Ohio | Environmental Protection Agency

John R. Kasich, Governor
Mary Taylor, Lt. Governor
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TO: Internet Address: rcra-docket@U.S. EPA.gov

RE: RCRA Docket #: EPA-HQ-RCRA-2010-0742

Definition of Solid Waste

DATE: October 19, 2011

RCRA DOCKET:

Please find enclosed the Ohio Environmental Protection Agency's comments on U.S. EPA's proposal to modify the hazardous waste rules to exclude certain hazardous secondary materials from the definition of solid waste when they are legitimately recycled. This proposal was issued July 22, 2011, in the *Federal Register* (Vol. 76, No. 141, pg. 44094).

Ohio EPA requests that these comments be made an official part of the record. If you have any questions or need additional clarification regarding the enclosed comments, please do not hesitate to contact Karen Hale, Division of Materials and Waste Management, at (614) 644-2621 or karen.hale@epa.state.oh.us

Sincerely,

Pamela S. Allen

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Chief
Division of Materials and Waste Management

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1. Current 2008 Definition of Solid Waste (DSW) Rule

Ohio EPA strongly supports retaining the 2008 DSW rule and exclusions. The current 2008 DSW rule is an encouraging and important step in promoting a change in the current governmental and public thinking of what constitutes waste management verses materials management. It recognizes the commodity-like value contained in the hazardous secondary materials (HSM) that generators have either become accustomed, or forced by regulation, to dispose. The 2008 DSW rule recognizes recycling of HSM as a value-added materials recovery industry.

Ohio EPA anticipated adopting the 2008 DSW rule when it was finalized. However, because of the lawsuits and the uncertain future of the rule, we did not. Our primary concerns were: 1.) Expending significant resources to adopt the rules only to have the rules change in the near future and 2.) Having a universe of facilities subject to hazardous waste permitting that was unprepared or unwilling to obtain a permit if the rule changed. Ohio EPA decided not to adopt changes to the hazardous waste recycling rules until the petition and lawsuits were settled and the future of the rules appeared stable.

2. Elimination of the Transferred-based Reclamation Exclusion

Ohio EPA does not support the elimination of the transferred-based reclamation exclusion. EPA contends that the transfer of HSM is an indicator of discard; Ohio does not agree with this conclusion.

The transfer of a material is not an indicator of discard. Actually, commerce is dependent on the transfer of materials in order to increase and gain their value. For example: crude oil must be transferred to a specific processor in order to gain the fuel value. Then that processor must transfer the material to a distributor who in turn transfers the material to a gasoline station where the material is transferred to the vehicle. There are thousands of such examples in commerce that demonstrate a material must be transferred in order increase a material's value. All industries would fail unless their materials were transferred to another person for further specialized processing or use. With each transfer, the material increases in value; this also occurs with the legitimate recycling of hazardous waste.

Whether discard occurs is solely dependent on whether the HSM is legitimately recycled. When determining legitimacy, one must consider the ultimate disposition of the material and the handling/processing of the material by the receiving facility. The 2008 codified legitimacy criteria include these considerations and should be the primary basis for distinguishing materials management from waste management.

EPA received comments from environmental activists stating that the lack of specific HSM management standards and regulatory oversight was potentially harmful to the environment. Therefore, as a compromise, Ohio EPA would support retaining the current 2008 DSW rules and exclusions and adding a condition that requires HSM generators and recyclers to follow the hazardous waste tank and container storage requirements for large quantity generators. We disagree with commenters that recycling facilities will not receive regulatory oversight. HSM would still be subject to codified conditions that overseeing regulatory agencies are charged with implementing and EPA could include inspection goals for these facilities in state work plans.

3. Legitimate Recycling

In general, we agree with the four criteria that makeup the legitimacy criteria. Ohio EPA supports the addition of a petition process if the generator does not appear to meet one of the criteria but the recycling is still legitimate. The petition process will be especially useful in addressing legitimate recycling scenarios where toxics may be present or elevated in the end product, but pose no increased threat to human health or the environment. Ohio EPA is aware that legitimate recycling can occur even though the end product may contain 'toxics-along-for-the-ride.'

