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2015 Definition of Solid Waste Final Rule
Summary Analysis

July 2015

Prepared by the

Compliance Monitoring and Enforcement Task Force of the
ASTSWMO Hazardous Waste Subcommittee

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Introduction

The 2015 Definition of Solid Waste (DSW) Final Rule issued by the U.S. Environmental Protection Agency (EPA) was published in the Federal Register on January 13, 2015, and becomes effective on July 13, 2015. The rule was proposed by EPA in July 2011. Two Task Forces (Task Force) within ASTSWMO's Hazardous Waste Subcommittee developed comments regarding the proposal, which were submitted to EPA on October 20, 2011. With the issuance of the 2015 final rule, the Subcommittee's Compliance Monitoring and Enforcement Task Force undertook a review of the rule to evaluate how it addressed the 2011 Task Force comments on the proposed rule. The following table correlates the various sections of the rule to the 2011 Task Force comments:

2015 Final Rule		**2011 Proposed Rule, ASTSWMO Task Force Comments** (10/20/11)
V.	Revisions to the Exclusion for Hazardous Secondary Materials That Are Legitimately Reclaimed Under the Control of the Generator	Section IX – page 6
VI.	Verified Recycler Exclusion Replacing the Exclusion for Hazardous Secondary Materials That are Transferred for the Purposes of Reclamation	Section VII – page 3
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XV.	Major Comments on the Replacement of the Exclusion for Hazardous Secondary Materials That are Transferred for the Purpose of Reclamation	
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The following summary analysis, completed in April 2015, compares the provisions in the 2015 DSW Final Rule with the 2011 ASTSWMO Task Force Comments. The summary indicates where comments were not addressed in the rule. The Compliance Monitoring and Enforcement Task Force discussed these comments with EPA and understands the rationale for why they are not reflected in the final rule.

The Task Force hopes that this summary analysis will assist ASTSWMO members in their own review of the 2015 DSW Final Rule.

ASTSWMO would like to thank the following current and past members of the Compliance Monitoring and Enforcement Task Force for their work to develop this summary:

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Section V: Revisions to the Exclusion for Hazardous Secondary Materials that are Legitimately Reclaimed Under the Control of the Generator		
The Task Force remained firmly convinced that management of Hazardous Secondary Materials (HSM) in land-based units should be prohibited.	→	No changes made. The revised DSW still includes land-based units such as piles or surface impoundments in addition to the management units listed in 40 CFR 262.34(a)(1).
The Task Force believed the examples given in an attempt to define releases of HSM to the environment in the definition of the term "contained" are helpful, but have some significant omissions. The examples do not include soil contamination below the unit. One example cites release to groundwater, but that is too late. The contamination should not be allowed to pass through the soil to the groundwater before it is considered a release. The Task Force believed the rule should require inspection of land-based units, groundwater monitoring, or other definitive measures to determine when releases have occurred.	→	EPA is retaining the "contained" condition based on the rationale that hazardous secondary materials released to the environment are not destined for recycling and are clearly discarded, <u>but is adding</u> a regulatory definition of contained to make it easier for implementing agencies and the regulatory community to determine that a material is contained. EPA appears to have addressed with the addition of the term "releases to soil" included. *"…Unpermitted releases are releases that are not covered by a permit and may include, but are not limited to, releases through surface transport by precipitation runoff, releases to soil and groundwater, wind-blown dust, fugitive air emissions, and catastrophic unit failures;…"* The revision does not specifically address inspections or additional measures for land-based units but has added emergency preparedness and response requirements.

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Another omission was the failure to specify what concentration of HSM constituents would need to be detected to constitute a release. This will cause the regulated facility uncertainty about the level of controls necessary to avoid a situation that would be considered a violation by regulators.	→	This comment was not addressed. No levels of concentration are mentioned or identified in the Final Rule. EPA states in the Final Rule, *"Hazardous secondary materials that are not contained and are instead released to the environment are not destined for recycling and are clearly discarded."* Further, *"The Agency therefore is adding a regulatory definition of "contained" that resolves this uncertainty without sacrificing the flexibility that would allow the implementing authority to take into account a wide variety of case-specific circumstances when necessary."*
To alleviate these deficiencies with the term "contained" the Task Force believed the definition of "contained" should be removed and the rule text should be revised so that all references to "contained" instead refer to storage in tanks, containers, on drip pads, or in containment buildings meeting the requirements of 40 CFR 262.34(a)(1).	→	Not implemented. The term "contained" is defined in 40 CFR 260.10 and allows for land-based units and not just units listed in 40 CFR 262.34(a)(1).
In an effort to clarify the regulatory status of units from which releases have occurred, the preamble notes two provisions are being added to the "contained" standard: "(1) A HSM released to the environment is discarded and a solid waste unless it is immediately recovered for the purpose of reclamation; and (2) HSM managed in a unit with leaks or other continuing or intermittent unpermitted releases of the hazardous secondary material to the environment is	→	The preamble states *"…to clarify the regulatory status of units from which releases have occurred, the Agency is also adding to 40 CFR 261.4(a)(23) the following language: (1) A hazardous secondary material released to the environment is discarded and a solid waste unless it is immediately recovered for the purpose of* ***reclamation****; and (2) hazardous secondary material managed in a unit with leaks or other continuing* ***or intermittent unpermitted*** *releases of the hazardous secondary material to the environment is discarded and a solid waste."* (emphasis added) However, in the codified 40 CFR 261.4(a)(23)(v)(A) states *"The material must be contained as defined in §260.10. A hazardous secondary material released to the environment is discarded and a solid waste unless it is*

