble to the final regulation.

Since the Agency fully explained its rationale for this choice of factors when it promulgated the final rule in 1985, only a short additional explanation is required here. These factors all bear on a regulatory determination of whether a particular material is discarded. The fact that the sludge or byproduct at issue is typically disposed of rather than recycled bears on whether a material is discarded or intended for discard. The second factor—whether the material is replacing a raw material—indicates that the material would be utilized further in a primary process, an indication of process continuity.

The third factor, the relation of the recovery practice to the principal activity of the facility, is also relevant. Where sludges and byproducts are returned not to the principal manufacturing process at a facility, but rather to an ancillary recovery step, there is a potential element of discard about the activity. The material is no longer suitable for continued use in the manufacturing process, but must set aside for some other purpose. As previously discussed, an example is cryolite recovery from spent potliners in the primary aluminum industry, an activity similar to the recycling activities described as involving waste management in footnote 14 of the court's opinion in that a material taken from a process is no longer used in the process, and so is discarded when sent to a different recovery operation. (Other factors, perhaps more important, also indicate that this activity could involve a solid waste. That is, spent potliners contain high concentrations of cyanide which is not recycled—indicating a waste treatment objective—and potliners are typically piled in the open before being recycled.)

The final factor involves the means of handling sludges and byproducts before they are to be reclaimed. If these materials are stored securely so that hazardous constitutents are not likely to be released to land, air or water, their status as valuable, in-process materials is confirmed in an objective way. On the other hand, if the manner if storage meets the RCRA definition of disposal *i.e.*, placed on the land as in an impoundment or an unenclosed pile—the activity involves discard (see RCRA section 3004(k)). Consequently, this factor is certainly relevant in determining whether sludges and by-products are wastes when reclaimed. As noted earlier, the opinion supports this position. 824 F.2d at n.20.

In addition to the factors discussed above relating to whether reclamation occurs as part of a continuous manufacturing process, the proposed rule also contains an important consideration to be used to distinguish reclamation activities from waste treatment. This is the secondary material's similarity to the raw material it is replacing, both in terms of material value to be recovered and concentration of toxic constituents. For example, an emission control dust from primary lead production sent to a different lead smelter but containing as much lead, and the same toxic constituents, as ore concentrate, is much more likely to be involved in a single, continuous production process than a sludge from an unrelated industry (for example, electroplating) which contains less recoverable metal than the virgin ore concentrate and (more importantly)

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significant concentrations of toxic constituents not normally found in the ore concentrate. Most importantly, these other hazardous constituents are normally not recovered, and so are typically discarded by the process. These materials are not only discarded, but their presence often indicates that the recycling activity is largely a waste treatment process.

Finally, there may be situations where the Agency has designated a sludge or byproduct as a solid waste via listing but the material at a particular facility is acutally being reclaimed in a manner resembling on-going production without discard. For example, if the Agency were to list a particular slag from primary lead smelting because it is typically disposed of, is normally stored in open piles for long periods before recovery, and contains low amounts of lead compared to normal ore concentrate, but at a particular facility the slag is stored in storage bins, is typically shipped to another lead smelter within a short time of generation, and is unusually lead rich, the particular slag would not be deemed to be discarded. This possibility is remote, given that the existing closed-loop exclusion will already exclude most or all of the situations where listed sludges and byproducts are truly involved in on-going production. To allow for the possibility, however, we are also proposing to amend the rules today to indicate that any person with a listed sludge or byproduct destined for reclamation in a primary process not already excluded under the closed-loop provision can show that the sludge or byproduct is not discarded because it is involved in a continuous manufacturing process. This provision would be self-executing, and so does not require prior petition to the Agency. However, the burden of proof is on the person making this claim (§ 261.2(f)), and the demonstration would have to be based on the same factors the Agency would consider. In this regard, we note that the factor to be given principal weight in evaluating such a claim is how the materials are stored before being reclaimed. If the manner of storage involves disposal (i.e., involving placement on the land) it would be ineligible for exclusion under this provision. Only in unusual circumstances (storage in an enclosed pile for example) might the Agency accept such a claim. A demonstration would also have to address whether there are toxic constituents present which are not normally found in the corresponding virgin material and whether such toxic constituents are reclaimed or are discarded.

C. Exclusion of Spent Materials Reclaimed in Closed Systems and Returned to the Original Process

The final exclusion we are proposing in today's rules is for hazardous secondary materials that are reclaimed in closed systems followed by return of the reclaimed material to the original process. An example would be spent solvents that are stored and reclaimed in devices that are connected by pipes followed by return of the reclaimed solvent to the original process for further use. Another example is the regeneration of spent acid at steel plants which is sent to the original process for further use, where the entire operation occurs in tanks and/or industrial furnaces and the operation is connected by pipes. Under these circumstances, the spent material is not discarded. There is no element of discard perceptible when materials are reclaimed in these closed systems; there is just one continuous process.

