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Revisions to the Definition of Solid Waste Final Rule Compilations: The Reasonable Efforts Condition

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Office of Resource Conservation and Recovery
U.S. Environmental Protection Agency

INTRODUCTION

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Conservation and Recovery Act (RCRA) definition of solid waste ([40 CFR 261.2](#)). In particular, this rule establishes three self-implementing exclusions to the definition of solid waste for hazardous secondary materials that are reclaimed. One of the exclusions involves hazardous secondary materials that are legitimately reclaimed under the control of the generator (onsite reclamation, reclamation by the same company, and reclamation under certain tolling arrangements). The second exclusion involves hazardous secondary materials that are transferred to another company for reclamation. The last exclusion involves hazardous secondary materials that are exported for reclamation. In addition, the 2008 DSW rule outlines a procedure for case-by-case non-waste determinations.

About the 2008 DSW Rule

On October 30, 2008, the U.S. Environmental Protection Agency (EPA) published a final rule that streamlines regulation of hazardous secondary materials to encourage beneficial recycling and to help conserve resources.

The [Revisions to the Definition of Solid Waste \(DSW\) Final Rule](#) (“DSW rule”) amends and clarifies the Resource

For more information on the DSW rule, see [EPA’s DSW Federal Register Notices web page](#)

About the “Revisions to the Definition of Solid Waste Final Rule Compilations”

The *Revisions to the Definition of Solid Waste Final Rule Compilations* provide easy access for EPA, the states, the regulated community, and the public to important information regarding three provisions under the DSW rule: legitimate recycling, reasonable efforts, and the contained standard. This user-friendly reference tool reduces the need for stakeholders to search through multiple *Federal Register* notices and will improve understanding of each of these three subjects. For each compilation, EPA has incorporated information from relevant preambles, regulations, and other materials. Please note that this reference is designed to be web-based; therefore, the usefulness of the document is maximized when it is viewed on a computer that is connected to the Internet.

This volume of the *Compilations* series provides information about the reasonable efforts condition under the DSW rule. The compilations covering the legitimacy standard and the contained standard will be available at <http://www.epa.gov/epawaste/hazard/dsw/impresource.htm#guide>.

This document is not a rulemaking and does not change any existing solid or hazardous waste requirements. Any reformatting of regulatory language is only intended to make the language easier to read. Moreover, EPA’s intention is to include only that CFR language that is directly relevant to the reasonable efforts condition. Note: other relevant language to this standard may exist and may not be included in this document; users of this document are responsible for examining all CFR language and other information that may be relevant to the reasonable efforts condition. Any language in this document, including any reformatted CFR language to assist in ease of reading, is not a substitute for the CFR itself or the requirements in the CFR. In addition, we also provide links to the [Government Printing Office’s Electronic Code of Federal Regulations Web site](#) (e-CFR), which is updated almost daily.

In addition, this reference document presents matters related only to the reasonable efforts condition of the federal definition of solid waste and hazardous waste recycling regulations. Most states are authorized to manage their own solid and hazardous waste regulatory programs. Therefore, states may have their own regulations that apply in lieu of the federal regulations. While most state regulations are based on the federal requirements, some states have developed regulations that are more stringent than the federal program. We direct you to the following Web site to determine if your state regulatory program is different from the federal program: <http://epa.gov/waste/wyl/stateprograms.htm>.

For a collection of written materials about other issues related to the definition of solid waste, see the [Definition of Solid Waste Compendium](#). For more information regarding

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the various regulations applied to facilities generating or managing hazardous waste, see [Hazardous Waste Generators: A User Friendly Reference Document](#).

The *Compilations* series is also available in Microsoft Word format from EPA upon request. For more information on these versions and any other questions or comments concerning this document, please contact EPA's Office of Resource Conservation and Recovery:

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About “The Reasonable Efforts Condition” Compilation

The reasonable efforts condition is a condition of the transfer-based exclusion from the RCRA definition of solid waste at [40 CFR 261.4\(a\)\(24\)](#) and under the exclusion at [40 CFR 261.4\(a\)\(25\)](#) for generators who export hazardous secondary materials for reclamation. This condition requires generators to conduct reasonable efforts prior to transferring their hazardous secondary materials to ensure that the reclamation facility intends to safely manage and reclaim the hazardous secondary materials. Generators must also conduct reasonable efforts on intermediate facilities, if applicable. Generators are not required to conduct reasonable efforts if the reclamation facility/intermediate facility has a RCRA Part B permit or interim status standards that address the units being used to manage the hazardous secondary materials.