We suggest a fifth criterion be added to the legitimacy criteria. The criterion is that recyclers demonstrate that they have appropriate sized equipment and throughput capacity for the amount of HSM destined for recycling. Such a requirement helps guard against speculative accumulation.

4. HSM Reclaimed Under the Control of the Generator

Ohio EPA supports retaining this exclusion. EPA proposes five changes to this exclusion; they are presented below followed by our comments.

(a) Add a regulatory definition of "contained" to the 2008 DSW generator-controlled recycling exclusion.

Ohio EPA supports that a definition of "contained" be codified rather than explained through guidance. The definition EPA proposes is reasonable and puts forth more of a performance-based standard than a prescriptive standard which we believe is a good approach since prescriptive standards for storage can over regulate some HSM and under-regulate other HSM. The proposed definition of "contained" obligates the generator and recycler to use acceptable industry methods for the type of HSM handled.

Ohio EPA does not agree with EPA's position that HSM remaining in a unit with non-routine leaks at facilities with procedures for detection and response to such leaks or continuing releases is discarded and a solid and hazardous waste. The HSM remaining in the unit is not released to the environment and therefore is not disposed or discarded if destined for legitimate reclamation. However, Ohio EPA would consider the material released to the environment to be no longer destined for recycling and therefore, disposed and subject to enforcement action if not cleaned up in a timely and responsive manner by the facility operator.

(b) Notification as a condition of the generator-controlled recycling exclusion.

Ohio EPA does not support that notification be a condition of the generator-controlled exclusion. Under EPA's proposal, the lack of notification can subject generators who are legitimately recycling to undue severe enforcement consequences and penalties.

The purpose of notification is only to inform. It has no technical bearing on whether a generator's HSM is being legitimately recycled or discarded and should only be viewed as paperwork violation and nothing more.

(c) Require generators to document the HSM accumulation start date on drum/tank or log for purposes of documenting speculative accumulation

Ohio EPA does not believe that this is a useful requirement. Documenting when HSM is first received for recycling will do nothing to prove that speculative accumulation is or is not occurring after two years. Speculative accumulation is based on recycling, during a calendar year, a certain percentage of the total amount of HSM at the facility on January 1st of that year. The speculative accumulation rule does not contain a first-in, first-out requirement for the recycling of HSM therefore; recording the accumulation start date is meaningless after about two years.

If Ohio EPA suspected a facility was storing a certain quantity of HSM for too long, we would request the facility operator to demonstrate that the HSM was indeed recyclable according to the legitimacy criteria and 40 CFR 261.2 (f).

(d) Keep records of HSM shipments (new requirement).

This is a reasonable requirement. Ohio EPA believes that having documentation of the amount of HSM received for recycling would be helpful to the recycler in demonstrating that HSM is not being speculatively accumulated.

(e) Eliminate the 2008 DSW "toll manufacturing" recycling exclusion because no company has used it.

Ohio EPA supports retaining this exclusion. We believe that companies did not use the toll manufacturing exclusion because of the uncertainty of the future of the DSW rule due to the lawsuits and petition. Companies were likely aware that major changes to the rule (such as you have proposed) would require facilities receiving HSM generated off-site to obtain a hazardous waste permit to continue recycling HSM. Facilities wanting to use the exclusion might have been unable or unwilling to obtain a hazardous waste permit if the rules were changed.

5. Implement Alternative RCRA Subtitle C Regulation for Offsite Transfer Recycling (261.6 & 266.30)

Ohio EPA strongly supports retaining the 2008 DSW rule and exclusions. The current 2008 DSW rule is an encouraging and important step in promoting a change in the current governmental and public thinking of what constitutes waste management verses materials management. It recognizes the commodity-like value contained in the HSM that generators have either become accustomed, or forced by regulation, to dispose. The 2008 DSW rule recognizes recycling of HSM as a value-added materials recovery industry.

