

(discussed in more detail below) elaborated on those guidelines, and reinforced the principle that recycling of hazardous secondary materials that is not legitimate amounts to treatment or disposal, which is a regulated activity under RCRA.

In recent years, a wide range of RCRA stakeholders, including many state agency officials, have expressed concern that the statements in preamble and current guidance on legitimate recycling do not provide sufficient clarity or predictability for making recycling legitimacy determinations. Because of these concerns, many stakeholders have encouraged EPA to revise and clarify the current legitimacy criteria, and to promulgate them in regulations.

EPA believes that today's proposed rulemaking is a good opportunity to establish RCRA's recycling legitimacy criteria in regulations, and at the same time to make clarifying revisions to them. Accordingly, today's proposal includes specific regulatory provisions for distinguishing legitimate recycling from sham recycling practices, which reorganize and clarify the existing criteria that have been articulated in preamble statements and guidance. Today's proposal to codify recycling legitimacy criteria is not based on any direction from the D.C. Circuit Court.

Today's proposed legitimacy criteria are intended primarily to clarify and simplify the same basic legitimacy principles that have been in use since 1985. We believe that the new codified regulatory criteria will, when applied to actual recycling scenarios, result in determinations that are consistent with those based on current guidance. As such, we do not anticipate the need for overseeing agencies to revisit previous legitimacy determinations if the proposed criteria are finalized.

2. What Is the Current Guidance for Legitimate Recycling?

In the January 4, 1985 preamble to the final rule that established the current definition of solid waste regulations, EPA described several indications of sham recycling. A similar discussion that addressed legitimacy as it pertains to burning materials for energy recovery was presented in the preamble to the January 8, 1988 proposed amendments to the definition of solid waste (53 FR 522), portions of which were never finalized. On April 26, 1989, the Office of Solid Waste issued a memorandum that consolidated preamble statements concerning legitimate recycling into a single list of criteria to be considered in evaluating legitimacy (OSWER directive 9441.1989(19)). This memorandum has been, and still is, the primary source of

guidance for the regulated community and for overseeing agencies in distinguishing between legitimate and sham recycling.

As explained in the 1989 memorandum, a legitimacy determination involves evaluating case-specific information to determine whether or not a secondary material being recycled is in effect being used as a commodity, rather than as a waste. The 1989 memorandum identified six criteria to be considered in evaluating this fundamental question, explaining that each recycling scenario is likely to require a case-specific evaluation. The memorandum further explained that, depending on the case-specific facts and circumstances, certain criteria may weigh more heavily than others in making legitimacy determinations. The general criteria presented in the 1989 guidance memorandum are as follows:

- Is the secondary material similar to an analogous raw material or product?
- What degree of processing is required to produce a finished product?
- What is the value of the secondary material?
- Is there a guaranteed market for the end product?
- Is the secondary material handled in a manner consistent with the raw material/product it replaces?
- Other relevant factors (*e.g.*, economics of the recycling process, toxic constituents "along for the ride")?

3. Today's Proposed Criteria for Legitimate Recycling

A. What types of recycling would be addressed by today's legitimacy criteria? Today's proposal would add a new paragraph (h) to the 40 CFR 261.2 definition of solid waste, specifying four general criteria to be used in determining whether recycling of hazardous secondary materials is legitimate.¹⁴ These legitimacy criteria are intended to apply generally to the following types of materials:

- Recyclable hazardous secondary materials that would be excluded from Subtitle C regulation as wastes under today's proposal for intra-industry recycling.
- Hazardous secondary materials that, because they are recycled, are excluded

or exempted from Subtitle C regulation under other regulatory provisions (see, for example, the exclusions in 40 CFR 261.4).

- Recyclable hazardous wastes that are regulated under Subtitle C prior to recycling.

Today's proposal is the Agency's first attempt to codify in regulatory form general, broadly applicable principles for making recycling legitimacy determinations. It should be noted, however, that the Agency has examined in depth a number of waste-specific and industry-specific recycling practices, and has promulgated regulations that address the legitimacy of many of these practices in much more specific terms. Thus, there will be situations where today's broadly-applicable proposed criteria would in a sense overlap with these more specific legitimacy provisions. One example of this would be the recently promulgated regulations for zinc fertilizers made from recycled hazardous secondary materials, which (among other things) specifies numerical limits on five heavy metal contaminants and dioxins in these zinc fertilizer products (67 FR 48393, July 24, 2002). Other examples of more specific legitimacy provisions are found in the regulations promulgated for comparable fuels (63 FR 33782, June 19, 1998), the "use constituting disposal" provisions in 40 CFR part 266, subpart C, and the "burning for energy recovery" provisions in 40 CFR part 266, subpart H.

Where more specific criteria or requirements have been established in regulations, affected parties should look to those regulatory provisions, in addition to the generic legitimacy criteria being proposed in today's rule. For example, for a zinc micronutrient fertilizer manufacturer, the analysis of "toxics along for the ride" (see Criterion #4, discussed below) would involve an analysis of whether his fertilizer product meets the contaminant limits specified in 40 CFR 261.4(a)(21). The Agency specifically requests comments on any scenarios where the public sees a conflict between the generic legitimacy criteria and more specific regulatory provisions for a particular recycling practice, and what potential problems could arise from any such conflicting legitimacy provisions.

If EPA or an authorized state agency determines that a process is not legitimate recycling, the activity would be considered waste treatment or disposal and would thus be subject to regulation under RCRA Subtitle C, if hazardous. These proposed criteria are intended to apply to all recycling of hazardous secondary materials,

¹⁴ It should be noted that today's proposed legitimacy criteria are not intended to apply to recycling of materials that are non-hazardous (*i.e.*, materials that are not listed hazardous wastes, and that do not exhibit a hazardous characteristic). Thus, for example, recycling of non-hazardous household wastes, such as newspapers and aluminum cans, would not be subject to the proposed criteria. Likewise, the proposed criteria would not apply to recycling of non-hazardous secondary materials generated from industrial operations.