

This approach would likely require recyclers in many cases to perform a life-cycle risk assessment, examining potential exposure scenarios from use of recycled products, and estimating the risks associated with such exposures. In many cases, such analyses could be relatively straightforward "screening" analyses, though in other cases more elaborate analysis might be needed, particularly for consumer products.

EPA is not proposing a risk-based approach to setting limits on "toxics along for the ride," primarily due to its potential complexity. It can also be argued that the legitimacy of a recycling process relates more directly to how it compares with normal industrial production, rather than the risks that may be posed by recycled products (since products made from raw materials can also pose risks). Finally, a risk-based approach in assessing toxics along for the ride would be a radical departure from how this issue is currently considered, which is not our intent in today's proposal.

The Agency invites comment on the alternative approaches described above, and other approaches for establishing legitimate recycling with regard to hazardous constituents or characteristics in recycled products.

IV. Request for Comment on a Broader Exclusion for Legitimate Recycling

While the scope of today's lead proposal is limited to materials that are generated and reclaimed within the same industry, discussions with various stakeholders during the development of this proposal identified an alternative regulatory option that could further encourage recycling and reuse while maintaining protection of human health and the environment. EPA is considering this regulatory option, and may adopt it in the final rule; we therefore solicit comment on the option, as described below.

This option, as identified by stakeholders, would provide a broader regulatory conditional exclusion from RCRA regulation for essentially all materials that are legitimately recycled by reclamation, whether the recycling is done within the generating industry, or between industries. Although RCRA provides the authority to regulate many of those materials recycled between industries, such a broader regulatory exclusion, properly crafted, could encourage additional recycling and reuse while protecting human health and the environment. It is not envisioned that such a broader regulatory exclusion would alter the current status of the three types of recycling practices that are specifically

outside the scope of today's proposal (*i.e.*, burning for energy recovery, as defined at 40 CFR 261.2(c)(2); use constituting disposal, as defined at 40 CFR 261.2(c)(1); or recycling of inherently waste-like materials, as defined at 40 CFR 261.2(d)).

By removing most regulatory controls from all legitimate reclamation, this broader option could encourage additional recycling of hazardous secondary materials above and beyond that expected as a result of the intra-industry option proposed today. This broader regulatory exclusion could thus potentially result in less disposal of valuable materials, less use of virgin materials, and better resource conservation. In addition, it could result in lower costs associated with RCRA permits, manifesting, and other requirements. Such an approach might be of particular benefit for an industry that is composed primarily of small business entities. For onsite recycling to be economically feasible, large quantities of secondary materials may be required. Small businesses generally do not generate such large quantities. Therefore, smaller businesses may often not be able to recycle materials themselves, and may rely primarily on third party recyclers that are considered part of the waste management industry. These specialized recycling businesses may have particular expertise with reclaiming materials and finding markets for them. A broader exclusion would tend to encourage these types of inter-industry recycling transactions. Stakeholders suggesting this approach also believe that legitimate recycling activities do not pose risks of hazardous material releases or human exposures to such releases, and hence such an exclusion could achieve the benefits of increased recycling and at the same time protect human health and the environment.

A broader regulatory exclusion of this kind would apply only to hazardous secondary materials that are legitimately recycled by reclamation. With regard to defining legitimate recycling, today's proposal specifies four legitimacy criteria that would be evaluated on a case-by-case basis in judging whether a particular recycling practice is legitimate. As discussed in detail in section III.B., there may be some situations in which a recycling activity that does not conform to one or more of the criteria could be considered legitimate. The proposed criteria, and the manner in which they would be used, are modeled on EPA's current guidance for legitimate recycling.

Today's proposed legitimacy criteria could be adopted as part of a broader

regulatory exclusion for legitimate recycling. Alternatively, the same legitimacy principles could be expressed as explicit regulatory requirements that would each have to be met, rather than as criteria to be considered, as discussed in section III.B. Expressing legitimacy principles as regulatory requirements could result in more transparent and predictable legitimacy determinations, which could be an advantage in implementing a broader regulatory exclusion that would apply to a wider, more diverse set of industries and recycling practices. However, such an approach would be a departure from the current system for evaluating legitimacy, and could be considered more stringent than the legitimacy criteria proposed today. We anticipate that, whichever approach to defining legitimacy is adopted in the final rule (*i.e.*, the approach proposed today, or expressing legitimacy principles as regulatory requirements), the new legitimacy provisions would apply universally to all recycling, rather than only to materials affected by the new exclusion. We solicit comment on this issue.

If a broader regulatory exclusion were to be adopted, we envision that certain key requirements in today's proposal would be maintained. For example, persons claiming the exclusion would be required to submit a one-time notification to the appropriate State or EPA Region, as proposed today in 40 CFR 261.2(g)(4). Persons handling these materials would also be required to comply with the existing requirements for speculative accumulation (see 40 CFR 261.1(c)(8) and 261.2(c)(4)). We generally impose these limits when we issue conditional exclusions from the definition of solid waste, to help ensure that secondary materials are actually recycled.

In addition, to ensure protection of human health and the environment, it might be appropriate to impose additional requirements or conditions beyond those included for the intra-industry option discussed in section III.A of this preamble. For example, more frequent reporting and recordkeeping requirements might be appropriate, similar to those types of conditions included in EPA's recently-promulgated rulemaking for zinc fertilizers made from hazardous secondary materials (*see* 67 FR 48393, July 24, 2002). Alternatively, recordkeeping approaches as discussed in section III.A.8. of today's rule could provide additional safeguards through monitoring and documentation. Additional safeguards on storage or handling (*e.g.*, a ban on land placement,