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discarded and a solid waste." The corresponding proposed text of 40 CFR 261.4(a)(23)(ii)(B) uses the word "recycling" in place of "reclamation" and omits the phrase "or intermittent unpermitted". This should be clarified in the final rule.		*immediately recovered for the purpose of **recycling**. Hazardous secondary material managed in a unit with leaks or other continuing releases is discarded and a solid waste."* (emphasis added) This was not clarified as requested.
The preamble also notes that "in the event of a release from a unit to the environment, the HSM that remain in the unit could still meet the terms of the exclusion, as long as the other provisions of the containment definition are met." Our reading of the third sentence of the rule text at 40 CFR 261.4(a)(23)(ii)(B) is exactly the opposite. Based on the wording of the actual rule text, if the unit has leaks or releases to the environment, any HSM within that unit is "discarded and a solid waste." This should be clarified in the final rule.	→	This seems to be clarified in the Final Rule by adding the following to 40 CFR 261.4(a)(23): *"(1) A hazardous secondary material released to the environment is discarded and a solid waste unless it is immediately recovered for the purpose of reclamation; and (2) hazardous secondary material managed in a unit with leaks or other continuing or intermittent unpermitted releases of the hazardous secondary material to the environment is discarded and a solid waste."*
The Task Force believed that generators under this exclusion should be held to the same container standards as hazardous waste generators. EPA's proposal for separate containment standards for HSM reclaimed under the control of the generator would be more confusing to	→	The Final Rule added a definition of "contained" to 40 CFR 260.10.

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regulated facilities and more difficult for regulators to enforce. The Task Force supported notification as a condition of the exclusion. The HSM could be subject to full regulation as a hazardous waste if the generator or reclaimer failed to submit notification. The Task Force also believes that enforcement discretion can be used if the generator/recycler is meeting the other recycling requirements, but only failed to submit a notification. In that circumstance, a State could elect to only cite an administrative violation and not vacate the exclusion. A notification requirement would discourage facilities that might otherwise consider trying to "fly below the radar", while it would at the same time allow States to exercise appropriate enforcement discretion when the failure to notify is simply an administrative oversight.	→	The notification has been added as a condition of the exclusion as requested. The Final Rule states *"EPA is finalizing the notification provision as a condition of the generator-controlled exclusion because it is the only formal indication of a facility's intent to reclaim a hazardous secondary material under the conditional exclusion rather than to discard it."*
The Task Force believed that all facilities subject to speculative accumulation prohibitions, including those using the generator controlled exclusion, must be able to demonstrate they are in compliance with the prohibition. The easiest and clearest way to demonstrate	→	EPA addressed speculative accumulation on page 1705 of the Final Rule and includes requirements for documenting the HSM is not being speculatively accumulated by using labels, logs, or other documentation. 40 CFR 261.1(c)(8) was revised to include the marking and/or documentation requirement.

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compliance would be with logs, labels and other documentation. While the Task Force believed the current speculative accumulation provisions already mandate some method to positively demonstrate a generator is meeting the 75% threshold for recycling. The Task Force favored updating 261.1(c)(8) to require signs with an accumulation start date, notations in an inventory log, or another equivalent documentation method to assure speculative accumulation is not occurring.		
The Task Force supported the proposed recordkeeping requirements for facilities that operate under a tolling agreement, but believed the exclusion should be withdrawn, given that no facilities have notified they are operating under this provision since the 2008 DSW rule was finalized.	→	Not implemented. The exclusion for tolling and "same-company" recycling was retained in the Final Rule.
The proposed rule at 261.4(a)(23)(i)(B) did not provide for any method to track a generator's HSM when it is transferred off-site to another location under the control of the generator. To ensure HSM is being handled as a valuable commodity and "discard" has not occurred while in transit, a bill of lading or other shipping document must be required whereby the	→	The Final Rule addressed this concern. 40 CFR 261.4(a)(23)(i)(B) was revised to include the following: *"The generating and receiving facilities must both maintain at their facilities for no less than three years records of hazardous secondary materials sent or received under this exclusion…These requirements may be satisfied by routine business records (e.g., financial records, bills of lading, copies of DOT shipping papers, or electronic confirmations)…"*

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receiving site certifies it has received the full quantity identified on the shipping paper.		
Section VI: Verified Recycler Exclusion Replacing the Exclusion for Hazardous Secondary Materials that are Transferred for the Purposes of Reclamation		
Based on comments received and further assessment, EPA has decided to replace the 2008 DSW exclusion for HSM that are transferred for the purpose of legitimate reclamation with an exclusion for HSM sent for reclamation at a verified recycler. EPA determined such an exclusion would address the regulatory gaps identified in the 2008 DSW rule.	→	The Verified Recycler Exclusion includes: • Requires all hazardous materials recyclers operating under this provision have RCRA permits that address the materials, or obtain a variance prior to operating under the exclusion. This will allow EPA and the states to use the RCRA permitting process or solid waste variance process to verify that a facility has established protective measures to manage the material. • Under the variance process, EPA and the states will also be able to review and approve the facilities' financial assurance plan to ensure that they are financially stable and that there will be funds available should the unexpected happen. • Requires that all entities subject to the new exclusions – both generators and recyclers – meet emergency response and preparedness requirements. This includes requiring facilities to make arrangements with local emergency response officials, which provides local fire departments and hospitals with critical information to enable them to tailor their preparations and response, thereby reducing risk to communities. • Includes a public participation requirement for recyclers seeking a verified recycler variance, so that communities are notified prior to

