

including any recycling that may be covered under today's proposed exclusion for "materials recycled in a continuous process within the generating industry." If an owner/operator claims they are conducting legitimate recycling but the appropriate regulatory agency determines that the process is sham recycling, the recycler and the generator(s) of the recycled material may be subject to enforcement action. As noted earlier, if a hazardous secondary material is discarded through sham recycling, the generator and all others who have handled or managed the material may be subject to enforcement for violations of RCRA Subtitle C requirements. To avoid enforcement, a prudent generator will take steps to ensure that the recycling of his materials is legitimate.

B. What are today's proposed legitimacy criteria, and how would they be used? The following is a discussion of today's proposed legitimacy criteria, with an explanation of how each of the proposed criteria relates to preamble statements and guidance currently in use. The four proposed criteria are:

1. Criterion #1: The secondary material to be recycled is managed as a valuable commodity. Where there is an analogous raw material, the secondary material should be managed in a manner consistent with the management of the raw material. Where there is no analogous raw material, the secondary material should be managed to minimize the potential for releases into the environment.

2. Criterion #2: The secondary material provides a useful contribution to the recycling process or to a product of the recycling process and evaluating this criterion should include consideration of the economics of the recycling transaction. The recycling process itself may involve reclamation, or direct reuse without reclamation.

3. Criterion #3: The recycling process yields a valuable product or intermediate that is: (i) Sold to a third party; or (ii) Used by the recycler or the generator as an effective substitute for a commercial product or as a useful ingredient in an industrial process.

4. Criterion #4: The product of the recycling process:

(i) Does not contain significant amounts of hazardous constituents that are not found in analogous products; and

(ii) Does not contain significantly elevated levels of any hazardous constituents that are found in analogous products; and

(iii) Does not exhibit a hazardous characteristic that analogous products do not exhibit.

As proposed today, these legitimacy criteria are not expressed as questions to be answered, as they were in the 1989 guidance. Rather, they are expressed as principles to be assessed on a case-specific basis. As proposed, therefore, a legitimacy determination would be a case-specific judgment as to whether a particular recycling practice is consistent with the four criteria in 40 CFR 261.2(h).

The proposed legitimacy criteria are intended to apply to a wide range of recycling scenarios across a wide array of industries. Although EPA expects that most, if not all, legitimate recycling practices will conform to each of the four criteria, the application of the criteria will require some subjective evaluation and balancing. Furthermore, there may be situations when a recycling activity that does not conform to one or more of the criteria could be considered legitimate. For example, with regard to the first criterion listed above, there could be a situation in which the secondary material to be recycled is managed in a different (though protective) manner than analogous raw materials are managed. Such recycling might nevertheless be considered legitimate if the recycling process satisfied the other three criteria, and management of the materials is reasonable and appropriate. There are likely to be other types of situations where a particular legitimacy criterion may not be met, but where the overall recycling practice would nevertheless be considered legitimate. Although we believe that today's proposed criteria would provide a sound basis for making legitimacy determinations, we are interested in any examples of legitimate recycling practices that might not meet all of the criteria proposed today.

The proposed legitimacy criteria, if finalized, would continue to be used in the same way as the current guidance has been used. That is, we would expect the regulated community to continue to evaluate their recycling operations using the criteria, and reach their own conclusions without prior approval by an overseeing agency. Such conclusions would, of course, be subject to review by EPA or the authorized state should the need arise.

EPA requests comment as to whether the proposed legitimacy criteria should be structured differently in the final rule, such as in the form of mandatory requirements that must all be met, or perhaps in a system where certain criteria are mandatory and others are not. We are especially interested as to whether structuring the legitimacy criteria differently would necessitate revisiting previous legitimacy

determinations made by regulated entities or implementing agencies. We are also interested in comments as to any case-specific examples of legitimate recycling where one or more of the proposed factors would not be relevant in making determinations, and whether or not other additional criteria beyond those proposed today should be considered in making legitimacy determinations.

The following is an explanation of each of the four proposed legitimacy criteria, including a discussion of how each proposed criterion relates to existing guidance.

1. Criterion #1: "The secondary material to be recycled is managed as a valuable commodity. Where there is an analogous raw material, the secondary material should be managed in a manner consistent with the management of the raw material. Where there is no analogous raw material, the secondary material should be managed to minimize the potential for releases into the environment."

In EPA's view, a recycler will value secondary materials that provide an important contribution to his process or product and will manage them in a manner consistent with a valuable feedstock material (*i.e.*, will manage them to minimize their loss). If the recycler does not manage them as he would manage valuable feedstock, it may indicate that the "recycling" practice actually involves disposal of the secondary material.

Therefore, the secondary material to be recycled should be managed prior to recycling in essentially the same way as raw materials are managed in the course of normal manufacturing. EPA expects all parties involved in handling secondary materials destined for recycling to handle them as carefully as "analogous" raw materials would be handled. Such parties include generators, transporters, and recyclers, as well as any other parties that manage the secondary materials prior to recycling. To illustrate, hazardous metal-bearing secondary materials can often be used as substitutes for "raw" metal ore concentrates in making metal products. Assuming both types of materials have similar physical properties, the Agency would expect the secondary materials and the metal ore concentrates to be managed in the same or similar units. If, however, in this example the secondary materials were managed in outdoor piles, while the ore concentrate materials were managed in containers, an overseeing agency might well determine that the practice of storing the secondary materials in outdoor piles indicates sham recycling.