If EPA retains the transferred-based 2008 exclusion, this alternative is not needed. However, if U.S. EPA is compelled to eliminate the transferred-based 2008 exclusion and replace it with the proposed alternative, we offer the following comments.

The proposed alternative exclusion for offsite transfer recycling provides little incentive to encourage generators to recycle. Because, generators' HSM is still defined as a waste and a hazardous waste, the exclusion requires more paperwork and documentation on the part of the generator (especially a SQG) and generators must notify ever two years. To provide an incentive, Ohio suggests that generators be allowed to store HSM for longer than one year provided they can substantiate the need for the extended storage; the storage is protective of human health and the environment; and they do not store more than two full shipments of HSM. This approach is similar to that allowed for generators of universal waste.

Ohio EPA does not support the creation of a new "hazardous recyclable materials" manifest. Under the alternative manifest system proposed in the rule, the same requirements as a hazardous waste manifest would apply but the manifests instead would be labeled "hazardous recyclable materials" manifest. This would add confusion and additional effort to the completion and processing of shipment documentation. A better approach would be to use text or codes on the hazardous waste manifest to identify the material as HSM.

The current hazardous waste rules define hazardous wastes that are recycled as "recyclable materials," see 40 CFR 261.6(a)(1). This proposed exclusion introduces a new term "hazardous recyclable materials." Ohio EPA believes is new term is unnecessary and confusing since the defined term "recyclable materials" already exists. We suggest that EPA eliminate the new term and replace it with "recyclable materials."

Lastly, EPA needs to review the new provision at 40 CFR 266.30(c). The provision appears to allow facilities to store HSM, generated offsite, without obtaining a hazardous waste permit. In order to require a permit, it is our understanding that EPA needs to reference part 124 and 270 in the provision.

6. Add a new "*Re-Manufacturing*" DSW Exclusion:

Ohio EPA strongly supports retaining the 2008 DSW rule and exclusions. The current 2008 DSW rule is an encouraging and important step in promoting a change in the current governmental and public thinking of what constitutes waste management verses materials management. It recognizes the commodity-like value contained in the HSM that generators have either become accustomed, or forced by regulation, to dispose. The 2008 DSW rule recognizes recycling of HSM as a value-added materials recovery industry.

If EPA retains the transferred-based 2008 exclusion, this alternative is not necessary. However, if U.S. EPA eliminates the transferred-based 2008 exclusion, Ohio EPA supports the proposed exclusion with no additional management or recordkeeping requirements.

However, we are concerned with EPA developing another unique regulatory term that has a meaning outside the common meaning of the term. Such a situation adds to the complexity of the recycling rules and causes inconsistent rule interpretations. Simply put, these solvents are being reclaimed so that they can be used again. The common sense of the term "remanufacturing" applies to items that have not been used and need fixed, reconditioned, rebuilt or refurbished to be operational. EPA should maintain the exclusion (if the transferred-based exclusion is not retained) but replace the term "re-manufacturing" with "reclaiming" or "recycling."

7. Revise pre-2008 DSW Recycling Exclusions and Exemptions:

EPA proposes to require generators and facilities handling hazardous waste under the 32 recycling exclusions in 40 CFR 261.4 and 261.6 to document that their recycling is legitimate, notify, biennially report, and contain their materials.

Ohio EPA supports that generators, handlers and recyclers of pre-2008 excluded hazardous waste comply with the legitimacy criteria and notify. However, we do not support the requirement to have generators and handlers of excluded wastes biennially report these activities. The requirement to "contain" a HSM is covered under the legitimacy criteria.