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		recycling operations beginning and have a chance to weigh in on the environmental decisions that affect them. • Requires facilities seeking a verified recycler variance to address whether their activities pose a risk to nearby communities and whether their activities add to the cumulative environmental impacts.
Section VII: Remanufacturing Exclusion		
The Task Force supported legitimate recycling/reclamation as a way to reduce waste and conserve resources, but the preamble only described a concept behind the exclusion. The Task Force had a concern that even though these would be higher purity and higher value solvents, they are spent and not a useable product.	→	These HSMs transferred to third parties do not involve discard and can result in extending the useful life of a commercial-grade chemical. Under appropriate conditions the potential for discard in inter-company remanufacturing transfers would be low because they will be incorporated into the manufacturing process rather than accumulated and disposed of.
The Task Force also believed the rule should specify that solvents must be used by the company that actually remanufactures the solvent, and that the exclusion would not apply to commercial solvent recyclers.	→	The exclusion is applicable to the 18[1] solvents identified as being used for reacting, extracting, purifying, or blending chemicals (or for rinsing out process lines associated with these functions) in the following sectors: • Pharmaceutical manufacturing (NAICS 325412) • Basic organic chemical manufacturing (NAICS 325199) • Plastics and resins manufacturing (NAICS 325211) • Paints and coatings manufacturing (NAICS 325510) The HSM generator sends the HSM spent solvents to a remanufacturer in the same sector/NAICS.

[1] Toluene, xylenes, ethylbenzene, 1,2,4-trimethylbenzene, chlorobenzene, n-hexane, cyclohexane, methyl-tert-butyl-ether, acetonitrile, chloroform, chloromethane, dichloromethane, methyl isobutyl ketone, NN-dimethylformamide, tetrahydrofuran, n-butyl alcohol, ethanol, and/or methanol.

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The Task Force believed the term "continuing use" to refer to the post-remanufacturing use of a reclaimed material will cause confusion with the established term "continued use." The Task Force suggested using another term such as "subsequent use…."	→	After remanufacturing, the use of remanufactured solvent shall be limited to the same processes described above, in the same industry sectors/NAICS or to using them as ingredients in a product. The remanufactured solvent use does not involve cleaning or degreasing oil, grease or similar material from textiles, glassware, metal surfaces, or other articles. The term "continuing use" is retained.
Section VIII: Revisions to the Definition of Legitimacy & Prohibition of Sham Recycling		
The Task Force provided several comments on the Revisions to the Definition of Legitimacy, including: • Supported the proposal to apply the legitimacy factors to all hazardous materials recycling, with some exceptions (i.e., lead acid batteries, circuit boards, scrap metal, etc.). Codifying the legitimacy criteria will give enforcement personnel actual codified criteria to make determinations on legitimate recycling as well as provide the regulated community criteria for evaluating potential recycling efforts;	→	• EPA stated on page 1720 of the Final Rule, *"Today we are codifying that the legitimate recycling provision applies to all hazardous secondary materials that are excluded or exempted from Subtitle C regulation because they are recycled and that it also applies to recyclable hazardous waste that remain subject to the hazardous waste regulations. However, instead of changing the language of each recycling exclusion or exemption to include the requirement as we proposed in the 2011 DSW proposal, we have instead added language in §261.2(g) that specifically prohibits sham recycling, including recycling to ensure that all recycling, including recycling under the pre-2008 exclusions is legitimate (i.e., real recycling)."*

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• Encouraged EPA to require generators and recyclers to have documentation of legitimate recycling of HSM;	→	• EPA disagreed with ASTSWMO's comments. EPA stated on page 1730 of the Final Rule, *"After reviewing the public comments, we have decided that, as a general matter, documentation of legitimacy is <u>not</u> necessary for most hazardous secondary materials recycling. Instead, we will continue to rely on the current provision in § 261.2(f) that requires respondents to demonstrate that the material is not a waste. Section 261.2(f) requires persons claiming that materials are not solid waste or are conditionally exempt from RCRA Subtitle C regulation to provide appropriate documentation of these claims."* However, EPA finalized two exceptions to the general case where documentation of legitimate recycling is not required. The first being finalized is a requirement for facilities reclaiming hazardous secondary materials under the control of the generator, that is, any facility claiming the exclusion at § 261.4(a)(23), to document the legitimacy of the reclamation process. The other exception where documentation is required is for those facilities whose product made from recycled hazardous secondary materials does not meet factor 4, but would still be considered a legitimately recycled product. Those facilities would need to maintain documentation as to why the recycling is still legitimate as it relates to factor 4.
• Hazardous Recyclable Material (HRM) should be exempt from the legitimacy factors. One category is closed-loop recycling should be considered legitimate even if it fails legitimacy factor 4 if the generator reuses the reclaimed material in the original process;	→	• EPA expects that the vast majority of recycling being performed under the existing exclusions is currently being undertaken conscientiously and would be considered legitimate under the new legitimacy provision with no further action required on the part of the company. One example is hazardous secondary materials recycled in a ''closed-loop'' production process under 40 CFR 261.4(a)(8). Under this exclusion, the hazardous secondary material is reused within the production process from which it came, thus providing a useful contribution to the product (factor 1) and also producing a valuable product or intermediate (factor 2) (assuming

