

materials potentially affected by today's proposed regulatory exclusion are generated in the following industries:

- Inorganic chemicals
- Plastic Materials and Resins
- Pharmaceutical Preparations
- Cyclic Crudes and Intermediates
- Industrial Organic Chemicals
- Secondary Smelting of Nonferrous Metals
- Plating and Polishing
- Printed Circuit Boards

More detailed discussion of the potential impacts of this rule on the regulated community is presented in section VII.A. of this preamble.

In addition to the industries that may potentially benefit from the regulatory exclusion in today's proposal, the proposed provisions relating to legitimacy of recycling activities should provide a more general benefit to those who are engaged in hazardous material recycling, by providing clearer, more explicit rules for distinguishing between recycling practices that are legitimate, and those that EPA considers to be "sham" recycling.

#### C. How Is Hazardous Waste Recycling Currently Regulated?

The basic regulatory provisions for defining "solid wastes" and "hazardous wastes" under RCRA are found in part 261 of title 40 of the Code of Federal Regulations (CFR). To be subject to RCRA's hazardous waste regulatory program, a material must be a solid waste that is also a hazardous waste. A solid waste is a hazardous waste if it is explicitly listed as such (in subpart D of part 261), or if it exhibits a hazardous characteristic (as specified in subpart C of part 261).

In general, hazardous wastes are subject to RCRA's full "cradle to grave" regulatory system, from the time they are generated to when they ultimately are disposed of. However, hazardous secondary materials can often be recycled instead of being disposed, which can change how those wastes are regulated. The "definition of solid waste" regulations in part 261 in effect separate recyclable hazardous secondary materials into two broad categories—those that are classified as solid wastes when recycled, and are therefore subject to regulation under RCRA, and those that are not considered solid wastes when they are recycled, and thus are not regulated. It should be understood that the term "hazardous secondary material" as it is used in today's proposed rule and preamble therefore refers to both categories of recyclable materials; that is, materials that are regulated as hazardous wastes when

recycled, and materials that are not considered wastes when recycled.

Hazardous secondary materials that are not regulated as wastes when they are recycled include, for example, those which are used or reused directly as effective substitutes for commercial products, and those which can be used as ingredients in an industrial process, provided the materials are not being reclaimed. *See* 40 CFR 261.2(e). In essence, EPA considers these types of recycling practices to be more akin to normal industrial production than waste management. EPA does not consider them to involve management of discarded materials for purposes of RCRA Subtitle C.

In contrast, some recycling practices bear more resemblance to waste management, and the hazardous secondary materials therefore remain regulated as wastes. One type of recycling that falls within this category and that is especially relevant to this proposed rule is reclamation of certain types of hazardous secondary materials. Reclamation involves processing of secondary materials in some way so that the materials can be used or reused. *See* 40 CFR 261.1(c)(4) and 40 CFR 261.2(c)(3). An example of reclamation is processing of a spent solvent to restore its solvent properties before it is suitable for reuse as a solvent. As explained elsewhere in this preamble, today's proposal would de-regulate a specific subset of these materials that are recycled by being reclaimed.

The existing part 261 regulations identify other types of recycling practices that are fully regulated because they generally are more likely to involve discard of materials (*see* 40 CFR 261.2(c)). These practices include recycling of "inherently waste-like" materials, recycling of materials that are "used in a manner constituting disposal," and "burning of materials for energy recovery." Today's proposal is not intended to affect how these recycling practices are regulated.

The current regulations also provide certain specific exemptions and exclusions from the definition of solid waste for particular recycling practices. For example, pulping liquors from paper manufacturing that are reclaimed in a pulping liquor recovery furnace and then reused in the pulping process are excluded from regulation under 40 CFR 261.4(a)(6). In some cases, these exclusions specify certain conditions that must be met in order to qualify for and maintain the excluded status of the recycled material. An example of such a "conditional exclusion" is the one provided in 40 CFR 261.4(a)(9) for spent wood preserving solutions that are

reclaimed and reused. Today's proposal would impact some of these existing exclusions, as discussed in Section III.A. below.

#### D. What Are the Legal Issues Surrounding the Definition of Solid Waste?

##### 1. Background

RCRA gives EPA authority to regulate the management of "solid wastes" under its non-hazardous waste program. *See, e.g.* RCRA sections 1008(a), 4001 and 4004(a). RCRA also gives EPA authority to regulate hazardous wastes. *See, e.g.*, RCRA sections 3001–3004. "Hazardous wastes" are the subset of solid wastes that present threats to human health and the environment. *See* section 1004(5). EPA may also address solid and hazardous wastes under its endangerment authorities in section 7003. (Similar authorities are available for citizen suits under section 7002.) Materials that are not wastes are generally not subject to regulation under RCRA Subtitle C. Thus, the definition of "solid waste" plays a key role in defining the scope of EPA's RCRA's authorities.

The statute defines "solid waste" as " \* \* \* any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material \* \* \* resulting from industrial, commercial, mining, and agricultural operations, and from community activities. \* \* \* " RCRA Section 1004 (27) (emphasis added). In its RCRA regulations, EPA has historically defined some materials destined for recycling as "waste," while excluding others.

Since 1980, EPA has interpreted "solid waste" under its Subtitle C regulations to encompass both materials that are destined for final, permanent placement in disposal units, as well as *some* materials that are destined for recycling. 45 FR 33090–95 (May 19, 1980); 50 FR 604–656 (Jan. 4, 1985) (*see* especially pages 616–618). EPA has offered three arguments in support of this approach:

- The statute and the legislative history suggest that Congress expected EPA to regulate as wastes some materials that are destined for recycling (*see* 45 FR 33091, citing numerous sections of the statute and *U.S. Brewers' Association v. EPA*, 600 F. 2d 974 (D.C. Cir. 1979); 48 FR 14502–04 (April 3, 1983); and 50 FR 616–618).

- Many materials stored or transported prior to recycling present the same types of threats to human health and the environment as materials