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OSWER Docket
Environmental Protection Agency
Mail Code 5305T
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

ATTN: Docket ID No. RCRA – 2002 – 0031

RE: Proposed Rule, Revisions to the Definition of Solid Waste (68 FR 61558)

Dear Sir/Madam:

The Hazardous Waste Recycling Task Force (“Task Force”) of the Association of State and Territorial Solid Waste Management Officials (herein referred to as “ASTSWMO”) has reviewed the October 28, 2003 proposed rule containing suggested revisions to the definition of solid waste at 68 FR 61558, the “ABR Rule.” The Task Force is comprised of 13 State waste program experts representing all geographic and regional areas of the country, and the comments contained herein reflect their collective technical opinions regarding major aspects of the rule proposal. The ASTSWMO Board of Directors will be submitted a separate letter to the Docket stating its support of task force comments regarding three areas discussed in the proposal of significant importance to States: notification, legitimacy criteria, and exclusion of on-site recycling. Individual States will also submit comments reflecting their own unique perspectives on the proposed components of the rule.

Section III (A)(4): What Is Meant By A "Continuous Process Within A Generating Industry"

EPA co-proposed two options to establish the regulatory framework for the exclusion and summarized possible alternative approaches. Despite lengthy discussions, no consensus was reached amongst task force members regarding how the recycling must be conducted in order to qualify for the exclusion. Some task force members support Option 2, others support Option 1 while others find neither option acceptable. Please find below our reasons for supporting the different options.

The difference between Option 1 and 2 is that Option 2 prohibits the exclusion of secondary material when it is reclaimed within the same generating industry if the reclaimer also accepts secondary material generated from companies outside his generating industry. EPA explains in the preamble discussion that Option 2 would establish a bright-line to distinguish facilities that are engaged in recycling that is eligible for the proposed exclusion, and facilities which could be considered to be engaged in commercial recycling.

Option 1: Supporters of Option 1 think that such a distinction is neither necessary nor warranted because it already exists within the hazardous waste program. Under both proposed options, facilities that store and reclaim secondary materials generated outside of their industry need a hazardous waste storage permit. Therefore, the commercial recyclers will be distinguished by their permit. Option 1 supporters believe that Option 2 does nothing to further protect the environment or prevent sham recycling. It does though make the exclusion more complex.

One member believes Option 1 is the least restrictive with regard to how secondary materials may be recycled.

Option 2: Option 2 supporters point out that a facility that recycles without storage may not need a permit, and thus would not have a "bright-line" under Option 1. Given that the NAICS is proposed to identify establishments that may benefit from the exclusion, Option 2 mitigates against commercial waste treatment facilities misclassifying themselves under the NAICS and improperly benefitting from the exclusion. Further, it is unclear from the proposal whether even a permitted facility would have to formally modify its permit to handle additional quantities of excluded hazardous secondary materials managed under the exclusion; if they're not solid waste, the States may not have jurisdiction to require changes for the resulting need for increased capacity.

Some members believe Option 2 is the better option for the reasons expressed in the preamble – specifically, concerns regarding the mixing and commingling of hazardous secondary materials either prior to or during recycling.

Same Generating Facility: Still another member strongly recommends that EPA consider limiting the recycling exclusion to materials destined for recycling within the same generating facility. To expand the exclusion to facilities within the same generating industry as proposed potentially excludes from regulation facilities like secondary lead smelters, fuel blenders, foundries reprocessing metal bearing wastes, and many others. Such facilities have a long history of environmental impact and many are currently involved in extensive cleanup under CERCLA or HSWA resulting from historical operations which the proposed rule attempts to exclude. Unchecked operation of such facilities represents a risk to human health and the environment which the current solid waste definition and subject management standards were designed to mitigate. Retention of adequate minimum technical standards for "pre-recycling management" (e.g., storage, pre-treatment) at these facilities helps to ensure that materials are handled in a manner which is protective of human health and the environment.

