

“sham” practices in the definition of solid waste (API and Chevron-Texaco).

The Synthetic Organic Chemical Manufacturers Association (SOCMA) raised issues on clarifying the terms “continuous industrial process,” “generating industry” and “off-site/on-site.” SOCMA provided examples of how the different terms could be applied to the Association’s members. SOCMA also provided specific comments and regulatory language for an expanded variance procedure to exempt materials from the definition of solid waste.

API and Chevron-Texaco offered the most specific comments, attaching regulatory language for discussion. Chevron-Texaco suggested adding a requirement that material with hazardous constituents above Universal Treatment Standard (UTS) levels that is managed such that the material is released to the environment would be considered discarded. API offered several possible new additions to the definition of discarded material, which closely follow examples that EPA has used in past rulemaking and guidance. (see October 3, 2002 letter from API to EPA).

Several commenters (e.g. API, SOCMA) focused on the decision’s discussion of a waste being recycled in a “continuous industrial process.” They stated that a “continuous” process encompasses all of the steps between original production of a raw material and eventual disposal, including any reclamation that might occur. These commenters believed that “continuous industrial process” did not necessarily imply only a single industry. Commenters cited examples of generators sending material off-site to recyclers who reclaim the material for reuse in other industries.

Other industry-suggested revisions include creating a variance process for waste going to environmentally protective recycling (ACC), adding specific language that co-products are not solid waste (Hogan and Hartson, LLP), extending the storage accumulation times (SOCMA), revising the definition of “accumulated speculatively” in 40 CFR 261.1(b)(8) for the mining and mineral processing industry (National Mining Association), and a recycling exclusion for spent pickle liquor recycling efforts (American Iron and Steel Institute).

The Association of State and Territorial Solid Waste Management Officials (ASTSWMO) expressed general support for simplifying the current regulations and encouraging recycling. However, they also expressed the strong opinion that codified legitimacy criteria

should be included in any changes, and that a notification or certification provision be added to allow state regulatory agencies to determine whether recycling practices are legitimate.

F. What Is the Scope of Today’s Proposed Rule?

As discussed previously in this section of today’s preamble, spent materials, listed sludges and listed byproducts that are recycled by being reclaimed are currently considered wastes for RCRA regulatory purposes. Today’s proposal would affect a particular subset of these waste materials. Specifically, materials that are “generated and reclaimed in a continuous process within the same industry” (as defined in this proposal) would no longer be regulated under RCRA’s Subtitle C hazardous waste management system.

Today’s proposed 40 CFR 261.2(g)(2) also requires that reclamation of excluded materials within the generating industry must produce a product or ingredient that can be used or reused without any further reclamation. This requirement is intended to prevent situations where excluded materials might be only partially reclaimed within the generating industry, and then sent to a different industry for one or more “final” reclamation steps. We do not believe that such partial reclamation practices would be consistent with the concept of “continuous process within the same industry” as it is articulated in today’s proposal.

Today’s proposal would not affect materials that are reclaimed in other ways. Thus, spent materials, listed byproducts and listed sludges that are generated and reclaimed in different industries would generally remain subject to regulation as wastes. This proposal would also not affect materials that are currently considered wastes because they are recycled in a certain way. This category of wastes includes materials that are “inherently waste-like,” materials that are “speculatively accumulated,” materials that are recycled and “used in a manner constituting disposal,” and materials that are “burned for energy recovery.” The regulatory provisions for these categories of wastes are found in 40 CFR 261.2.

Today’s proposal would also codify in regulations criteria for assessing “legitimate recycling” of hazardous secondary materials. These criteria would apply not only to the materials that would be excluded under today’s proposal, but more broadly to recycling

of hazardous wastes, as well as recycling of hazardous secondary materials that are not considered wastes when they are recycled. These criteria for legitimate recycling would not, however, apply to materials that are not hazardous wastes, or materials that do not exhibit a hazardous characteristic.

III. Detailed Description of Today’s Proposed Rule

A. Exclusion for Hazardous Secondary Materials Generated and Reclaimed in a Continuous Process Within the Same Industry

1. What Is the Intent of the Proposed Exclusion?

Today’s proposal would exclude from the RCRA regulatory definition of solid waste hazardous secondary materials that are generated and reclaimed in a continuous process within the same industry. As discussed in the previous section of this preamble, the D.C. Circuit Court’s decisions have provided general direction to the Agency as to the meaning of “discarded materials” in section 1004(27) and the extent of the Agency’s Subtitle C jurisdiction over recycling. Today’s proposed rule is intended to define “solid waste” for Subtitle C purposes in a way that we believe is consistent with the Court’s general direction, to establish specific rules for how the exclusion will be implemented, and explain how the exclusion fits into RCRA’s general regulatory framework.

Today’s proposal would modify the current regulatory provision at 40 CFR 261.2(c)(3), which specifies that some types of hazardous secondary materials are wastes if their recycling involves reclamation. In effect, we are proposing to relinquish regulatory controls over such materials, provided that they are generated and reclaimed in accordance with today’s proposal. This proposal, which we believe is consistent with the Court’s opinions, would generally exclude materials that are recycled in a manner more akin to normal industrial production than waste management.

2. What Is “Reclamation?”

“Reclamation” of materials can involve a number of different types of activities and end results. As defined in 40 CFR 261.1(c), a material is reclaimed “* * * if it is processed to recover a usable product, or if it is regenerated.” From a technical standpoint, some reclamation processes are relatively simple, such as magnetic separation of ferrous metals from a pollution control sludge. Other types of reclamation may be much more complex, and may involve a series of processing steps to