

any geographical limits on movements of excluded materials, provided that each facility where the material is reclaimed is in the same industry that originally generated the material.

It is likely that there will be many situations in which reclamation of an excluded material results in a finished end-product that needs no further reclamation, as well as a residual secondary material that has no further use and must be disposed of. Such residuals would be wastes, and thus not eligible for the exclusion. If the wastes were hazardous, they would need to be managed according to applicable hazardous waste regulations.

Today's proposal also anticipates situations where residuals from reclamation of excluded materials are sent to a different industry for further reclamation. As proposed in 40 CFR 261.2(g)(2)(ii), such residual materials would not be eligible for today's exclusion, since they would no longer be managed within the same industry. The fact that such materials are sent to another industry and are thus ineligible for the exclusion would not, however, affect the exclusion for materials that remained within the generating industry. To illustrate, if intra-industry reclamation of an excluded metal-bearing sludge generated a residual material that was then sent to a different industry for further reclamation, that residual would be considered a waste, but the exclusion for the original metal-bearing sludge would not be affected. Similarly, a reclamation process might generate two types of residual materials—one which could be further reclaimed in the same industry, and another that is amenable to reclamation in a different industry. In such cases, the material that continues to move in the same industry would continue to be excluded, while the residual material sent to a different industry would not be excluded.

*Co-Proposal Option #2:* Today's co-proposed Option #2 is identical to the first option described above, with one exception. Under Option #2, hazardous secondary materials that are generated and reclaimed in a continuous process within the same industry would not be eligible for the exclusion if the reclamation takes place at a facility that also recycles regulated hazardous wastes generated in a different industry. This option would, however, allow the exclusion for materials recycled within the same industry if the reclamation facility is also recycling non-hazardous wastes, or hazardous materials that are excluded from regulation under other provisions (such materials could include, for example, characteristic by-

products and sludges that are not solid wastes when reclaimed according to 40 CFR 261.2(c), or materials being used as effective substitutes for commercial products under 40 CFR 261.2(e)). This regulatory option would, in effect, establish a bright line to distinguish facilities that are engaged in recycling that is eligible for today's proposed exclusion, and facilities which could be considered to be engaged in commercial recycling, and which should thus be ineligible for the exclusion.

To illustrate this co-proposed option, if a paint manufacturer who reclaims spent solvents were to accept spent solvents from other paint manufacturers, as well as spent solvents from a generator in a different industry (e.g., an automobile repair shop), none of the spent solvents managed by the paint manufacturer would be eligible for the exclusion proposed today. If, however, in this example the solvents from the automobile repair shop were excluded under a different regulatory provision (e.g., because they are reused without reclamation—see 40 CFR 261.2(e)), the solvents generated and reclaimed within the paint manufacturing industry would be eligible for the exclusion.

*Advantages and disadvantages of Options #1 and #2.* The Agency believes that Option #1 described above would likely encourage more beneficial recycling, since it would allow the exclusion for a somewhat broader set of recycling practices. Another argument for this option might be that the exclusion for a material managed at a reclamation facility should not be affected by the fact that more stringently regulated materials (i.e., hazardous wastes) are also being managed at the facility. Such facilities would typically have RCRA permits, and thus would be subject to stringent design, operating and corrective action requirements. Some might argue, therefore, that such regulated facilities are well-suited to manage materials that would not be regulated under the terms of today's proposed exclusion.

With regard to Option #2, an advantage to this approach would be greater certainty to the regulated community as to when they would be ineligible for the exclusion we propose today. Otherwise, it could be difficult for a generator to determine if facilities engaged in intra-industry recycling that also recycle hazardous wastes from one or more different industries are engaged in a continuous process within the generating industry. Option #2 clearly defines whether the recycling is taking place within the generating industry by drawing a bright line between excluded

recycling and commercial recycling. As explained below, commercial recycling presents different legal and policy issues compared with recycling within other industries. For some facilities, this regulatory option would also address potential concerns regarding the mixing of excluded secondary materials with regulated hazardous wastes. Another concern is that if excluded secondary materials were allowed to be mingled with regulated hazardous wastes, it could be much more difficult for overseeing agencies to determine whether the generator and/or reclaimer were in compliance with the terms of the exclusion.

EPA requests comment on the two co-proposed regulatory options described above, particularly with regard to the advantages and disadvantages of the different approaches, their potential associated benefits, and whether such approaches would be consistent with the general direction given in this area by the D.C. Circuit Court of Appeals.

#### 5. What Other Options Were Considered for Defining "Continuous Process Within the Same Industry?"

In developing the exclusion in today's proposal, the Agency considered several alternative approaches to defining the concept of "continuous process within the generating industry." One option that was considered would define the scope of the exclusion depending on who uses the products of the recycling process after the secondary materials are reclaimed. Under this approach, to be eligible for the exclusion, the products from reclamation of secondary materials could be: (a) Sold to the general public if such products were considered typical products of the generating industry; or (b) reused as a product or ingredient within the generating industry, if the reclaimed material was not a typical product of the generating industry.

To illustrate this option, if a paint manufacturer received spent solvent from another paint manufacturer that s/he then reclaimed, the reclaimed solvent could not be sold to the general public and maintain the exclusion, under the assumption that solvent is not a typical product of the paint manufacturing industry. In this example, the reclaimed solvent would have to be reused within the paint manufacturing industry in order to maintain the exclusion. The paint manufacturer would thus have the option of reusing the solvent (e.g., as an ingredient in making paint), or selling it to another party within the paint manufacturing industry. Under this alternative approach, if the reclaimed