Intra-company: Neither of the options is particularly attractive to one member. Without record keeping and reporting, it will be difficult for inspectors to trace the movements of the materials for purposes of assuring compliance. And given the complexities of the international, interstate and intra-industry movements of these materials, the record keeping and reporting that would be required to effectively track the materials could be overly burdensome. There is support for the on-site reclamation option as described on page 61575, for the reasons EPA describes, with adequate record keeping and reporting. There is also support for a within-company option, again with adequate record keeping and reporting.

User of End-product must be in Same Industry: There is support for the establishment of limitations for the end users of recycled hazardous secondary material. There is concern regarding the concept of the sale or distribution of recycled hazardous secondary material to the general public due to the potential for the material to contain "toxins along for the ride". If these products were sold to household consumers, the waste resulting from their activities would no longer be subject to regulation. It is proposed that regulations be established to limit the sale of products derived from hazardous secondary materials to commercial consumers that are part of the "same industry".

Other Considerations: The ABR ruling was that “. . . at least some of the secondary material EPA seeks to regulate as solid waste (in the mineral processing rule) is destined for reuse as part of a continuous industrial process and thus is not abandoned or thrown away.” Attempting to address other than mineral processing wastes (the rule on this has already been changed pursuant to the court’s decision) yet limiting exclusions to only those “in the same industry” makes the proposed rule overly complicated and unnecessary at this time. If materials are properly evaluated and managed according to the legitimacy criteria, many thought to be regulated may actually be unregulated at the current time. Delisting is another current option available for consideration.

Section III (A)(6): Considerations for Defining "Same Generating Industry"

The Task Force is split on whether the NAICS system should be used to define "same generating industry." In view of the foreseeable issues surrounding the use of NAICS system, it seems reasonable to initially limit the scope of the proposed exclusion to reduce the number of implementation issues that must be addressed. Of those members that can live with the NAICS system, all believe it will be difficult to implement and most support limiting it initially to the manufacturing codes beginning with 31, 32, and 33.

Several members could support using the 3 digit NAICS codes. However, some members condition support of the 3 digit NAICS system upon the generator's notification including the name and address of the off-site recycling facilities. One member would support the 3 digit NAICS if, in addition to the generator's notification, a notification was required of recyclers receiving hazardous secondary materials for reclamation. Otherwise they support the other off-site option that receives most task force support; excluded intra-company recycling. It is noted that the NAICS codes are to be amended every five years and there is concern about the effect of the NAICS changes on the excluded status of hazardous secondary materials.

All but one of the task force members support excluding on-site recycling for both manufacturing and non-manufacturing codes as a companion to both of the off-site options listed above.

One task force member would rather EPA identify and codify each recycling process which they believe is excluded by virtue of being "continuous processing in the same generating industry". Another member only supports codifying the legitimacy criteria.

Section III (A)(6): Regulatory Option for On-site Recycling

All task force States, except one, strongly support the exclusion of hazardous secondary materials that are legitimately recycled on-site regardless of the NAICS codes applicable to the generating and recycling processes.

If the product of the recycling process continues to be used on-site either in the manufacturing process or in a process that supports facility operations (i.e., the activity is vertically integrated) it should not be considered a separate establishment and hence, a different industry (i.e., NAICS code) for the purposes of the exclusion. Such an approach matches the common meaning of "the same industry" and would significantly reduce the complexity of the proposed exclusion, promote consistent implementation of the exclusion by generators and regulatory agencies, and facilitate recycling of hazardous secondary materials. This approach would also avoid the unintended consequences of the proposal where legitimate recycling activities currently in practice at sites with multiple NAICS codes would be subject to regulation. Further, on-site recycling would avoid hazardous secondary materials being transported over public roads thus reducing the potential risk of release of hazardous materials into the environment from transportation associated accidents.

As mentioned, one State does not support an exclusion for the legitimate on-site recycling of hazardous secondary materials. This is because that State has adopted streamlined regulations for both on-site and off-site recycling facilities. The recyclers operate under a certification issued by the State following review and approval of the facility's application and operation plans. That State's regulation also contains a financial assurance requirement. The State considers on-site recycling no less damaging to the environment than off-site recycling.

Section III (A)(7): Definition of "Continuous Process"

With regards to the use of the current speculative accumulation provision to define "continuous process," a majority of the members believe that the "75% recycled in a calendar year" time period is workable. However, the time frame allowed for the accumulation of hazardous secondary materials prior to recycling needs to be limited to 180 days. In addition, the definition of continuous process should be expanded to require record keeping substantiating that the definition is being met by the generator and/or recycler.

