

**Proposed Definition of Solid Waste Rule (DSW)**  
**Proposed Rule**  
**76 FR 44094**  
**June 30, 2011**

**What is this *Federal Register* about?**

This proposed rule to revise the definition of solid waste rule and hazardous waste recycling exclusions is in response to a petition and lawsuit filed by Earthjustice. In December 2008, EPA adopted new exclusions for the recycling of hazardous waste and codified criteria that define legitimate recycling. Earthjustice representing Sierra Club petitioned EPA to reconsider and repeal the DSW rule in January 2009 and then filed a lawsuit in February 2009. In September 2010, EPA and Sierra Club negotiated an agreement where EPA would propose a new rule by June 30, 2011 and publish a final rule by December 2012 that addressed their concerns.

EPA proposes to change or remove certain provisions contained in the 2008 DSW rule, revise existing variance criteria and add new exclusions for hazardous secondary material (HSM) that is reclaimed.

**Overview of Current Definition of Solid Waste rules (i.e., 2008 DSW rule):**

In 2008, U.S. EPA finalized revisions to the definition of solid waste, 40 CFR part 261.2 and the exclusions, 40 CFR part 261.4, that exclude HSMs from regulation if they are reclaimed under the following relationships:

- A. Under the control of the generator; there are three subcategories under this exclusion:
  - Generator on-site reclamation,
  - Intra-company reclamation, and
  - Reclamation under a tolling contract between contractor and chemical manufacturer; or
- B. By another person (i.e., third party or off-site recycler) when certain conditions are met; no hazardous waste permit is required.

Also, a generator or reclaimer has the option to obtain a non-waste determination from the overseeing agency to reclaim HSM; the procedure is similar to obtaining a variance from classification as a waste under OAC rule 3745-50-23. Hazardous secondary material means a secondary material (e.g., spent material, by-product, scrap metal or sludge) that when discarded, would be identified as hazardous waste under 40 CFR part 261.

In addition, U.S. EPA codified two factors to define legitimate recycling of HSM and two legitimacy factors that must be “considered” by the recycler. The two required factors are 1.) The HSM must provide a useful contribution to the process or product and 2.) The product must be valuable. The two factors that need to be considered by the reclaimer are 1.) The management of HSM as a valuable material and 2.) The presence of toxic constituents contained in the recycled product as compared to an analogous product made from virgin inputs.

## **Proposed Revisions to the 2008 DSW rule**

### **A. Exclusion A: Under the Control of the Generator**

EPA proposes to keep the 2008 DSW exclusion for HSM reclaimed under the control of the generator but with modifications. The proposed modifications are:

- (1) Add a regulatory definition of “contained” for storage units;
- (2) Require biennial notification and make notification a condition of the exclusion;
- (3) Require generators to mark the HSM accumulation start date on drums/tanks or keep a log; this is for the purposes of documenting speculative accumulation (new requirement);
- (4) Keep records of HSM shipments (new requirement); and
- (5) Eliminate the 2008 DSW “toll manufacturing” recycling exclusion because no company has used it.

### **B. Exclusion B: HSM generated and transferred to another person for reclamation**

Under this 2008 DSW exclusion, the reclamation is performed at an off-site facility. The parties do not need to be related or be in contract in order for the HSM to be excluded from being a waste and a hazardous waste. The receiving reclamation or intermediate facility does not need a HW permit. However, specified conditions must be met by the generator, intermediate facility and recycler. Requirements applicable to the reclaimer are:

1. HSM must be legitimately recycled;
2. No speculative accumulation of HSM;
3. Notification & biennial reporting;
4. HSM must be managed in a protective manner and contained; and
5. Reclaimer must have financial assurance;

### **Proposed changes to Exclusion B:**

EPA proposes to remove this exclusion altogether. All off-site third party reclaimers and intermediate storage facilities will need to obtain a hazardous waste storage permit to accept HSM for reclamation unless the HSM is not stored at the facility prior to reclamation. EPA’s rationale for removing the transferred based exclusion is that, absent specific conditions, the transfer of HSM to a third-party recycler is indicative of discard and therefore should be regulated.

### **C. Proposed Revisions to the 2008 DSW Definition of “Legitimate”**

In the 2008 DSW rule, EPA codified two mandatory factors to define legitimate recycling of hazardous secondary materials and two factors that must be “considered” by the recycler. EPA proposes to make all four legitimacy factors mandatory and include a petition process for cases where one factor is not met but the recycling is still legitimate. EPA also, proposes that the recycler maintain documentation of how the recycling activity meets the legitimacy criteria.

## **Proposed NEW Provisions to the Hazardous Waste Recycling Rules**

EPA proposes four new provisions to the DSW rule. They are:

1. Alternative RCRA Subtitle C Regulation for Offsite Transfer Recycling
2. Revise the 1985 Partial Recycling Variance
3. Add a new “Re-Manufacturing” DSW Exclusion
4. Revise pre-2008 DSW Recycling Exclusions & Exemptions

### **1. Implement Alternative RCRA Subtitle C Regulation for Offsite Transfer Recycling:**

Since, EPA proposes to remove the exclusion for off-site third party reclamation, they propose to implement an alternative regulation for HSMs that are transferred offsite for reclamation. This option only applies to generators and is an effort to give generators some type of carrot for recycling. The receiving reclamation facility would need to have a HW storage permit. The waste is still defined as a solid and a hazardous waste but the generator could store the hazardous waste for up to a year if they developed a reclamation plan and made prior arrangements with a recycler. .

### **2. Revise the 1985 Partial Recycling Variance under 260.31(c):**

EPA proposes to change the variance criteria for materials that are reclaimed but need to be reclaimed further before the material is completely recovered. The basis of the variance is that the reclaimed material is commodity-like and should not be defined as a waste even though it is not completely recovered.

EPA proposes to significantly change the criteria to make it clear at what point in the recycling process they intended the variance to apply and what type of material qualifies for commodity-like designation. Also, EPA plans to remove the current variance criteria of “Other relevant factors.”

### **3. Add a new “Re-Manufacturing” DSW Exclusion:**

EPA proposes to add a new DSW recycling exclusion involving inter-company transfer for off-site reclamation of solvents via “re-manufacturing” (i.e., transfer from one manufacturer to another) for the purpose of extending the useful life of the spent solvent, by keeping the solvent in commerce to reproduce a commercial grade of the original solvent for continued use as a “processing aid” to manufacturing. The exclusion is applicable to only companies in the chemical manufacturing industry and the exclusion only applies to 18 solvents if they are used as a manufacturing “processing aid.”

### **4. Revise pre-2008 DSW Recycling Exclusions & Exemptions:**

EPA proposes to require generators and facilities handling hazardous waste under 32 recycling exclusions in OAC rules 3745-51-04 and 06 to document that their recycling is legitimate. They also want input as to whether these facilities should notify, biennially report and be required to contain their materials. This proposal has the possibility of affecting a significant number of different types of facilities including: demolition companies, scrap metal dealers, dentists, veterinarians, heating and cooling repair companies, jewelers, generators and handlers of lead acid batteries and steelmaking facilities.

## **Links**

*Federal Register:* [July 22, 2011](#)

U.S. EPA’s rule summary [webpage](#)