



DSW Final Rule

Introduction to the Definition of Solid Waste Final Rule

Office of Solid Waste, EPA

October 24, 2008



DSW Final Rule

Today's Objective:

To give an overview of the new Definition of Solid Waste (DSW) rule.

- Signed by EPA Administrator October 7th, 2008.
- Publication in the Federal Register expected October 30th.



DSW Final Rule

Today's Agenda:

1. Why did EPA develop the DSW rule?
2. What is the (brief!) history of this rule?
3. What materials are eligible for the final rule?
4. What exactly is in the DSW final rule?
5. How does the final rule compare to the 2007 proposal?
6. When can I start using the rule?



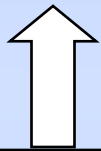
(1) Why did EPA develop the DSW rule?

- To encourage resource conservation by streamlining regulation of hazardous secondary materials that are reclaimed.
- Streamlining the regulations, while maintaining critical controls, will make recycling these materials not only safe, but also easier and more cost-efficient.



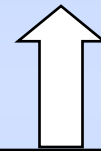
(2) *What is the (brief!) history of this rule?*

Several court decisions regarding when a material is a “waste”



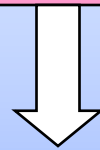
Last 20 years

EPA conducts studies on hazardous waste recycling

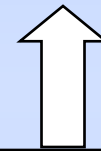


2003

EPA proposes to exclude materials “reclaimed in a continuous process within the same generating industry”

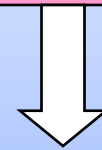


EPA publishes final rule!



2007

EPA proposes to exclude materials based on the concept of “discard”



2008



(2) What is the (brief!) history of this rule?

What studies did EPA conduct to support the rule?

- Good Current Practices for Recycling Hazardous Secondary Materials (HSM)
- Environmental Problems Associated with Recycling HSM
- Potential Effects of Market Forces on Recycling HSM



(2) What is the (brief!) history of this rule?

What did commenters say on the 2007 proposal?

States	-Generally supportive, but wanted additional conditions.
Industry	-Generally positive, liked 2007 proposal much better than 2003. -Some argued against EPA's authority to impose any conditions.
Waste Management	-Commenters were split; some opposed proposal, some supported, but with additional conditions.
Environmental Groups	-Opposed 2007 proposal.



(3) What materials are eligible for the final rule?

Hazardous secondary materials sent for reclamation are eligible for this rule.

Materials that are NOT eligible include:

- *Materials recycled by 'use constituting disposal' and burning for energy recovery*
- *Inherently waste-like materials*
- *Materials already excluded from the definition of solid waste under 40 CFR 261.4(a)*
- *Spent lead-acid batteries*
- *Spent petroleum catalysts (K171 and K172)*



(4) *What exactly is in the DSW final rule?*

Four major components of final rule:

1. ***Under the Control of the Generator Exclusion***

Self-implementing exclusion for materials generated and recycled under the control of the generator.

2. ***Transfer-based Exclusion***

Self-implementing exclusion for materials generated and transferred to another company for recycling.

3. ***Non-waste determination procedure***

Materials that are non-wastes (determined through a petition process)

4. ***“Legitimate” recycling provision***



(4) What exactly is in the DSW final rule?

1. “Under the Control of the Generator” Exclusion:

- ***Includes hazardous secondary materials that are generated and reclaimed...***
 - at the same facility
 - by the same company (even at different facilities)
 - under certain toll manufacturing arrangements
- ***Under this exclusion, generators must:***
 - Legitimately recycle materials
 - Not speculatively accumulate materials
 - Submit notifications (using the Site ID form)
 - Ensure materials are “contained”
 - Reclaim materials within the United States



(4) What exactly is in the DSW final rule?

2. “Transfer-Based” Exclusion:

- ***Includes hazardous secondary materials that are generated and transferred to another person for reclamation.***
- ***Under this exclusion, generators must:***
 - Legitimately recycle materials
 - Not speculatively accumulate materials
 - Submit notifications (using the Site ID form)
 - Ensure materials are “contained”
 - Make “reasonable efforts” to evaluate the reclaimer and intermediate facility to determine that they will safely and legitimately recycle
 - Maintain records of off-site shipments and confirmations of receipt
 - Provide notice and obtain consent for exports



(4) *What exactly is in the DSW final rule?*

2. ***“Transfer-Based” Exclusion (cont.):***

- ***Under this exclusion, reclaimers and intermediate facilities must:***
 - Legitimately recycle materials
 - Not speculatively accumulate materials
 - Submit notifications (using the Site ID form)
 - Ensure materials are “contained” and managed in a manner at least as protective as analogous raw materials
 - Manage recycling residuals safely
 - Maintain records of shipments and send confirmations of receipt to generator
 - Have financial assurance



(4) *What exactly is in the DSW final rule?*

2. ***“Transfer-Based Exclusion” -- What is reasonable efforts?***

- Reasonable efforts requires generators to evaluate a reclaimer or intermediate facility to ensure that they intend to properly manage and legitimately recycle the material prior to shipping it to the facility.
- Generators must make reasonable efforts and document the evaluation every three years at a minimum. Documentation includes a certification statement.
- The minimum standard for reasonable efforts consists of five questions.
- Reasonable efforts is not required if a generator chooses to send his materials to a facility that will manage the material under a RCRA Part B permit or interim status standards.