We encourage EPA to reduce the accumulation time frame allowed for the recycling to 180 days, instead of a calendar year. The regulated community would still have the familiarity of the seventy-

five percent recycling requirement, and the ability to accumulate larger amounts of hazardous secondary material that might be necessary for recycling, but the maximum amount of hazardous secondary material on-site at any one time would be reduced. With a 180 day accumulation time frame, should the recycler lose its market, or the process change, or the economics of the process fail, or the recycler go out of business, the amount of hazardous secondary material on-site that would have to be cleaned up would be substantially less than the amount of material that could be accumulated under the proposed time frame. Further, should a recycler truly need to extend the time frame for the accumulation of hazardous secondary material, he can request a variance from speculative accumulation according to 40 CFR 260.30.

Most task force members support the use of a speculative accumulation definition to define continuous process only so long as a detailed record keeping requirement is maintained. With normal manufacturing, it is standard business practice for a company to keep records regarding its inventory of inputs, from whom the inputs were obtained, the amount of inputs used, the amount of product produced and sold, and the purchasers of the product. Such records would also be maintained by a recycler as part of its standard business practice, especially if the material is a “commodity,” as opposed to a “waste.” Therefore, we do not believe that record keeping requirements would create an unreasonable burden.

Further, without record keeping requirements, it would be difficult for the regulatory agency to determine if the speculative accumulation provision was being met and that the recycling was continuous. The required records for a generator should include the amounts of hazardous secondary material generated and recycled on-site or sent off-site for recycling. An off-site recycler should record the amounts of hazardous secondary material received, from whom it was received, and the amounts actually recycled on a daily basis. Several task force members suggested that the facility should be able to demonstrate that the material is recycled on a “first in – first out” basis.“ Should a “first in – first out” or other approach to defining continuous process be finalized, recyclable material should not be allowed to be stored for a time frame longer than mandated by the speculative accumulation requirements. This information should be maintained on-site and made available to the regulatory agency when requested.

Some members of the task force suggested that a facility taking advantage of the exclusion submit annual reports showing that the process was continuous. Most task force members felt that annual reporting was not necessary. The feeling of the majority was that the facility must keep detailed records on site in order to substantiate claims that recycling was occurring in a timely manner. All such records would be made available to the regulatory agency when requested.

One task force member suggested that a certification process be used since her State already has such a process and it works well. The recycler would certify as to their process and the regulatory agency would make a determination as to the efficacy of the certification on a case-by-case basis. This would eliminate the “continuous process” and “speculative accumulation” questions.

Some members of the task force suggested allowing the use of waste brokers as part of the continuous process, reasoning that a broker could encourage recycling by locating more and better markets for the material. A broker would be a third party, not associated with either company. The proposal already allows use of third parties to transport the hazardous secondary material and a broker would only be another third party. Most members of the task force felt that transportation of the hazardous secondary material to a recycler might be a necessity, and thus be part of a continuous process. However, the use of a broker should not be within the concept of the proposed definition of "continuous process."

Section III (A)(8): What Type of Notification Would Be Required?

There is nearly unanimous support within the task force for a notification provision in the proposed rule. The task force holds that notification is necessary to ensure that the States are aware of excluded recycling activities to ensure that the terms of the exclusion are being complied with. Absent notification, ensuring compliance with the terms of the exclusion is, at best, highly resource-intensive, and may prove to be completely infeasible. Notification is necessary to protect legitimate recyclers from being at a competitive disadvantage *vis-à-vis* entities that are not in compliance with the terms of the exclusion ("sham recyclers"). Further, notification will allow EPA and/or the States to compile credible, substantiated evidence regarding the quantities of hazardous secondary materials that are diverted from waste management to resource recovery. As one of the task force members puts it,

"Also, the lack of information collection and dissemination may actually be impeding the public's understanding and acceptance of legitimate recycling. All too often, it is only the horror stories regarding recycling that are told. But, the overseeing agencies cannot present the whole picture and comment on the overall success of recycling because we do not compile comprehensive information. Furthermore, it is difficult to afford a change of attitude or opinion if one does not have information on which to support such a change."