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		that the production process is, by definition, producing a product). Since the closed-loop exclusion requires tank storage and that the entire process through completion of reclamation is closed by being entirely connected with pipes and other comparable enclosed means of conveyance, this management would be considered to meet factor 3, management of the hazardous secondary material as a valuable commodity. The product of this type of recycling process would be comparable to a legitimate product or intermediate because the hazardous secondary materials being recycled are returned to the original process from which they were generated to be reused (factor 4). Further discussion on page 1723, column 1: Within factor 4, the Agency is also creating a provision for hazardous secondary materials that are recycled by being returned to the original process from which they were generated, such as in a closed-loop recycling process, to meet the factor.
• The text of 260.43(a)(4) contained a wording error. The text provided for an "or" situation where it should have been "and."	→	• The text was revised as requested.
• With respect to 260.43(a)(4), the Task Force suggested that EPA codify "the product of the recycling process" must be the "first generation" product, not products subsequently produced from the first-generation product;	→	• While the suggested language was not incorporated in the final rule, the rule does include a provision specifying that (where there is no analogous product), a "product of (a) recycling process is comparable to a legitimate product or intermediate if… the product is a commodity that meets widely recognized commodity standards and specifications…"
• Legitimacy factor 4 did not go far enough. The Task Force believed that in cases where the finished product	→	• EPA finalized the proposed language in this factor and is using the term "comparable" in discussing levels of hazardous constituents. This term means any contaminants present in the product made from hazardous

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would be applied to or used on the ground and the comparable product did not contain measurable concentrations of the hazardous constituent, the product should meet the LDR standards for the hazardous constituents; • The Task Force did not support the petition provision of 260.43(c) allowing a facility to petition EPA or an authorized state to consider a recycling process "legitimate" if it met the first two factors, but fails to meet one or both of the last two;	→	secondary materials are present at levels comparable to or lower than the levels in the analogous product, although levels can be slightly higher than those found in the analogous product, but must be within a small acceptable range. This change in language is not a change from EPA's long-standing policy and it is also consistent with the legitimacy provisions in the Identification of Non-Hazardous Secondary Materials that are Solid Wastes final rule (76 FR 15456, March 21, 2011). • EPA is not finalizing the petition process in this final rule. Instead, EPA has made two changes to its proposal to account for the situations that the petition process was meant to cover. The first is the additional provisions in factor 4 that describe the specific situations in which EPA considers a product of a recycling process to be comparable to an analogous product or intermediate. The second is the documentation, certification, and notice provision for products that have levels of hazardous constituents that are not comparable to or lower than an analogous product or intermediate or that are unable to be compared, but which are not covered by the new provisions. Under the documentation, certification, and notice process, a recycler must determine that its recycling is still legitimate despite the levels of hazardous constituents in the recycled product not being comparable to those in an analogous product or intermediate. This determination can take into account exposure of toxics in the product, bioavailability of toxics in the product or other relevant considerations that show the recycled product does not contain levels of hazardous constituents that pose a risk to human health or the environment. The facility then must prepare documentation explaining its assessment and include a certification that the recycling is legitimate. In addition, the facility would need to notify the appropriate Regional Administrator (or State Director, in an authorized state) of this finding. This provision is a less burdensome process for both recyclers and

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		the states implementing the RCRA program because it maintains the self-implementing nature of the legitimacy requirement. However, because facilities will still have to provide notice to the regulatory agency, it also allows implementing agencies to perform oversight and inspections of recycling facilities if they are concerned about the legitimacy of a specific recycling process.
• In legitimacy factor 3, the Task Force believed that requiring HSM to be managed in a manner consistent with the management of the raw material or "in an equally protective manner" is not protective enough if it allows HSM to be managed in a land-based unit. The Task Force supports the requirement to contain HSMs in units that meet the same design, operating, inspection, and closure standards for containers, tanks, containment buildings, and drip pads.	→	EPA is finalizing the regulatory language for factor 3 as proposed and has determined the added flexibility will allow existing legitimate recycling to continue without any negative impact on environmental protection. Factor 3 addresses the management of hazardous secondary materials in two distinct situations. The first situation is when a hazardous secondary material is analogous to a raw material which it is replacing in the process. In this case, the hazardous secondary material should be managed prior to recycling similarly to the way the analogous raw materials are managed in the course of normal manufacturing, or in an equally protective manner. The second situation factor 3 addresses is the case where there is no analogous raw material that the hazardous secondary material is replacing. This could be either because the process is designed around a particular hazardous secondary material—that is, the hazardous secondary material is not replacing anything—or it could be because of physical or chemical differences between the hazardous secondary material and the raw material that are too significant for them to be considered "analogous." Hazardous secondary materials that have significantly different physical or chemical properties when compared to the raw material would not be considered analogous even if they serve the same function because it may not be appropriate to manage them in the same way. In this situation, the

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		hazardous secondary material would have to be contained for this factor to be met. The term ''contained'' as discussed in section V of the preamble, means that the unit in which the material is stored is in good condition, with no leaks or releases to the environment, and that the unit is designed to prevent such releases. In addition, to meet the contained standard, the unit must be labeled or have a system to identify the hazardous secondary material in it and must not hold incompatible materials or pose a risk of fires. Hazardous secondary materials in units that meet the applicable requirements of 40 CFR parts 264 or 265 are presumed to be contained. Land-based units can meet the definition of contained.
Section IX: Revisions to Solid Waste Variances & Non-Waste Exclusions		
ASTSWMO comments and EPA responses can be found in Section XVIII below.		EPA made revisions to the criteria for the partial reclamation variance (40 260.31(c)) and the non-waste determination (40 CFR 260.34) and the procedures for variances from classification as a solid waste and non-waste determinations (40 CFR 260.33). Each of these changes is summarized below: A. Non-waste Determinations: The purpose of the non-waste determination process is to provide parties with an administrative process for receiving a determination from the overseeing agency that their hazardous secondary materials are not a waste when recycled. This process may be appropriate for cases where there is ambiguity about whether a hazardous secondary material is a waste when recycled and provide certainty for both the facility and the overseeing agency regarding the classification of the material. The two types of non-waste determinations are: i. Determinations for hazardous secondary materials reclaimed in a continuous industrial process, and