(4) What exactly is in the DSW final rule?

2. “Transfer-Based Exclusion” -- What is reasonable efforts?

Five questions must be affirmatively answered by the generator:

1. Is the reclamation process legitimate?
2. Has the facility notified authorities and indicated that it has financial assurance?
3. Does publicly available information indicate that there are no formal enforcement actions taken against the facility in the previous three years and that the facility is not a “significant non-complier” with RCRA Subtitle C? If “no,” does the generator have “credible evidence” the material will be properly managed?
4. Does the facility have the equipment and trained personnel to safely recycle the material?
5. Does the facility have the required permits to manage residuals, have a contract to dispose of them at a permitted facility, or does the generator have “credible evidence” residuals will be safely managed?



(4) What exactly is in the DSW final rule?

3. Non-Waste Determination Procedure:

- ***Includes hazardous secondary materials that are...***
 - reclaimed in a continuous industrial process; or
 - indistinguishable in all relevant aspects from a product or intermediate
- ***Materials recycled by 'use constituting disposal' and burning for energy recovery are not eligible for a non-waste determination.***
- ***To obtain a non-waste determination, facilities must:***
 - Legitimately recycle materials
 - Demonstrate that the hazardous secondary material meets eligibility criteria
 - Submit application to EPA or authorized state



(4) What exactly is in the DSW final rule?

4. Legitimate Recycling Provision:

- Is a condition of the new DSW exclusions and non-waste determinations.
- Is equivalent to the existing policy for legitimate recycling.



(4) What exactly is in the DSW final rule?

4. Legitimate Recycling Provision (cont.):

- ***Two mandatory factors***
 - Materials must provide useful contribution to product or recycling process
 - Recycling must produce valuable product
- ***Two factors must be considered***
 - Materials must be managed as valuable commodities
 - Products of recycling must not contain significantly higher levels of hazardous constituents than are in analogous products



(5) How does the final rule compare to the 2007 proposal?

Topic	2007 Proposed Rule	2008 Final Rule
Notification	One-time notification	<ul style="list-style-type: none">-Biennial notification-Additional information required-Uses Site ID form
Recordkeeping	Maintain records of off-site shipments	<ul style="list-style-type: none">-Maintain records of off-site shipments-Confirmations of receipt-Annual reports for exports
Reasonable Efforts	General standard	<ul style="list-style-type: none">-Questions included in regulatory text-Documentation & certification required



(5) How does the final rule compare to the 2007 proposal?

Topic	2007 Proposed Rule	2008 Final Rule
Intermediate Facilities	Prohibited use of intermediate facilities.	Allows use of intermediate facilities, provided certain conditions are met.
Financial Assurance	Required compliance with 40 CFR 264 Subpart H.	Requires compliance with new 40 CFR 261 Subpart H, which modifies financial assurance for hazardous secondary materials.
Non-waste Determinations	Proposed (3) types of non-waste determinations.	<ul style="list-style-type: none"> -Finalizes (2) types of non-waste determinations. -Requires facilities to re-apply in the event of a change.
Legitimacy	Codified legitimacy criteria apply to all hazardous waste recycling.	Codified legitimacy provision applies to new DSW exclusions and non-waste determinations and is substantively the same as existing policy. Existing policy continues to apply to other recycling.



(6) When can I start using the rule?

- In **unauthorized** states the federal rule will be effective ~ December 29th (60 days after publication).
- In authorized states the rule does not go into effect unless and until the state adopts the rule into its own state regulations.
- To obtain maximum benefit from the new rule across the country we strongly encourage authorized states to adopt the rule expeditiously.



(6) When can I start using the rule?

- We are extremely thankful for all the assistance, real-world experience, ideas, and support that we have gotten over many years from ASTSWMO, and particularly from the Hazardous Waste Recycling Task Force. We believe the final rule reflects much of the thinking that we have all done together. We hope you will find that it successfully incorporates your input and addresses any concerns you may have had.
- We look forward to working closely with you as you adopt the rule and begin to implement it. We will do our best to assist you to ensure that the process goes smoothly and results in a much better hazardous waste recycling program!



For additional information or to give feedback...

- EPA is developing outreach materials and programs to support the rulemaking – do you have any suggestions?
- Please contact:

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(703) 308-8672	(703) 308-8800
atagi.tracy@epa.gov	goode.marilyn@epa.gov
- Or visit our DSW webpage for more information:
<http://www.epa.gov/epawaste/hazard/dsw/rulemaking.htm>



Appendix

ADDITIONAL SLIDES



What are the expected impacts of the DSW rule?

- Our Regulatory Impact Analysis estimates:
 - 5,600 facilities and 1.5 million tons of hazardous waste will be affected annually, providing a cost savings of approximately \$95 million per year
 - Affected materials include 23,000 tons of new recycling.



How does the DSW rule compare to the existing Subtitle C regulations for Generators?