There is also majority support among the task force members that the notification provision should include the same information about the reclaimer as is provided for the generator. It was pointed out that, historically, environmental problems tended to occur with recycling facilities and that ensuring compliance with the terms of the exclusion, particularly given the enforcement scenario presented on page 68FR61581, is impossible without this information. The position of some members on the task force is that the notification should be in the form of a certification by a responsible corporate official, as described on page 68FR61577.

Some members of the task force favored expansion of the notification and record keeping requirements of the proposal (as described on page 68FR61577-8), particularly in requiring revisions to the notification with changes in generator (or reclaimer) name or location, or hazardous secondary material being reclaimed. Various members of the task force also support annual notification, notification of recovery method and quantity of hazardous secondary material recycled, and maintenance of recycling records on-site.

Finally, there is strong support among the task force members for EPA to develop a standardized form for the notification, to provide for electronic submittal of the notification, and, if these ends can be realized, to establish an electronic national database of hazardous secondary material reclaimers pursuant to the exclusion.

Section III (B): Legitimate Recycling

All task force members strongly support the codification of criteria that define legitimate recycling of hazardous secondary materials. Codification of the criteria is needed to establish clear regulatory jurisdiction that delineates beneficial use of a hazardous secondary material from waste treatment, to ensure enforceability of the criteria, and to ensure that both the regulated community and overseeing agencies are aware of the criteria applicable to legitimate recycling.

We believe that all of the proposed criteria are important. A majority of the task force members believe that for a recycling activity to be deemed legitimate, all four criteria must be met by the generator and/or recycler. Further, the generator/recycler needs to maintain documentation substantiating that the recycling activity meets the criteria. Other members believe that the generator/recycler must consider all four criteria when claiming that their material is being legitimately recycled and document how each criterion is met by the recycling activity. If one or more of the criteria are not applicable, the generator/recycler should document why the criteria is not appropriate. The above mentioned records need to be maintained on-site by the recycler and available upon request by the regulatory agency.

The legitimacy criteria that EPA proposed provide a good basis on which to build meaningful criteria. They target the aspects of hazardous secondary material processing that differentiate beneficial use of a secondary material from discarding it. However, we do have suggestions for revising the criteria in an effort to remove ambiguity for the purpose of promoting consistent application of the criteria by generators, recyclers and the overseeing agencies.

Criterion #1: This criterion pertains to the storage and management of the secondary material prior to recycling. EPA proposes that the secondary material be stored and managed in a manner similar to an analogous product, or if no analogous product exists, then in a manner that minimizes the potential for releases to the environment. Several members do not believe that storing a material in the same manner as an analogous product necessarily minimizes its potential for release to the environment. This criterion should be revised to contain a storage/management performance standard that is based on the type of material being recycled and the method of storage/management used to ensure that it minimizes releases of hazardous constituents into the environment. Containers and tanks containing secondary materials should be closed to prevent loss of volatile materials.

Recommended storage of hazardous secondary materials should be in tanks, containers, containment building or covered piles located on an impervious surface with provisions to collect and properly manage any contaminated runoff. Some task force members favor a prohibition against land storage consistent with the guidance from which the proposed legitimacy criteria were derived.

Criterion #2: This proposed criterion requires that a hazardous secondary material provide a useful contribution to the process or the product. Task force members believe that the secondary material's contribution to the process or the product must be transparent, able to be demonstrated, and evident. In addition, several members support a specific requirement to consider economic factors as part of the criterion.

Criterion #3: This proposed criterion requires the recycling process to yield a valuable product or intermediate that is sold to a third party or used by the recycler or the generator as an effective substitute for a commercial product or as a useful ingredient in an industrial process. All task force members support the use of this criterion.

Several members are concerned that this criterion does not guard against a generator or recycler who uses his own end-product in order to make the product appear successful and hence, the recycling legitimate. As written, this criterion does not require that the end-product of an industrial process, one that uses an intermediate derived from a hazardous secondary material or a hazardous secondary material as an ingredient, be a valuable product and sold to a third party. This criterion should be revised to clearly state this expectation. In addition, several members suggest that this criterion specify a specific percentage of product that must be sold or used in a specific time frame.