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		ii. Determinations for hazardous secondary materials indistinguishable in all relevant aspects from a product or intermediate. Each type of non-waste determination consists of several criteria that must be addressed by the applicant in an application submitted to the overseeing agency. The overseeing agency will evaluate application request additional information as needed and proceed processing the application as given in the rule including providing public notice of its tentative decision. Additionally, the determinations only apply to reclamation activities and cannot be applied to recycling scenarios where burning for energy recovery or use constituting disposal will occur. <u>B. Procedures for Solid Waste Variances and Non-waste Determinations</u> The existing procedures the overseeing agency needs to follow when granting a variance from classification as a waste or a non-waste determination include the agency evaluating the variance application, providing public notice of the agency's tentative decision to grant or deny the variance and accepting public comment on the action for 30 days. The agency may also hold a hearing if needed and the agency can issue a final decision after consideration of comments. The additional procedures EPA adopted in 2015 require: • The variance or non-waste determination holder to inform the overseeing agency that a change has occurred that affects how the hazardous secondary material meets the criteria of the variance or non-waste determination, and • The overseeing agency needs to evaluate this information and determine if the applicant needs to re-apply for the variance or non-waste determination.

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		Also, the variance and the non-waste determinations can only be effective for up to ten years at which the applicant must re-apply for the variance or non-waste determination. Lastly, the holder of a variance or non-waste determination must initially notify and re-notify the overseeing agency each even-numbered year by March 1. C. Partial Reclamation Variance There are four variances from classification of a waste that render a recycled material no longer classified as a waste (or a hazardous waste) when recycled under certain circumstances. The variance that EPA revised in this rulemaking is the partial reclamation variance. The partial reclamation variance is now only applicable to hazardous secondary materials that have been reclaimed, using a process other than the process that generated the original material, but need to be reclaimed further to produce a final product. EPA revised the introductory text and five of the six criteria for the partial reclamation variance to clarify when a partially-reclaimed material is commodity-like and no longer a waste. EPA removed the sixth criterion – "Other relevant factors"- since it provided the overseeing agency wide discretion to consider additional aspects related to the recycling of the material. The introductory test was revised to specify when a variance is applicable to a partially reclaimed material and that the five variance criteria must be met. EPA's intent is that the variance will apply after partial reclamation of a hazardous secondary material has produced a commodity-like material as demonstrated by meeting the five variance criteria.

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		Criterion 1 The first criterion was amended to clarify that a partial reclamation process other than the process that generated the hazardous secondary material must be used to produce the commodity-like material eligible for the partial reclamation variance. Criterion 2 Criterion two evaluates the economic value of the partially reclaimed material and whether it will be purchased for further reclamation. Supporting evidence for this criterion can include sales information, demonstrated demand for the material, business contracts and the purchase price of the partially reclaimed material. Criterion 3 The focus of criterion 3 evaluates whether the partially reclaimed material can substitute for a product or process intermediate produced from a virgin material in a production process. One could support this criterion by comparing the physical and chemical characteristics of the partially reclaimed material to the normally used product or process intermediate. Criterion 4 Criterion four considers whether there is a market for the partially reclaimed material. This aspect may be demonstrated by records of sales of the partially reclaimed material; known customers who purchase the material; business contracts; traditional usage of the material and the stability of the markets for the partially reclaimed material. Criterion 5 The fifth, and last criterion, evaluates how the partially reclaimed material is managed and handled to minimize loss. The concept here is that commodity-like materials are managed so their value is retained and not lost due to

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		releases or deterioration. Information to support this criterion can include process design and explanation of equipment used to manage the partially reclamation material, employee training programs and inspection procedures.
Section X: Effect on Facilities Currently Operating Under Solid Waste Exclusions		
Most Task Force members believed codifying the legitimacy criteria for the existing exclusions formalizes years of EPA guidance, thus giving States and industry a definitive standard for evaluating legitimate recycling. These Task Force members did not believe industries operating under the current regulatory exclusions should have any problems with the 260.43 standards if their recycling is truly legitimate.	→	EPA noted that the final rule does not supersede any of the pre-2008 solid waste exclusions or other prior solid waste determinations or variances, including determinations made in letters of interpretation and inspection reports. However, there are two revisions to the regulations that may impact facilities' responsibilities under an existing exclusion. The two revisions are as follows: 1. A new recordkeeping requirement for speculative accumulation (40 CFR §261.1(c)(8)) 2. A documentation, certification, and notification requirement for recycling processes which are legitimate despite having levels of hazardous constituents that are not comparable to or unable to be compared to a legitimate product. (*The codification of the prohibition of sham recycling (§ 261.2(g)), and the definition of legitimate recycling (§ 260.43) being finalized today will not impose any new requirements on persons recycling under the pre-2008 recycling exclusions, except in the case where the product of the recycling process (1) has levels of hazardous constituents that are not comparable to or lower than those in a legitimate product (i.e., are significantly elevated) or (2) is unable to be compared to a legitimate product and the product of the recycling process is not a widely recognized commodity (e.g. scrap metal) and is not returned to the original production process (e.g., closed loop recycling). In this case, the person performing the recycling must conduct the necessary analysis and prepare documentation stating why the recycling is still legitimate.*)
Some Task Force members did not support codifying the legitimate recycling standard, additional recordkeeping requirements in the speculative	→	Because the new rule includes more stringent standards for the generator-controlled exclusion at 40 CFR 261.4(a)(23), facilities that are currently managing HSM under these provisions must ensure they are complying with the more stringent standards by the effective date of the rule. The new

