

EPA DEFINITION OF SOLID WASTE RULE (October 2008)

Under RCRA regulations, some materials are excluded from the definition of "solid waste" (and therefore "hazardous waste") based on their handling and end use. The new rule is intended to encourage the reclamation of valuable materials by permitting facilities to recycle products and invoke exclusions from the "waste" definitions of RCRA. The exclusions will permit a site that conducts or transfers materials for legitimate reclamation to avoid generator of hazardous waste status, and thereby reduce its RCRA liability. The rule does not impact the validity or conditions of existing exclusions. It will not be effective in an authorized state until adopted by the state.

The rule creates 2 new exclusions for hazardous secondary materials that are:

- Legitimately Reclaimed under the Control of the Generator in Non-Land-Based-Units (e.g., tanks, containers, containment buildings)
(Entities operating multiple facilities could use this exclusion to reclaim a material at a different facility from where it was generated.)
- Transferred for the Purpose of Legitimate Reclamation
(Refiners could use this exclusion in addition to the exclusion that permits them to transfer oil-bearing hazardous secondary materials from refinery to refinery.)

The rule codifies the RCRA concept of "legitimate recycling."

The Rule codifies regulatory factors for determining when recycling is legitimate, and therefore when the exclusions apply. These factors have developed over time through case law and this rule incorporates them into RCRA for more consistent application.

The rule establishes a process for case-by-case EPA hazardous waste determinations.

The rule will streamline requests for case-by-case determination of whether a hazardous secondary material qualifies for a non-waste exclusion by not being discarded. (Refiners could use this process to make an advance determination. This should help a facility avoid risk that its own interpretation may conflict with EPA's later interpretation. The process appears to provide a more streamlined fact-based review than is now typical for RCRA determinations.)

The rule does not go as far as some would have liked, on two key issues:

- **Energy recovery.** The rule does not change the definition of recycling as it relates to materials used for energy recovery, to produce a fuel or otherwise contained in fuels.
- **Recordkeeping requirements.** Generators, reclaimers and intermediate facilities invoking the exclusions must maintain documentation of when the shipment occurred, who the transporter was, and other relevant information. Generators will also have to make reasonable efforts to determine that legitimate recycling will occur at the receiving facility. More burdensome is an additional requirement that the facility submit a notification prior to operating under this exclusion and by March 1 of each even numbered year to the EPA Regional Administrator. This notification requirement is not a condition of the exclusion. Thus, failure to comply with the requirement constitutes a violation of RCRA, but does not affect the excluded status of the hazardous secondary materials.

Rule: <http://www.epa.gov/epawaste/hazard/dsw/rulemaking.htm>

More information: <http://www.epa.gov/epawaste/hazard/dsw/index.htm>