Criterion #4: This criterion is commonly referred to as "toxics along for the ride." Its purpose is to discern when a hazardous constituent is possibly being discarded through recycling by appearing in the product at increased levels as compared with similar products. Each of the criterion needs to be as straight-forward and transparent as possible so that the recycler understands what is required from the criteria and to better ensure that each criterion will be implemented in a consistent manner. This criterion is the most unclear of the four. This is due to the use of the terms "significant" and "significantly" in the tests used to determine this criterion is met.

A majority of the task force members suggest that EPA provide clarity as to what is considered an excessive amount of hazardous constituents in a hazardous secondary material in relationship to risk to human health and the environment. The goal to improving clarity will be to provide a "bright-line" that is understood by both the generator of the material and the regulating authority reviewing the recycling determination. EPA should describe a range of methods and when they may be appropriate to use in demonstrating that the relative risk of hazardous constituents in secondary material is in-line with the analogous raw materials or at least below a level of concern for human health or the environment. Methods discussed should include comparison of concentrations of hazardous constituents, analysis of fate of hazardous constituents, and risk assessments.

Section IV: Request for Comment on a Broader Exclusion for Legitimate Recycling

EPA requests comment on whether a broad exclusion should be developed where all hazardous secondary materials that are legitimately recycled as defined by the legitimacy criteria are not considered "discarded" and therefore, not defined as a solid waste under the hazardous waste regulations. All task force members, except for two, strongly oppose the development of a broad exclusion.

A broad exclusion would allow hazardous secondary materials that are currently defined as hazardous wastes to move from reclamation facility to reclamation facility largely without regulatory tracking or controls. Recycling facilities manage secondary materials that are known to cause significant environmental threats if mismanaged. Regulation of hazardous secondary materials was deemed necessary in 1978, in part, after materials intended for recycling were found abandoned, disposed into the environment, and managed at facilities in a manner that threatened human health, water, air and land. Some task force States are still dealing with significant environmental contamination resulting from previous excluded recycling. Therefore, a majority of the task force members do not support the finalization of a broad exclusion now because it could lead to environmental problems similar to those that preceded the RCRA Subtitle C program.

However, many of the members could support a broader exclusion in the future provided that the “tools” (e.g., notification, speculative accumulation, criteria for legitimate recycling) proposed in this rule are shown to be effective in locating and curtailing sham recycling and addressing practices that pose a threat to human health and the environment. The proper and successful implementation of these tools by rule is a critical first step to considering a broader exclusion in the future.

The two task force members that support the development of a broad exclusion believe that the value in the secondary material and how it can be reclaimed should be the focus in determining whether a material is being discarded. The use of legitimacy criteria does this by focusing on those factors that are meaningful in distinguishing waste management (i.e., sham recycling) from beneficial reuse of the a secondary material. In addition to the use of the legitimacy criteria, the broad exclusion needs to include a notification requirement, the application of the speculative accumulation provision and a requirement for the recycler to obtain financial assurance.

Section VI (C): Interstate Transport

In an effort to ease the complexity of interstate transport for the purposes of this exclusion, a majority of the task force members offer the following suggestion. If the State in which the hazardous secondary material is generated and the State in which the material is reclaimed both determine that the reclamation process constitutes legitimate recycling, then the material is not a solid waste for the purposes of interstate transportation. However, we understand that some States may have statutory requirements that would prohibit them from adopting such a regulatory provision.

We appreciate the opportunity to provide comments on this important proposal, and look forward to continuing to work with EPA on definition of solid waste issues of mutual interest. Please contact me at 614-644-2927 or karen.hale@epa.state.oh.us if you have any questions or need further clarification of any of these Hazardous Waste Recycling Task Force comments.

Sincerely,

Karen Hale /s/

Karen Hale (OH)
Chair
ASTSWMO Hazardous Waste Recycling
Task Force

cc: Charlotte Mooney, OSW
ASTSWMO Hazardous Waste Recycling Task Force
ASTSWMO Board of Directors