The Agency indeed has already excluded a subset of these situations. See § 261.4(a)(8) (July 14, 1986), excluding from jurisdiction secondary materials which are reclaimed and returned for reuse in a production process and the reclamation system is closed in the sense of only tank storage being involved, the system is connected with pipes or other enclosed means of conveyance, the reclamation does not involve controlled flame combustion, accumulation time never exceeds 12 months, and the reclaimed material is not used to produce a fuel or a material that is recycled by being placed on the land. The exclusion proposed today would slightly extend this principle to cover situations where the reclaimed material is returned to the original process not as a feedstock but for some other purpose such as a degreasing agent. (The Agency suggested that such a change might be appropriate in the rulemaking on hazardous waste tanks. 51 FR 25442 (July 14, 1986).)

Although the court's opinion did not deal explicitly with this type of reclamation, we have concluded that the court's rationale applies to these closed reclamation systems. The reclamation of spent materials is not precisely like the petroleum refining and mining (smelting) processes discussed in the opinion because the latter processes involve continued extraction of hydrocarbon or metal values from secondary materials as part of on-going manufacturing processes, while reclamation of spent materials involves recovery of the same material (e.g., a solvent). However, EPA notes that in some cases, spent materials (or other hazardous secondary materials) are reclaimed continuously (or nearly so), and the reclamation process is an integral part of the manufacturing process. In these cases, provided there is no element of discard, EPA has concluded that the secondary material being so reclaimed is not a solid waste. We are therefore proposing to amend § 261.4 to exclude spent materials being reclaimed in closed systems, subject to certain conditions specifying the nature of the closed system.

Today's rule thus proposes to exclude from jurisdiction hazardous secondary materials that are reclaimed and returned to the original process (as these terms are explained in 51 FR 25442 and 50 FR 640 (July 14, 1986 and January 4, 1985) provided that only tank storage is involved and the entire process through completion of reclamation is closed by being entirely connected with pipes or similar enclosed conveying devices. Like the existing exclusion in § 261.4(a)(8), today's proposal does not apply when there are elements of discard involved in the recycling process. Thus, if secondary materials accumulate for extended periods without being reclaimed, the process is not continuous because recycling is not occurring and the materials have been disposed of through storage. The 12-month period specified in existing rules, which proved non-controversial when adopted for other types of tank systems, appears to be an appropriate time period to gauge overlong accumulation. (Note that an owner or operator claiming this exclusion must keep sufficient documentation to show that his operation meets the conditions of the exclusion—in this case that his storage does not exceed 12 months.) See § 261.2(f)

Second, the rule proposed today would not exclude situations when the reclaimed material is to be burned for energy recovery or placed on the land. Processes where secondary materials are burned for energy recovery or are used to produce fuels, or materials that are applied directly to the land are not within the court's view of in-process, on-going manufacturing. (The condition in existing § 261.4(a)(8)(ii) likewise is intended to retain jurisdiction over recycling activities involving burning for energy recovery. 51 FR 25442 Col. 3.) These provisions would have little meaning if they could be avoided by the simple expedient of connecting a unit burning wastes for energy recovery to a tank via piping. Not only are these

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burning or land placement activities themselves disposal, but the statute specifically addresses on-site waste burning activities and commands their regulation. See section 3004(q)(2)(B); see also sections 3004(q)(2)(A), 3004(r)(2), and 3014(2)(B)(i)(II). Similarly, if the materials are being incinerated, they are not being recycled at all and so would be disposed of via destruction. The proposed rule consequently also indicates that the exclusion does not apply when hazardous secondary materials are piped to incinerators.

IV. State Authority

A. Applicability of Rules in Authorized States

Under section 3006 of RCRA, EPA may authorize qualified States to administer and enforce the RCRA program within the State. (See 40 CFR Part 271 for the standards and requirements for authorization.) Following authorization, EPA retains enforcement authority under sections 3008, 7003 and 3013 of RCRA, although authorized States have primary enforcement responsibility.

Prior to the Hazardous and Solid Waste Amendments of 1984 ("HSWA"), a State with final authorization administered its hazardous waste program entirely in lieu of EPA administering the Federal program in that State. The Federal requirements no longer applied in the authorized State, and EPA could not issue permits for any facilities in the State which the State was authorized to permit. When new, more stringent Federal requirements were promulgated or enacted, the State was obliged to enact equivalent authority within specified time frames. New Federal requirements did not take effect in an authorized State until the State adopted the requirements as State law.