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accumulation standard, the contained standard, or the notification provision for the 32 previously excluded or exempt wastes. They believe the exclusions for these wastes have been codified for a number of years and have operated without any additional requirements. These members believe that if EPA finalizes this proposal there will be an undue burden to the regulated community as well as to the States.		provisions include (1) complying with the regulatory definition of "contained"; (2) maintaining shipping records for reclamation under same-company and toll manufacturing agreements; (3) (for the person performing the recycling) documenting how the recycling meets all 4 factors of legitimacy; and (4) meeting the new emergency preparedness and response conditions.
Most Task Force members supported making ***initial*** notification a condition of the current exemptions with exceptions. Currently, facilities acting under these exclusions are not required to notify unless these exclusions are occurring at facilities that are otherwise regulated, or States learn of the facility through citizen complaints or other means. Notifications will allow States to periodically evaluate these facilities to ensure they are meeting all the terms of their exclusions.	→	The Final Rule does not supersede any of the pre-2008 solid waste exclusions or other prior solid waste determinations or variances, including determinations made in letters of interpretation and inspection reports. If a HSM has been determined not to be a solid waste for whatever reason, such a determination remains in effect, unless the authorized state decides to revisit the regulatory determination under their current authority. If a HSM has been excluded from hazardous waste regulations (i.e., Bevill exclusion in 40 CFR 261.4(b)(7)) the regulatory status of that material will not be affected by this Final Rule. However, there are two revisions that may impact existing exclusions: (1) new recordkeeping requirements for speculative accumulation; and (2) documentation, certification, and notification requirements for recycling processes which are legitimate despite having levels of hazardous constituents that are not comparable to a legitimate product. For facilities currently operating under the 2008 Solid Waste Exclusions they must ensure they are complying with the standards in the January 13, 2015 final rule by the effective date of the rule, which is July 13, 2015.

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Section XI: Effect on Spent Petroleum Catalysts		
The Task Force did not provide comments regarding the recycling of spent petroleum catalysts because EPA did not propose any changes as to how the recycling of spent petroleum catalysts would be impacted by the revised DSW rule as compared to the 2008 DSW rule. Spent petroleum catalyst was not eligible to be excluded from the definition of a solid waste under the 2008 DSW rule.	→	In 2008, EPA determined that since some spent petroleum catalysts can at times be pyrophoric (a characteristic that EPA believed recyclers were generally not equipped to manage) that it was best not to allow spent petroleum catalysts to be eligible for exclusion under the DSW rule. EPA instead intended to develop a waste specific recycling exclusion for the catalysts that would address the unique properties of the wastes. However, following review of the draft final 2015 DSW rule by the Office of Management and Budget (OMB), The White House, EPA revised the draft final rule to allow spent petroleum catalysts destined for reclamation to be eligible for exclusion under the generator-controlled and verified recycler exclusions. EPA concluded that since it had changed the definition of "contained" to include requirements to address the risk of fires and explosions, EPA no longer had reason to deny eligibility of these wastes. Please see the summary sections for the generator-controlled and verified recycler exclusions for information about the conditions of the exclusions.
Section XII: Effect on CERCLA		
This was not a part of the Proposed Rule.	→	Final Rule does not change the universe of hazardous substance recycling activities that could be exempted from CERCLA liability. The Final Rule only changes the definition of solid waste for purposes of RCRA Subtitle C requirements.
Section XIII: General Comments on the 2011 Proposed Revisions to the Definition of Solid Waste		
No "General" comments submitted by ASTSWMO.		EPA's authority to regulate hazardous waste recycling: • The RCRA statute and the legislative history suggest that Congress expected EPA to regulate as solid and hazardous wastes certain materials that are destined for recycling.

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		Supporting Record (Environmental Problems Study) • The Agency maintains that the scope of the environmental problems study is appropriate for the purpose of the DSW rulemaking effort. Correlation of Recycling Damage Cases with Regulatory Exclusions, Exemptions or Alternative Standards: • Because notification was not required, EPA does not have precise data regarding which and how many facilities are recycling HSM under reduced regulation. • Although it is difficult to assign specific damage cases to certain exclusions, EPA notes in the environmental problems study only 9 of the damage cases were operating under a RCRA permit at the time of the damage. EPA can generally conclude that the majority of the damage cases at third party recyclers were operating outside of RCRA.
Section XIV: Major Comments on the Exclusion for Hazardous Secondary Materials Legitimately Reclaimed Under the Control of the Generator & Recordkeeping for Speculative Accumulation		
The Task Force remained convinced that management of HSMs in land-based units should be prohibited. The Task Force could not envision circumstances where the management of HSM in a land-based unit would not lead to contamination of the underlying and adjacent soils. The Task Force believed HSM management at a generator site should be limited to those management units that meet the same design, operating, inspection, and closure	→	EPA disagreed that land-based units should be prohibited under the generator-controlled exclusion. HSMs "contained" in land based units and not speculatively accumulated at a facility that has provided notification are managing HSMs like valuable commodities not wastes. "Land-based unit" defined in 40 CFR 260.10 explicitly excludes land-based production units.