Ohio EPA is concerned that the requirement of biennial reporting will overwhelm our data processing resources. The best we can estimate, this requirement will impact thousands of facilities currently not subject to RCRA. It will impact all forms of scrap metal handling facilities (e.g., vehicle junk yards, scrap dealers, demolition debris handlers and steel making facilities), generators and retailers that handle used lead acid batteries (e.g., all types of industries, vehicle repair facilities, Wal-Mart, AutoZone, Meijer and Advance Auto), generators and handlers of precious metals destined for reclamation (e.g., x-ray facilities, dentists, veterinarians and jewelers) and the air conditioning and cooling repair industry for recovered refrigerants. Other types of excluded facilities include wood preservers, paper mills and the mineral processing industry but their numbers are not as large in Ohio. There are 5,500 dentists, 2,400 veterinarians and 745 scrap metal handlers in Ohio. That's nearly 9,000 new facilities impacted by this change in just three industries.

Furthermore, the proposed biennial requirement is more stringent than we currently apply to all other RCRA facilities except LQGs and TSDFs, who must file a biennial report (BR) and therefore are re-notifying as part of that. Having a biennial re-notification that coincides with the BR submittal date could be a significant strain in states where the BR person also processes the notifications. If only initial notifications were required as well as updates (randomly received), the states would find it easier to fold them into the current work flow. Ohio EPA suggests that after the initial notification of activity, re-notification should only be required when key pieces of information change, such as facility name; owner/operator; or the type of regulated activities.

To support the proposed changes to the pre-2008 exclusion, EPA claims that 118 of the 208 damages cases occurred at facilities operating under a pre-2008 exclusion. The most prevalent facilities were battery recyclers, scrap metal dealers, used oil handlers and drum reconditioners. However, EPA's recycling damage case study is incomplete and inconclusive. For many of the stated damage cases and information provided, it is impossible to conclude what material(s) caused the damage and if the material was an excluded hazardous waste. Also, it appears that many of the facilities had been operating long before the 1982 cutoff date and the damage was historic. EPA chose a cutoff date of 1982 in effort to distinguish historic damage from post RCRA damage cases. Only those cases where the facility started recycling after RCRA was adopted should be considered in the damage study.

8. Initial and Biennial Notification w/HSM Addendum by the Facilities Operating Under the Pre-2008 Exclusions and Exemptions

Requiring HSM Addendum to be completed is burdensome for the facilities under an exemption/exclusion. While they know that the material in question is excluded or exempt, they may not be in the habit of quantifying it or determining what the waste code(s) would be if it was managed as hazardous waste. Therefore the estimates they provide on the Addendum would be suspect at best, especially for the initial submittal. The analyses drawn from these estimates would probably not be good enough to base programmatic decisions upon.

If the facilities do not file an Addendum but only submit a Site ID form, then the form would have to be modified to add a section for tracking the types of exemptions or exclusions they are operating under. Considering the number of changes that would have to occur when a new field is added, it is doubtful this could be ready in time for the proposed rule's December 2012 effective date. In addition, US EPA would have to allow time for states to change their own databases and programs if they translate rather than do direct RCRAInfo entry. Based on past experience, it takes more than a year for states to make changes in their state-specific databases due to resource constraints.

If US EPA can rejuvenate the past plans for My RCRA ID, a web site where the public could apply for an ID or submit a subsequent notification, it would reduce the implementer's burden somewhat in the sense that the implementer would not have to key in the information. The software would prevent common errors such as omission of required information. However, the implementer still has to review the submittal, communicate with the facility contact about any issues found, and send the facility an acknowledgment of the processing (optional but done by many states). Note that some states may have fields in their notification form that are not tracked in RCRAInfo and therefore they could not use My RCRA ID for their regulated facilities.

9. Regulate HSM Sent Offsite for Recycling as Hazardous Waste and Use Notification in Lieu of Biennial Reporting

Any hazardous waste shipped off-site should be reported on the BR, not on the Addendum. The shipment information needs to be together in one database table for analysis purposes. Opening the door wider of not having hazardous waste on the BR (as has happened with generation data for Subpart K facilities) is not a good idea. The level of detail and the analysis possibilities in the BR is greater than the Addendum.

However, Ohio EPA does not know how many of these facilities would not be a LQG or TSD and would therefore not file a BR. Most of the HSM notifiers so far are LQGs but not all. We do not know if this rule change would alter the status of CESQGs and SQGs to LQGs.