In contrast, under section 3006(g) of RCRA, 42 U.S.C. 6926(g), new requirements and prohibitions imposed by HSWA take effect in authorized States at the same time that they take effect in nonauthorized States. EPA is directed to carry out those requirements and prohibitions in authorized States, including the issuance of permits, until the State is granted authorization to do so. While States must still adopt HSWA-related provisions as State law to retain final authorization, the HSWA applies in authorized States in the interim.

Today's proposed amendments are *not* imposed pursuant to HSWA. The rule changes, therefore, will become effective immediately only in those States without interim or final authorization, not in authorized States. The effect of the rule changes on State authorization is discussed next.

B. Effect on State Authorizations

Today's rule, if adopted as final, will not be effective in authorized States since the requirements are not being imposed pursuant to HSWA. Thus, the requirements will be applicable only in those States that do not have interim or final authorization. In authorized States, the requirements will not be applicable until the State revises its program to adopt equivalent requirements under State laws.

40 CFR 271.21(e)(2) requires that States that have final authorization must modify their programs to reflect Federal program changes and must subsequently submit the modifications to EPA for approval. However, it should be noted that authorized States are only required to modify their programs when EPA promulgates Federal standards that are more stringent or broader in scope than the existing Federal standards. Section 3009 of RCRA allows States to impose standards more stringent than those in the Federal program. For those Federal program changes that are less stringent or reduce the scope of the Federal program, States are not required to modify their programs. See 40 CFR 271.1(k). The amendments proposed today reduce the scope of the existing Federal requirements. Those provisions appear in 40 CFR 261.2 and 261.4. Therefore, authorized States will not be required to modify their programs to adopt requirements equivalent or substantially equivalent to the provisions proposed today.

However, as noted above, States are required by § 271.21 (51 FR 33722) to revise their programs to reflect Federal program changes. A number of States qualified for final authorization prior to being required to adopt the redefinition of solid waste rulemaking of January 4, 1985 (50 FR 614). Since the January 4, 1985 rule is more stringent than the rule under which such States were authorized, such States were required to revise their programs in accordance with § 271.21. Today's proposed changes, if promulgated, will not preclude EPA's ability to authorize States which have subsequently adopted the January 4 rule since it would reduce the scope of the Federal requirements. However, certain aspects of the State's regulation will be broader in scope than the Federal program and therefore not part of the authorized State program. This means that while they are enforceable under State law, they are not subject to Federal enforcement.

40 CFR 271.21(e) (51 FR 33722, September 22, 1986) provides for extensions of time at the discretion of the Regional Administrator for States to adopt changes to their regulations and/or statutes to conform to change in the Federal program. The question arises, however, of whether States which have not yet adopted the January 4 rule must adhere to EPA's published compliance schedules for such adoption. Where States have delayed rulemaking pending today's proposal clarifying the impact of the court's decision, the Regional Administrators may be flexible in further extending the modification deadlines. The Regional Administrators should take into account the States' regulatory and/or legislative procedures in deciding what further extensions may be warranted. However, any States which have delayed rulemaking should now proceed to expeditiously adopt the January 4, 1985, rules as amended by today's notice, when rule changes resulting from today's proposal are finalized.

V. Executive Order No. 12291—Regulatory Impacts

Under Executive Order No. 12291, EPA must determine whether a regulation is "major" and thus subject to the requirement to prepare a regulatory impact analysis. A rule is major if it will: (1) Have an effect on the economy of $100 million or more; (2) significantly increase costs or prices to industry; or (3) diminish the ability of the U.S.-based companies to compete in domestic or export markets. The Administrator has determined that today's proposed amendments do not constitute a major rule because the amendments will decrease the scope of the Subtitle C regulatory program. This proposed rule has been submitted to OMB for review under E.O. No. 12291.

VI. Paperwork Reduction Act

Under the Paperwork Reduction Act, 44 U.S.C. 3501 et. seq., EPA must consider the paperwork burden imposed by any information collection request in a proposed or final fule. This rule will not impose any new information collection requirements.

VII. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 601 et. seq., EPA must prepare a regulatory flexibility analysis for all proposed rules unless the Administrator certifies that the rule will not have a significant impact on a substantial number of small entities. Accordingly, I hereby certify, pursuant to 5 U.S.C. 601(b), that this rule will not have a

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significant impact on a substantial number of small entities because today's proposed amendments reduce the scope of the Subtitle C regulatory program.

