

entitled "Massachusetts RCRA Program Update: Issues Regarding Regulation of Recyclable Materials Reclaimed by Generators on Site." The differences include that the State does not count Class A recyclable materials in determining generator status (for wastes to be shipped off-site), resulting in some sources which would be LQGs under the Federal program instead being regulated in a lesser-regulated generator category. In addition, for sources which remain LQGs (notwithstanding the difference regarding counting), the usual LQG requirements regarding contingency planning and training do not apply to the parts of the generator's site handling the Class A hazardous recyclable materials. Rather, with respect to these recyclable materials, such generators are instead subject to the less formal and detailed Class A requirements regarding emergency planning and training.

The EPA is committed to reexamining the extent of flexibility that should be employed when reviewing State RCRA programs. In connection with another part of Massachusetts' ECOS program proposal, the EPA is creating a Work Group of EPA and State personnel to examine authorization issues. Without waiting for the results of this effort, the EPA nevertheless has employed some flexibility consistent with its current regulations in reviewing the Massachusetts RCRA program update, as indicated by its proposed approval of some Massachusetts provisions which differ from Federal provisions, discussed in part I.D. above. However, the differences between the Massachusetts Class A regulations and the EPA generator storage regulations are greater than those discussed in part I.D., and a standard authorization of the Class A regulations is precluded under the current EPA State authorization regulations by, for example, the difference regarding when TSDF permits are required. Thus the EPA is not proposing to approve the Massachusetts Class A regulations as a standard authorization.

2. Justification for Making a Change To the Federal Regulations To Allow the Authorization

The EPA is persuaded that it should make a State-specific regulation change to its Federal regulations to enable the authorization of the Class A regulations. The Massachusetts program comprehensively regulates hazardous wastes that are recycled on site by generators, and has operated successfully for many years. The State regulations contain incentives that encourage recycling (e.g., lower fees for

generators which recycle). In its ECOS project application, the MADEP reported that as of 1999, over 490,000 tons of wastes were recycled under its program, as opposed to 90,000 tons of hazardous wastes that were disposed. Basic requirements are in place in the State's recycling program, including the requirement to do waste determinations, the requirement to obtain hazardous waste i.d. numbers (except for VSQGs) and safe handling requirements. While less stringent with respect to certain details, the Massachusetts program is at least as stringent as the Federal program overall. In particular, the Massachusetts program regulates a broader universe of hazardous recyclable materials than are regulated in the Federal program. Even if the focus is limited to Federally regulated wastes, the Massachusetts program is as stringent as the Federal program overall. It regulates the recycling process itself as well as prior hazardous waste storage, unlike the Federal program which regulates only the storage. Finally, some of the State's more stringent storage requirements (described in Part I.D. above) have been applied to the storage of Class A materials, including additional labeling requirements and the prohibition of the use of open tanks.

Thus the Massachusetts Class A regulations meet the RCRA statutory test of protecting human health and the environment, and constitute an acceptable alternative approach (to regulating hazardous recyclable materials) to the approach currently set forth in the Federal regulations. In addition, the EPA recently announced that it is planning to propose a change to its regulations to revise the Federal RCRA regulatory requirements with respect to recyclable materials that remain in use in a continuous industrial process. 49 FR 11251 (March 13, 2002). This is a part of the EPA's response to the court's decision in *Association of Battery Recyclers v. EPA*, 208 F.3d 1047 (D.C.Cir. 2000) ("ABR"), which set aside a portion of an EPA regulation regarding mineral processing industry recyclable materials. If the EPA ultimately adopts a regulation exempting recyclable materials used in a continuous industrial process from Federal RCRA regulation, this exemption is likely to cover at least most Class A recyclable materials.

The EPA does not believe that in light of the ABR decision, it should determine now that all Class A materials are not subject to Federal regulation, and thus conclude that the Class A regulations create no authorization issues. Such a result is not compelled by the court's decision and would prejudice

the EPA's anticipated general rulemaking process. However, the fact that the EPA is planning to move in the direction of reducing regulation regarding recyclable materials is an additional reason counseling in favor of authorizing the State's program regarding Class A recyclable materials under the authority of a special EPA regulation. As mentioned above, the State's Class A program has operated successfully for many years. Requiring the State to now change that program to track EPA requirements does not make sense in the particular circumstances, including the EPA's announced intention to soon change the requirements.

The EPA is proposing to make the State-specific change to its Federal regulations pursuant to a proposal for flexibility submitted by the MADEP under the ECOS program. Under the Joint EPA/State Agreement to Pursue Regulatory Innovation, the EPA agreed to entertain State proposals for flexibility in an agreement entered into between the EPA and the Environmental Council of States. See 63 FR 24784 (May 5, 1998). As specified in that agreement, the EPA may accept State proposals to follow alternative regulatory requirements when (as here) the alternative requirements provide at least an equivalent overall level of environmental protection as the standard EPA mandated requirements.

C. What Is the Proposed Regulation Change?

The proposed change to the Federal regulations which will enable the EPA to grant the requested flexibility is set out at the end of this document. The EPA proposes to amend 40 CFR 262.10 to add a paragraph (k), which will specify that generators within Massachusetts may comply with the Class A regulations, when authorized, with respect to the recyclable materials and matters covered by the authorization, instead of complying with certain standard EPA regulations. The EPA proposes to have this new regulation take effect immediately upon its final promulgation. The EPA Administrator has delegated one-time authority to the Regional Administrator, EPA New England, to make this regulation change.

D. What Will Be the Effect of the Proposed Federal Regulation Change?

The proposed change to the Federal regulations will enable the EPA to authorize the Massachusetts regulations, since the Federal regulations will specify that the State regulations contain acceptable alternative standards