Also in this case, the state can choose whether to adopt this provision or stay with Subtitle C if they haven't already adopted 2008 DSW. It would be confusing to have a patchwork of some states requiring it to be reported on the BR and others on the Addendum. If it is a hazardous waste it should be reported the BR and be nationally consistent.

11. Revise the Solid Waste Variance for Partially Reclaimed Material

EPA proposes to modify the wording of five of the six variance criteria for partially reclaimed material to make it clear at what point in the recycling process the variance was intended to apply and what type of material was intended to qualify for commodity-like designation. Ohio EPA does not support any of the changes to the variance criteria that EPA proposes. No background documents, studies or other supporting information was included in the docket to support changing the criteria for this variance. The current variance for partially reclaimed HSM is a valuable tool to help change the perception that HSM is worthless, and to promote the recovery of nonrenewable resources.

We believe EPA is being arbitrary, unreasonable and unsupported in their approach of defining the characteristics of a commodity-like material. Furthermore, EPA makes implications in the preamble that states are inconsistent in their application of the variance and that the granted variances are not protective. However, no information was provided in the docket to support these implications.

EPA claims that the states are not applying the variance criteria in the manner that EPA intended. EPA provides no documentation in the docket, for public review, to substantiate how EPA "intended" the variance criteria to be applied when it was adopted in 1985. The only accessible information about the variance criteria written at that time is less than two columns of text in the January 4, 1985 *Federal Register*. The 1985 *Federal Register* presentation of the criteria provides "possible examples" of commodity-like materials but these examples do not rise to level of being the exclusive definition of commodity-like material. Stakeholders are only provided a narrative created in 2011 that is supposed to explain and substantiate what EPA intended in 1985. It is an unreasonable approach to supporting your proposal by using newly developed information to explain past actions. EPA needs to provide for public review historic information used to support the development of the 1985 variance criteria.

EPA argues that dewatered F006 metal-bearing sludges are not commodity-like because they are not smelter ready. However, EPA contradicts this argument in their response to comments when the World Resources Variance was issued in 2003. Furthermore, EPA has stated that dewatered F006 sludges can be eligible for a partial reclamation variance when destined for reclamation. See the following EPA letters at RCRA Online – PPC 9441.1996(05) and 9441.1995(24).

Ohio EPA believes that dewatered sludges are eligible for a variance if their metal content is similar or exceeds those of mined ore reserves. Simply put, if a certain metal content of ore is viewed by commerce to be a commodity and valuable enough to extract from the earth then wastes with similar metal content are commodity-like and reclamation of the metals should be promoted. EPA argues that sludges are not commodity-like because they are not smelter ready. However, ore reserves aren't smelter ready either but they are a commodity. Ore reserves must be processed using some of the same methods used to process metal-bearing wastes. EPA provides no documentation or study in the docket for public review as to why metal-bearing HSM are not commodity-like.

EPA also argues that F006 sludges have not been substantially processed by the dewatering process to render them commodity-like. Ohio EPA disagrees. Plating facilities invest significant capital and energy costs to convert the initial treated F006 sludge which is a liquid with suspended solids to a solid with a water content of forty to sixty percent. The Ohio facility that further reclaims the sludge uses a common mineral processing method of calcination to drive off excess water and water of hydration converting the metal hydroxides to metal oxides. Each process increases the value of the material.

EPA implies that the variances granted by the States are not protective of human health and the environment. But again, EPA provides no supporting documentation for this conclusion. Variances issued by Ohio EPA are protective of human health and the environment. We include material management standards, operational and emergency response procedures and facility closure standards in the variance document. The variance document is issued as a final action of the director and is enforceable under state law much like a permit.

Ohio EPA is aware that EPA has had a number of conversations and correspondences from World Resources Company over the last 10 years. World Resources Company objects to the variances for F006 that the states have issued. However, the docket contains no documents, letters or meeting notes. We believe EPA should be transparent and provide for public review the WRC documents and meeting notes regarding the partial reclamation variances issued by the states.