

or requiring a tracking system for off-site shipments) might also be appropriate to ensure environmental protection and/or assist regulatory agencies in their oversight efforts.

Regulatory text implementing such a broader exclusion for legitimately reclaimed materials would be codified in 40 CFR 261.4(a), which lists a series of exclusions from the definition of solid waste. Specifically, a new exclusion would be added at 40 CFR 261.4(a), stating that secondary materials that are legitimately recycled by reclamation are not solid wastes, provided that certain conditions are met. The exclusion would include a notification requirement identical to that set out in 40 CFR 261.2(g)(4) of the regulatory text proposed today for the intra-industry option, except that identification of the industry would not be required. The exclusion would also include a requirement prohibiting speculative accumulation identical to that set out in 40 CFR 261.2(g)(3)(ii) of the regulatory text proposed today for the intra-industry option. If it were determined appropriate to express the legitimacy principles for this broader exclusion as regulatory requirements, the exclusion would restate the legitimacy criteria proposed today in 40 CFR 261.2(h), and would specify that each of the four criteria must be met. If it were determined appropriate to apply today's proposed legitimacy criteria to this broader option, restating the criteria would not be necessary because 40 CFR 261.2(h) as proposed would apply to all recycling (including materials subject to the broader exclusion).

The regulatory text for this broader exclusion would also include a provision specifying that materials used in a manner constituting disposal, materials burned for energy recovery, and inherently waste-like materials are not eligible for the exclusion. This provision would be identical to that set out in 40 CFR 261.2(g)(1)(i)–(3) of the regulatory text proposed today. Finally, the text for the broader exclusion would (if deemed necessary) include a provision specifying any additional reporting and any recordkeeping requirements applied to the exclusion, and any other conditions determined appropriate to protect human health and the environment.

EPA seeks comment on the potential advantages and disadvantages of the broader regulatory exclusion for reclaimed materials described above. Specifically, we request comment on the increased recycling and reuse that would result from broadening the rule in this way, as well as comment on the potential effects to human health and

the environment. We also request comment on whether the legitimacy criteria proposed today would be sufficient to ensure that only real recycling and reuse would be exempted under such a provision, and on whether the proposed criteria should be reformulated into more prescriptive regulatory requirements. We are further interested in whether a case-by-case variance mechanism (*i.e.*, analogous to the existing provision for variances from classification as a solid waste—*see* 40 CFR 260.30) would be a more appropriate means of providing the type of regulatory relief for reclaimed materials that would flow from a broader exclusion based on legitimate recycling. Finally, we request comment on any additional requirements, restrictions or conditions that should be added to such a broader exclusion. The Agency will carefully consider all comments received on this regulatory option in determining the appropriate scope of the final rule.

#### **V. Effect of Today's Proposal on Other Programs**

##### *A. Exports and Imports*

The 40 CFR 261.2(g) exclusion in today's proposed rule for materials that are recycled "intra-industry" does not place any geographic restrictions on movements of such materials, provided they remain within the generating industry. It is therefore possible that in some cases excluded materials could be generated in the United States and subsequently exported for reclamation to a facility in a foreign country that is in the same industry that generated the material. Under today's proposal, the exclusion would be effective while the excluded material is within the United States. However, such excluded materials may be subject to regulation as hazardous wastes in the receiving country, even if they are excluded from the definition of solid waste domestically (*i.e.*, under RCRA). If this is the case, the U.S. exporter of the excluded material will need to comply with any applicable requirements of the importing country.

It is also important to note that there is an international agreement regarding imports and exports of hazardous wastes and other wastes that can affect international waste shipments. As of November 2002, 152 countries are Parties to the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal ("Basel Convention"). The Basel Convention prohibits transboundary movements of Basel-controlled hazardous and other wastes

between Parties and non-Parties, unless a Party and a non-Party have concluded a separate agreement pursuant to Article 11 of the Basel Convention. The United States signed the Basel Convention in 1990, but has not ratified it and therefore is not a party to the Convention. The United States is a party to two bilateral agreements and one multilateral agreement governing exports of RCRA-defined hazardous wastes. The 1986 "Agreement Between the Government of United States of America and the Government of Canada Concerning the Transboundary Movement of Hazardous Waste," and the 1986 "Agreement of Cooperation Between the United Mexican States and the United States of America Regarding the Transboundary Movement of Hazardous Waste and Hazardous Substances" are valid Basel Convention Article 11 bilateral agreements, and the 2001 "Decision C(2001)107 Concerning the Revision of Decision C(92)39 on the Control of Transboundary Movements of Wastes Destined for Recovery Operations" of the Organization for Economic Cooperation and Development (OECD) is a valid Basel Convention Article 11 multilateral agreement among the 30 OECD member countries.

The U.S. government over the last decade has considered ratification of the Basel Convention at various times. In order to ratify the Convention, legislation must be enacted that would amend RCRA to provide new authorities necessary to implement the terms of the Convention fully. The Basel Convention defines "hazardous waste" more broadly than RCRA does, subjecting a larger universe of materials to its jurisdiction. EPA is currently studying options for implementing the Basel Convention, including ways of defining "waste" for import and export purposes. Under various approaches, certain materials that are excluded from the RCRA definition of solid wastes domestically would be regulated for purposes of the Basel Convention when they are exported. Basel Convention protocols would not affect the domestic classification of excluded materials while such materials are physically located within the legal jurisdiction of the United States.

If the U.S. ratifies the Basel Convention, Basel-covered hazardous and other wastes, potentially including certain domestically excluded materials that are exported, would be subject to notice and consent procedures. Furthermore, if such wastes and excluded materials were to be exported to countries with which we do not have Article 11 agreements, EPA would have