VIII. Supporting Documents

The documents used in developing this notice are available in the EPA RCRA Docket at Room LG-100, 401 M Street SW., Washington, DC 20460. Persons who wish to view docket materials must make an appointment by calling (202) 475-9327. The docket code number is F-87-SWRP-FFFFF.

List of Subjects in 40 CFR Part 261

Hazardous waste, Recycling.

Dated: December 31, 1987.

Lee M. Thomas

Administrator.

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

PART 261—IDENTIFICATION AND LIST OF HAZARDOUS WASTE

1. The authority citation for Part 261 continues to read as follows:

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

2. Section 261.2 is amended by revising paragraph (c)(3) to read as follows:

§ 261.2 Definition of solid waste.

* * * * *

(c) * * *

(3) *Reclaimed.* (i) Materials noted with a "*" in column 3 of Table 1 are solid wastes when reclaimed. Sludges and byproducts will be designated by EPA as solid wastes by listing in § 261.31 or § 261.32 of this part based on consideration of the following factors, no one of which shall be determinative:

(A) Whether the sludge or byproduct, on an industry-wide basis, is typically recycled rather than disposed of;

(B) Whether the sludge or byproduct is replacing a raw material when it is reclaimed (i.e., whether it is reclaimed in a primary rather than a secondary process);

(C) Whether the reclamation practice is closely related to the principal activity of the reclamation facility;

(D) Whether the sludge or byproduct is stored before being reclaimed in a manner designed to minimize loss (for example, by utilizing storage practices that do not involve placement on the land); and

(E) Other appropriate factors.

(ii) The ultimate object in applying these factors is to determine whether the sludges or byproducts are being utilized in on-going, continuous manufacturing processes. However, when the sludges or byproducts contain significant concentrations of toxic constituents not normally found in the raw materials they are replacing, which toxic constituents are not reclaimed by the process, the process may be waste treatment rather than reclamation. In addition, if a byproduct or sludge actually has been designated as a solid waste pursuant to this provision, an individual generator may nevertheless demonstrate that his sludge or byproduct is being reclaimed in an on-going continuous manufacturing process based on the factors used by the Agency. This demonstration is self-implementing; but under paragraph (f) of this section, the burden of proof is on the generator making the demonstration. The Agency will not accept demonstrations where there is storage involving placement on the land.

* * * * *

2. Section 261.4 is amended by revising paragraph (a)(8) and by adding paragraphs (a)(9) and (a)(10) to read as follows:

§ 261.4 Exclusions.

* * * * *

(a) * * *

(8) Secondary materials that are reclaimed and returned to the original process or processes in which they were generated provided:

(i) Only tank storage is involved, and the entire process through completion of reclamation is closed by being entirely connected with pipes or other comparable enclosed means of conveyance;

(ii) Reclamation does not also involve controlled flame combustion for energy recovery (such as could occur in boilers or industrial furnaces) or incineration (by burning in an incinerator);

(iii) The secondary materials are never accumulated in such tanks for over twelve months without being reclaimed; and

(iv) The reclaimed material is not used to produce a fuel, or used to produce products that are used in a manner constituting disposal.

(9) Oil-bearing hazardous secondary materials from petroleum refining which are converted into petroleum coke at the same facility at which such materials are generated, provided the materials are not stored in a manner involving placement on the land, or accumulated speculatively, before being so recycled. (However, coke produced from such recycling is not a solid waste.)

(10) Oil-bearing hazardous secondary materials from petroleum refining that are generated onsite and reinserted into the petroleum refining process along with normal process, streams, provided that the materials are not stored in a manner involving placement on the land, or accumulated speculatively, before being so recycled. (Fuels produced from such recycling activities are not solid wastes.)

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 74 and 78

[MM Docket No. 86-405; FCC 87-390]

Broadcast Services; Flexible Operational and Licensing Procedures for the Broadcast Auxiliary Services and the Cable Television Relay Service

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This action terminates a proceeding that was initiated by a *Notice of Inquiry* (*NOI*), FCC 86-453, released November 4, 1986 (51 FR 40990, November 12, 1986) to gather information related to frequency coordination and the feasibility of relaxing licensing for portable and mobile stations in the broadcast auxiliary and the cable television relay services. The record lacks specific proposals and suggestions that could provide guidance to implement required participation in local frequency coordination, a necessary prerequisite to relaxing present licensing procedures.

ADDRESS: Federal Communications Commission, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Hank VanDeursen, Mass Media Bureau, (202) 632-9660.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Memorandum Opinion and Order in MM Docket No. 86-405, adopted December 15, 1987, and released December 30, 1987.

This full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street NW., Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Services, (202) 857-3800, 2100 M Street NW., Suite 140, Washington, DC 20037.