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standards for containers, tanks, containment buildings, and drip pads.		
The Task Force believed the examples given in an attempt to define releases of HSM to the environment in the definition of the term "contained" are helpful, but have significant omissions. The Task Force also believed the definition of "contained" should be revised so that all references to "contained" instead refer to storage in tanks, containers, on drip pads, or in containment buildings meeting the requirements of 40 CFR 262.34(a)(1).	→	EPA is retaining the "contained" condition based on the rationale that hazardous secondary materials released to the environment are not destined for recycling and are clearly discarded, but is adding a regulatory definition of contained to make it easier for implementing agencies and the regulatory community to determine that a material is contained.
The Task Force noted the proposed text of 40 CFR 261.4(a)(23)(ii)(B) used the word "recycling" in place of "reclamation" and omitted the phrase "or intermittent unpermitted."	→	EPA agreed with this comment and revised the final rule accordingly at 40 CFR 261.4(a)(23)(ii)(A).
The Task Force felt the rule needed to be clarified regarding releases and the status of the HSM in a unit that had releases. The Task Force also suggested the rule establish a concentration based standard to determine if a release had occurred.	→	EPA notes that the language of the proposed definition reads that the unit must be in good condition, "with no leaks or *other continuing or intermittent unpermitted releases* of hazardous secondary materials to the environment…(emphasis added). EPA states this language clearly does not mean that any single release of whatever nature would automatically place the HSM remaining in the unit under Subtitle C regulation. EPA disagreed with a concentration based standard as appropriate concentrations would vary depending on the particular HSM.

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The Task Force believed HSM management at a generator site should be limited to those management units meeting the requirements for generators under 40 CFR 262.34(a)(1), including the applicable provisions of Part 265.	→	EPA disagreed with imposing Subtitle C requirements stating that HSMs legitimately recycled are not discarded and have value that provides generators with incentives to safely manage and handle. Imposing Subtitle C requirements could discourage recycling and encourage disposal.
The proposed rule at 261.4(a)(23)(i)(B) does not provide for any method to track a generator's HSM when it is transferred off-site to another location under the control of the generator. To ensure HSM is being handled as a valuable commodity and "discard" has not occurred while in transit, a bill of lading or other shipping document must be required.	→	EPA believes DOT shipping papers, bills of lading and other routine business records could satisfy recordkeeping requirements and allow tracking of all HSM. EPA is finalizing the same company exclusion to include this requirement. EPA inadvertently omitted the alternative certification for facilities under common control that was in the 2008 DSW final rule. Therefore, EPA is retaining the alternative certification at 40 CFR 261.4(a)(23)(i)(B).
The Task Force believed the tolling exclusion should be withdrawn. If not withdrawn, then agrees with the proposed recordkeeping requirements for facilities that operate under a tolling agreement.	→	EPA supports retention of the tolling exclusion as contracts provide economic incentives to manage HSMs as valuable commodities. Recordkeeping requirements are sufficient to prevent discard eliminating need of manifesting. Elimination of the tolling exclusion would discourage reclamation of valuable HSMs that might otherwise be destroyed through incineration which is inconsistent with encouraging sustainable management of HSMs.
The Task Force supported notification as a condition of the exclusion.	→	EPA agreed. Notification is a condition of the generator-controlled exclusion in 40 CFR 261.4(a)(23), as well as a condition of the remanufacturing exclusion in 40 CFR 261.4(a)(27).

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The Task Force supported the one-year accumulation limit (or suggested use of the speculative accumulation provisions).	→	EPA has concluded that the proposed recordkeeping requirements for speculative accumulation provide considerable benefits to both regulatory authorities and the regulated community and that the burden on the regulated community will be minimal.
Section XV: Major Comments on the Replacement of the Exclusion for Hazardous Secondary Materials that are Transferred for the Purpose of Reclamation		
The Task Force agreed with the proposal to eliminate the transfer-based exclusion.	→	EPA replaced the transfer-based exclusion with the verified recycler exclusion. (Refer to Section VI above.)
Section XVI: Major Comments on the Remanufacturing Exclusion		
The Task Force agreed with the concept of a remanufacturing exclusion, but was not prepared to provide extensive comments on the proposal with no rule text to evaluate.	→	EPA believed the language contained adequate detail and that commenters were provided more than enough information to comment on the remanufacturing exclusion.
Section XVII: Major Comments on Legitimacy		
See Section VIII above.		
Section XVIII: Major Comments on the Revisions to Solid Waste Variances & Non-Waste Determinations		
The Task Force supported the changes to the partial reclamation variance. The Task Force also supported the removal of the 6th criterion, "other relevant factors," and agreed it was too subjective.	→	EPA eliminated the 6th criterion, "other relevant factors."
The Task Force supported the proposed requirement for facilities seeking non-waste determinations to affirmatively	→	EPA finalized the criterion to non-waste determinations in 40 CFR 260.34 that require facilities applying for a non-waste determination to explain or