Subtitle C Regulation Requirements	DSW Exclusion Requirements
- Cannot accumulate waste for more than 90 days without a permit	- Must meet speculative accumulation limits
- Must meet specific storage standards for tanks and containers.	- Hazardous secondary materials must be contained.
- Must have emergency coordinator, test and maintain emergency equipment, and have emergency plan.	-----
- Must have personnel training plan.	-----
- Waste must be packaged according to DOT regulations prior to transport.	- Hazardous secondary materials must be packaged according to DOT regulations prior to transport.
- Manifest required	-----
- Recordkeeping <ul style="list-style-type: none"> o Biennial Reporting o Exception Reporting o Three-year record retention 	- Recordkeeping: <ul style="list-style-type: none"> o Notifications o Records of off-site shipments & confirmations of receipt o Three-year record retention
-----	- Reasonable Efforts
- Exports <ul style="list-style-type: none"> o Notice & consent o Annual reports o Manifesting o Exception Reports 	- Exports <ul style="list-style-type: none"> o Notice & consent o Annual reports



How does the DSW rule compare to the existing Subtitle C regulations for Reclaimers?

Subtitle C Regulation Requirements	DSW Exclusion Requirements
- Must obtain Subtitle C permit	-----
- Waste analysis plan	-----
- Security measures	-----
- Financial assurance	- Financial assurance (modified)
- Personnel training	-----
- Must have emergency coordinator, and have emergency and contingency plan.	-----
- Manifest requirements	-----
- Recordkeeping: <ul style="list-style-type: none"> o Operating record o Biennial report o Import notification 	- Recordkeeping: <ul style="list-style-type: none"> o Notifications o Records of off-site shipments & confirmations of receipt o Three-year record retention
- Specific design standards for tanks, containers, containment buildings, surface impoundments and inspection requirements.	- Hazardous secondary materials must be contained and managed in a manner at least as protective as analogous raw materials.



What is “contained”?

- Generally, material is “contained” if it is placed in a unit that controls the movement of the material out of the unit and into the environment.
- Material that is released from the unit (e.g., through a spill) is considered a solid and hazardous waste unless it is immediately recovered.
- If a release is “significant” the material remaining in the unit could also be considered a solid and hazardous waste, depending on circumstances.



What is “contained”?

- If the materials are not managed as valuable raw materials, the unit could be considered to be storing hazardous waste.
- “Significant” releases are not necessarily large in volume; small releases over time could also be considered significant under some circumstances.



What is “financial assurance”?

- Financial assurance is the mechanism by which facilities ensure they will not abandon the materials in the event they cease operations or otherwise cannot recycle the materials.
- Financial assurance required under DSW is very similar to that required for interim status facilities, with some modifications:
 - The terminology has been changed to reflect the nature of the materials (e.g., “hazardous secondary materials” instead of “hazardous waste”)
 - The regulations have been revised to allow a unit at the end of its operating life to be released from financial assurance, if all hazardous secondary materials have been removed.
 - There is no requirement for post-closure financial assurance, because post-closure is only intended to apply to waste management units designed to maintain waste in place after the unit closes (e.g., in a landfill).



What is “financial assurance”?

- The basic steps include:
 - Facility develops a cost estimate on the amount of financial assurance that is required, based on the potential cost of closing the facility and disposing of any hazardous secondary material as hazardous waste.
 - Facility obtains and submits financial assurance using the same types of financial instruments available for interim status facilities (i.e., trust funds, payment surety bonds, letters of credit, insurance, or a financial test and corporate guarantee.)
 - A facility that already has financial assurance under RCRA part 264 or 265 may work with the State to determine if its current financial assurance is equivalent to that required for the exclusion.



What is “financial assurance”?

- The basic steps include (cont.):
 - At least 180 days prior to ending operations under the exclusion, the facility submits a plan for removing the materials and decontaminating the unit to the Regional Administrator.
 - The Regional Administrator will notify a facility that financial assurance is no longer required once he receives certification from a qualified professional engineer that all materials have been removed and the units are properly decontaminated.



What is the notification?

- Facilities must send a notification prior to operating under the exclusion and by March 1 of each even numbered year thereafter to the Regional Administrator using the Site ID form (EPA Form 8700-12).
- Information submitted in the notifications enables EPA and states to:
 - (1) monitor compliance of facilities;
 - (2) compile credible information for the public;
 - (3) measure performance and impacts of the rulemaking; and,
 - (4) target future program efforts to achieve further increases in recycling.



What is the notification?

Notifications must include the following information:

- (1) Name, address and EPA ID number (if applicable);
- (2) Name and telephone number of a contact person;
- (3) NAICS code;
- (4) Type of exclusion(s) the facility is claiming;
- (5) Whether the reclaimer/intermediate facility has financial assurance;
- (6) When the facility expects to begin managing materials;
- (7) A list of hazardous secondary materials to be managed;
- (8) Whether the materials will be managed in a land-based unit;
- (9) The quantity of materials to be managed annually; and
- (10) The certification (included in EPA form 8700-12) signed by an authorized representative.