This compilation discusses key elements relating to the reasonable efforts condition, including (click a topic below to jump to a section):

- [Applicability](#)
- [Five questions to answer for the reasonable efforts condition](#)
- [Frequency](#)
- [Documentation](#)
- [RCRA liability](#)
- [Regulatory text](#)

The text in the following sections is taken nearly verbatim from the preamble to the 2008 DSW rule and from final regulatory language. The excerpts presented in this compilation do not necessarily appear in the same order as in the original source. In some cases, we have reformatted passages to improve readability. Where the language in this compilation does not exactly match preamble or regulatory language, we have indicated this by bracketing the text (with the exception of headings and bold titles). As noted above, any changes to the preamble or regulatory text are for the convenience of the reader and are not to be taken as substitutes for the actual language of the regulations or the preamble.

THE REASONABLE EFFORTS CONDITION

Applicability

The reasonable efforts condition for generators [under the transfer-based exclusion from the RCRA Definition of Solid Waste at [40 CFR 261.4](#) (a)(24)] applies when hazardous secondary materials are transferred to[:]

- [I]ntermediate facilities (as defined in [40 CFR 260.10](#)) and reclamation facilities operating without a RCRA Part B permit or under the interim status standards that extend to management of the hazardous secondary materials in question [(73 FR 64686); or]
- Reclamation or intermediate facilit[ies with] a RCRA permit or compl[ying] with the interim status standards for another onsite operation unrelated to the hazardous secondary materials of interest to the generator.[73 FR 64686]

Exception for RCRA Part B Permit or interim status standards

[I]f the permit or interim status standards address the units being used to manage the hazardous secondary materials, [EPA does] not require generators to conduct reasonable efforts because [EPA believes] that a Part B permit or the interim status standards provide some assurance to generators that the facility has a measure of financial stability and that the hazardous secondary materials will be well managed. [73 FR 64686]

If a permitted facility later modifies its permit terms in a way that the permit no longer extends to the management of the hazardous secondary materials, the generator would need to perform reasonable efforts in accordance with this exclusion. EPA recommends that any hazardous secondary material generator transferring hazardous secondary materials to a permitted facility request that it get placed on the facility mailing list, so they can then receive notice of changes to the permit status of the reclaimer or intermediate facility (*see* [40 CFR 270.42](#) and [40 CFR 124.10](#)). [73 FR 64686]

[G]enerators who export hazardous secondary materials are required to notify the receiving country through EPA and obtain consent from that country before shipment of the hazardous secondary materials takes place (*see* [40 CFR 261.4\(a\)\(25\)](#)). These notice and consent requirements provide notification to the receiving country so that it can ensure that the hazardous secondary materials are reclaimed rather than disposed of or abandoned. Included by reference in [40 CFR 261.4\(a\)\(25\)](#), the generator must comply with the requirements of [40 CFR 261.4\(a\)\(24\)\(i\)–\(v\)](#), which comprise the hazardous secondary material generator requirements under the transfer-based exclusion, such as speculative accumulation and reasonable efforts. However, generators who export

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hazardous secondary materials for reclamation are not required to comply with [40 CFR 261.4\(a\)\(24\)\(v\)\(B\)\(2\)](#) for foreign reclaimers and intermediate facilities because, as part of satisfying reasonable efforts, this question requires the generator to affirmatively answer if the reclaimer or intermediate facility has notified the appropriate authorities pursuant to [§260.42](#) and if the reclaimer or intermediate facility has financial assurance as required under [40 CFR 261.4\(a\)\(24\)\(vi\)\(F\)](#). Since foreign reclaimers and foreign intermediate facilities are not subject to U.S. regulations, they cannot comply with the notification and financial assurance requirements under [the] rule (however, hazardous secondary material generators must affirmatively answer this question for domestic intermediate facilities). [73 FR 64698]

A generator should be allowed to use any credible evidence available in making reasonable efforts, including information[:]

- [G]athered by the generator[:]
- [P]rovided by the reclaimer or intermediate facility[:] and/or
- [P]rovided by a third party in lieu of personally performing an assessment. For example, the hazardous secondary material generator might hire an independent auditor to review the operations, produce audit reports as a consortium of generators, or rely on an assessment of a recycler or intermediate facility by a parent corporation or trade association that is used by several generating facilities. [73 FR 64686]