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demonstrate why they cannot meet, or should not have to meet, one of the existing exclusions under 261.2 or 261.4. The Task Force suggested that EPA's involvement in variances and non-waste determinations continue to be processed by EPA's Headquarters offices, which would help achieve the stated goal to "ensure national consistency and protectiveness." The Task Force believed there are region-to-region differences in interpretation just as there are State-to-State differences. The Task Force suggested EPA clarify in the Final Rule that petitions be sent to the "Regional Administrator" or the Director of the authorized state.	→	demonstrate why they cannot meet, or should not have to meet, the existing DSW exclusions under 40 CFR 261.2 or 261.4. EPA agreed with the comment and decided not to finalize the proposed change. The EPA Administrator will remain as the EPA recipient of petitions for variance and non-waste determinations. EPA also clarified the rule does not change the delegation of authority to States authorized to administer the hazardous waste regulations. Authorized States will continue to evaluate and decide whether to grant a solid waste variance or a non-waste determination. More specifically, EPA stated in its Response to Comments, *"EPA recognizes the commenters' concerns who argued that designating the Regional Administrator, rather than the Administrator, as the person responsible for evaluating such petitions and deciding whether to grant a solid waste variance or a non-waste determination may increase inconsistency by virtue of there being ten Regional Administrators as compared to the one Administrator. Because the Agency is striving for as much consistency as possible, we have decided not to finalize this proposed change."* *"EPA did not intend in the July 2011 proposed rule to undermine or remove the authority of State Directors of authorized states to grant or deny solid waste variances and non-waste determinations and we regret the confusion. We have clarified in the preamble to the proposed rule that the rule does not change in any way the delegation of authority to states authorized to administer the hazardous waste regulations and thus, authorized states that have adopted these provisions may continue to evaluate and decide whether to grant a solid waste variance or a non-waste determination, as they do currently. In response to the commenter who supported a clarification in the final regulatory language, we note that there are several places in the regulations that reference the role "Administrator" and that this role is delegated to the state when the state becomes authorized."*

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The Task Force understands EPA's goal to ensure national consistency with variance and non-waste determinations; however, some Task Force members did not support the proposed requirement for States to "share copies of the variance and non-waste determination petitions and tentative decisions" with EPA for comment. If the State is authorized to administer the RCRA Subtitle C Program, then the State bears the responsibility to issue these decisions. EPA's role in these cases is to conduct their reviews through the oversight process.	→	EPA did not codify this requirement in the final rule. EPA, however, will likely continue to work with the states in order to increase state-to-state consistency in such determinations and may pursue non-regulatory efforts to collect and share solid waste variances and non-waste determinations as part of implementing the final rule.
To the Task Force, a "renewal" of a variance or non-waste determination implies a full application to be submitted by a generator and full review of the information by the regulatory agency, coupled with notifications to the media, public comment, and possible hearings. Instead of "renewal," the Task Force suggests a requirement for generators to "recertify" that they continue to meet the conditions of a previously approved variance or non-waste determination on an annual or biennial basis.	→	EPA states it "understands that the "recertification" process suggested by commenters may serve to reduce burden on states. However, a recertification process would not allow the public an opportunity to review and comment, as is provided in the full application process. Therefore, EPA finds that replacing a periodic renewal with a periodic recertification is not sufficient. Instead, in order to better address resource burden on states, EPA is establishing a longer term limit of ten years, rather than the two to five years as suggested in the July 2011 proposal. <u>Periodic Renewal of Variances and Non-Waste Determinations</u> EPA addressed this issue by adding a provision to 40 CFR 260.33(d) that solid waste variances and non-waste determinations shall be effective for a fixed term not to exceed 10 years. EPA believes by allowing up to 10 years will reduce any burden on the facilities and the States and be consistent with term limits for RCRA hazardous waste permits.

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		<u>Re-Apply for a Variance in the Event of a Change</u> In addition, in the final rule EPA is requiring that facilities, in the event of a change, must send a description of the change to the regulatory authority and the regulatory authority will determine whether a facility must re-apply. EPA believes this allows both the regulatory authority and facility to avoid spending unnecessary resources if the change in circumstances is found to be of no consequence to the original variance. <u>Requiring Notification for Facilities Operating Under Variances and Non-Waste Determinations</u> The final rule also requires facilities to send a notification prior to operating and by March 1 of each even-numbered year. The notification will be on EPA Form 8700-12. This is intended to enable better compliance monitoring, improve transparency and allow variances and non-waste determinations to be tracked nationally.
Section XIX: Major Comments on the Proposed Revisions to Pre-2008 Recycling Exclusions		
The Task Force supported the application of the legitimacy criteria to the current exclusion with exceptions (lead-acid batteries, circuit boards, scrap metal, etc.)	→	No changes made to existing exclusions and exemptions. EPA instead codified a general prohibition against sham recycling at 40 CFR 261.2(g).
Most of the Task Force supported making initial notification a condition of the current exemptions with some exceptions. The notification allows States to periodically evaluate facilities to ensure they are meeting the terms of the exclusions.	→	Many commenters did not support adding notification to the pre-2008 exclusions. In the particular, commenters felt the Addendum to the Site Identification Form is too burdensome for facilities operating under a pre-2008 exemption/exclusion. Re-notification would be more stringent than what is currently required for HW SQG. EPA's intent was to provide basic information to regulators to enable compliance monitoring of the exclusions. More information needed so EPA deferred action on applying notification to the pre-2008 exclusions and exemptions until the commenters' concerns can be addressed.

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The Task Force suggested the proposed definition of "contained" be removed and the rule revised so that all references to "contained" instead refer to storage in tanks, containers, on drip pads, or in containment buildings meeting the requirements of 40 CFR 262.34(a)(1).	→	EPA understands that simply applying the contained standard across 32 recycling provisions may not be the most efficient/effective course of action; therefore, EPA is deferring action on applying the contained standard to the pre-2008 exclusions/exemptions until they can more adequately address commenters concerns.