

between processes that are continuous and those that are not. Under this existing rule, a material is accumulated speculatively if the person accumulating it cannot show that the material is potentially recyclable and has a feasible means of being recycled. More importantly for the purpose of this proposal, the person accumulating the material must show that during a calendar year (beginning January 1) the amount of material that is recycled, or transferred to a different site for recycling, must equal at least 75 percent by weight or volume of the amount of that material at the beginning of the period. This provision already applies to secondary materials not otherwise considered to be wastes when recycled, such as materials used as ingredients or commercial product substitutes, materials that are recycled in a closed-loop production process, or unlisted sludges and byproducts being reclaimed. These restrictions on speculative accumulation have been an important element of the RCRA recycling regulations since they were promulgated on January 4, 1985.

EPA believes that using the existing regulatory provisions for speculative accumulation as the time limit for defining "continuous process" in this rule is consistent with the D.C. Circuit Court's direction, and fits well within the existing regulatory structure for hazardous waste recycling. In the ABR decision, the Court suggested that temporary storage of secondary materials prior to reclamation may be a necessary phase in the overall reclamation process. However, in that decision the court did not suggest a particular time limit beyond which accumulation of materials could no longer be considered part of a continuous process.

For most types of recycling that are excluded from regulation under RCRA, the existing speculative accumulation provisions serve to define the point at which potentially recyclable secondary materials nevertheless become solid and hazardous wastes. As an example, secondary materials that can be directly used or reused without reclamation are not considered wastes, as long as they are not speculatively accumulated. Today's rule is consistent with this regulatory approach, in that it applies the same logic and limitations to storage of materials prior to recycling. We see no compelling reason why the speculative accumulation provisions should not serve the same purpose for recycling that would be excluded under today's proposal, and recycling that is excluded under other, existing regulatory provisions.

With regard to implementing the existing restrictions on speculative accumulation, persons accumulating secondary materials are required to demonstrate that they are recycling materials in the amounts specified in 40 CFR 261.1(c)(8). Making such demonstrations will generally require such persons to provide appropriate documentation to substantiate their claims, as specified in existing 40 CFR 261.2(f). In the preamble to the final speculative accumulation rule (50 FR 636, January 4, 1985), the Agency discussed certain types of documentation that would be appropriate in making satisfactory demonstrations, such as customarily maintained data on industrial process throughputs, and bills of lading for shipments sent off-site to a recycler. Other such documentation could include records identifying the recyclers receiving the secondary materials, or contracts and correspondence with a recycler.

The Agency believes that today's proposed definition of "continuous process" is consistent with the direction in the D.C. Circuit Court's opinions. Thus, this definition, as it fits within the broader context of today's proposed exclusion, should help to ensure that materials that would be excluded from regulation under today's proposal will not be discarded, and therefore do not need to be regulated as wastes under Subtitle C.

#### What Alternatives Did EPA Consider for Defining "Continuous Process?"

EPA considered several alternative approaches to placing time limits on "continuous process" in this proposed rule. One such alternative was to establish a limit of 90 days for accumulation of recyclable materials as the maximum time limit for a "continuous process." This would in some ways be consistent with the current time limit for accumulation of hazardous wastes by large quantity generators that do not have RCRA permits. Another alternative could be to establish a somewhat longer limit, such as 180 days (this alternative has some support in the decision of the U.S. Court of Appeals for the Fourth Circuit in *Owen Electric Steel Co. v. Browner*, 37 F. 3d 146 (4th Cir. 1994)). This is also the allowable accumulation time for small quantity generators that do not have RCRA permits.

Establishing a specific time limit in this rule (such as 90 or 180 days) to define "continuous process" could be coupled with a provision that would allow generators to exceed such time limits (for example, up to one-year) in

cases where they could demonstrate that recycling of the materials would be done within the extended time frame.

EPA chose not to set such stricter time limits to define "continuous process," largely because we believe that using the speculative accumulation provisions is more consistent with the current regulatory framework for recycling, and is familiar to the regulated community. It represents EPA's longstanding judgment that materials recycled within the one calendar year timeframe are in continuous use, and therefore are not discarded. Moreover, EPA is concerned that it might be difficult to select a shorter time limit that would be appropriate to the wide variety of materials and industries covered by this rule. This approach also offers greater flexibility for generators and reclaimers to optimize recycling opportunities. Shorter time limits could discourage some promising recycling opportunities, particularly in industries that tend to generate recyclable secondary materials episodically, as is often the case with (for example) specialty batch chemical manufacturers.

The Agency is aware, however, that there may be some potential complications with using the speculative accumulation time limit to define "continuous process." For one thing, establishing how long specific secondary materials have been stored at a generator's facility can be difficult for regulatory agencies, particularly since there are no explicit record keeping requirements in the regulations for speculative accumulation. Although we are not proposing today to modify the current regulations for speculative accumulation, we solicit comment as to whether those regulations should be strengthened as they would apply specifically to today's proposed exclusion, or perhaps more generally. Specifically, we request comment on the idea of requiring generators and off-site recyclers to maintain records that would serve to establish when specific volumes of materials were generated, and when they were recycled. EPA believes that such record keeping requirements might assist inspectors from regulatory agencies to verify that secondary materials stored for recycling are actually being reclaimed on a regular basis, rather than accumulating in increasing volumes over months and years. We also believe that such record keeping would likely impose a minimal burden on generators, since we understand that maintaining such records of inputs and outputs, and bills of lading for off-site shipments, is a standard business practice.