

current regulations could be read as triggering the closure requirements for those units, since owners/operators of non-land based hazardous waste units (e.g., tanks, containers, containment buildings) must begin closure within 90 days of receiving a unit's final volume of hazardous wastes. See 40 CFR 264.113(a) and 265.113(a). EPA is concerned that requiring closure of units in these situations would serve little environmental purpose, since after closure the unit would be immediately reopened and used to store the same (now excluded) material. It should also be noted that, under today's proposal, units storing excluded materials would be considered essentially the same as similar units used to store products. Thus, we do not believe that requiring these particular units to close through RCRA Subtitle C procedures is necessary to protect human health and the environment.

The Agency is today proposing that closure of storage units would not be required when such units cease storing hazardous wastes and are subsequently used to store the same materials that would no longer be regulated as wastes under today's proposed exclusion. If, however, such units were used previously to store different types of hazardous wastes, the units would be subject to hazardous waste closure requirements. We request comment as to whether more explicit regulatory provisions to address RCRA closure requirements in these types of situations would be appropriate in the final rule.

Enforcement

Today's proposed rule describes an exclusion from Subtitle C regulations for hazardous secondary materials recycled in certain ways, with the regulatory text describing the "boundaries" of the exclusion. If a material is not managed within these boundaries, the material is not excluded and is a hazardous waste for Subtitle C purposes from the time the generator first generated it. Therefore, each person who manages a hazardous secondary material that loses its exclusion would have to manage it consistently with hazardous waste management requirements from the point when the material was first generated, regardless of whether the person is the one who actually causes the loss of the exclusion.¹³ EPA could

choose to bring an enforcement action under RCRA section 3008(a) for all violations of Subtitle C requirements occurring from the time the material is generated through the time that it is finally disposed. States could choose to enforce for violations of state hazardous waste requirements under state authorities. Any enforcement action would address the management of those hazardous secondary materials that are outside the boundaries of the exclusion.

EPA believes that this approach, which treats hazardous secondary material that does not come within the boundaries of the exclusion as hazardous waste from its point of generation, provides everyone involved with an incentive to handle materials to prevent the loss of the exclusion. It also encourages each person to use all appropriate steps to see that others handle the material so it is legitimately reclaimed.

To illustrate, if the generator of a hazardous secondary material claims the exclusion and then sends the material, via a transporter, to a reclamation facility not in the same industry, then the material would not be excluded. It would be a hazardous waste. Further, if a generator considered a hazardous secondary material to be excluded, and sent the material via a transporter to a reclaimer who decided to dispose of it rather than reclaim it, the material again would be a hazardous waste. In both cases, EPA and an authorized state could choose to bring an enforcement action against the reclaimer, transporter, and/or generator, for violations of applicable RCRA hazardous waste requirements. The material would be a hazardous waste from the time the generator first generated it. Those who managed the waste also could be subject to EPA and/or state enforcement.

As with any violation, EPA and authorized states would have a range of enforcement options. Enforcing agencies would use their discretion to select the option that is appropriate to a specific case and its factual circumstances. Some of these options include sending a notice of violation, ordering that the situation be remedied, or assessing fines or other penalties as appropriate.

In an enforcement action, a respondent who claims that a particular hazardous secondary material is excluded because that material was managed consistently with 40 CFR 261.2(g) would have the burden of proof, including the burden of persuasion, to demonstrate that the

they are managed consistently with the boundaries of the exclusion.

material has been managed in a manner that maintains the exclusion from the point it was generated. 40 CFR 261.2(f). For example, a reclamation facility rebutting an allegation that it disposed of hazardous waste in violation of RCRA Subtitle C would have the burden of proving the material was an excluded hazardous secondary material because it had been managed consistently with 40 CFR 261.2(g) from the point when it was generated.

In addition, the exclusion in today's rule would not affect the obligation to promptly respond to and remediate any releases of hazardous secondary material that may occur. If, for example, a hazardous secondary material is spilled or released, then the material would be discarded. Any management of the released material not in compliance with applicable Federal and State hazardous waste requirements could result in an enforcement action. For example, a person who spilled or released a hazardous secondary material, and failed to immediately clean it up, could potentially be subject to enforcement for illegal disposal of the waste. See, for example, 40 CFR 264.1(g)(8). In addition, the waste could potentially be addressed through enforcement orders, such as orders under RCRA sections 3013 and 7003.

B. Legitimate Recycling

1. What Is Legitimate Recycling?

Under the current Subtitle C definition of solid waste, many hazardous secondary materials that would otherwise be subject to regulation under RCRA's "cradle to grave" system are not considered wastes if they are recycled. The general idea behind this construct is that recycling of such materials often closely resembles normal industrial production, rather than waste management. Since there can be a considerable economic incentive to manage recyclable materials outside the RCRA regulatory system, there is a clear potential for some handlers to claim that they are recycling, when in fact they are conducting waste treatment and/or disposal in the guise of recycling.

In the preamble to the 1985 regulations (50 FR 638, January 4, 1985), EPA articulated the need to distinguish between "sham" and "legitimate" recycling of hazardous secondary materials. The issue is whether these activities are legitimate recycling, or are rather some form of treatment or disposal being called recycling in an attempt to evade regulation. The 1985 preamble discussion cited above outlined several guidelines for making such distinctions. Subsequent guidance

¹³ The loss of the exclusion for some materials at a facility does not automatically effect the status of other hazardous secondary materials managed under the exclusion. For example, if a hazardous secondary material at a reclaimer loses the exclusion and thus is hazardous waste, the status of other hazardous secondary materials managed by that reclaimer remain unaffected, provided that