The Five Reasonable Efforts Questions

Hazardous secondary material generators wishing to take advantage of the [transfer-based] exclusion must be able to answer all [of the below] questions affirmatively to determine that their hazardous secondary materials are or will be properly and legitimately recycled and will not be discarded. [Note:] Generators who export hazardous secondary materials for reclamation are not required to comply with [40 CFR 261.4\(a\)\(24\)\(v\)\(B\)\(2\)](#). [73 FR 64698] The reasonable efforts questions are straightforward by design and will allow generators to use a common sense approach in answering the questions and satisfy[ing] the condition. These questions can be found at [40 CFR 261.4\(a\)\(24\)\(v\)\(B\)](#) and are discussed below. [73 FR 64686]

Question 1—Legitimate Recycling

Does the available information indicate that the reclamation process is legitimate pursuant to [§260.43](#)? In answering this question, the hazardous secondary material generator can rely on its existing knowledge of the physical and chemical properties of the hazardous secondary material, as well as information from other sources (e.g., the reclamation facility, audit reports, etc.) about the reclamation process. (By responding to this question, the hazardous secondary material generator has also

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satisfied its requirement in §260.43(a) to be able to demonstrate that the recycling is legitimate.) [73 FR 64687; §261.4(a)(24)(v)(B)(1)]

Determining whether a recycling operation is legitimate is a fundamental basis for establishing that a generator's hazardous secondary materials will not be discarded after being transferred to a reclamation facility. EPA believes that generators can [:]

- [W]ork with the owner or operator of the reclamation facility to verify that they have made a determination that the recycling is legitimate[.]
- [R]ely on its existing knowledge of the physical and chemical properties of the hazardous secondary material.
- [I]f questions or concerns remain regarding the legitimacy of the recycling activity, a generator could request additional information on how the definition of legitimacy is met. [73 FR 64687]

Question 2—Notification & Financial Assurance

Does the publicly available information indicate that the reclamation facility and any intermediate facility that is used by the hazardous secondary material generator have notified the appropriate authorities of hazardous secondary materials reclamation activities pursuant to [40 CFR 260.42](#) and have they notified the appropriate authorities that the financial assurance condition is satisfied per [40 CFR 261.4\(a\)\(24\)\(vi\)\(F\)](#)? In answering these questions, the hazardous secondary material generator can rely on the available information documenting the reclamation facility's and any intermediate facility's compliance with the notification requirements per [§260.42](#), including the requirement in [§260.42\(a\)\(5\)](#) to notify EPA whether the reclaimer or intermediate facility has financial assurance. [73 FR 64687; §261.4(a)(24)(v)(B)(2)]

Question (2) concentrates on whether the recycler or intermediate facility (to the extent that the hazardous secondary material generator uses an intermediate facility) has met the following obligations under the exclusion before accepting hazardous secondary materials:

- Notification of the appropriate regulatory authorities that it plans to reclaim (or, in the case of the intermediate facility, properly store the hazardous secondary material) excluded hazardous secondary materials, and
- [N]otification of the appropriate regulatory authorities that the facility has the necessary financial assurance to cover the costs of managing any hazardous secondary materials that remain if the facility closes. [73 FR 64688]

Generators may access the notification information, including the facility's notification that it has financial assurance, through EPA's public Web site at <http://www.epa.gov/enviro/html/rcris/> or other successor Web sites. [73 FR 64688]

Question 3—RCRA Compliance

Does publicly available information indicate that the reclamation facility or any intermediate facility that is used by the hazardous secondary material generator has not had any formal enforcement actions taken against the facility in the previous three years for violations of the RCRA hazardous waste regulations and has not been classified a significant noncomplier with RCRA Subtitle C? In answering this question, the hazardous secondary material generator can rely on the publicly available information from EPA or the state. If the reclamation facility or any intermediate facility that is used by the hazardous secondary material generator has had a formal enforcement action taken against the facility in the previous three years for violations of the RCRA hazardous waste regulations and has been classified as a significant non-complier with RCRA Subtitle C, does the hazardous secondary material generator have credible evidence that the facilities will manage the hazardous secondary materials properly? In answering this question, the hazardous secondary material generator can obtain additional information from EPA, the state, or the facility itself that the facility has addressed the violations, taken remedial steps to address the violations and prevent future violations, or that the violations are not relevant to the proper management of the hazardous secondary materials. [73 FR 64687; §261.4(a)(24)(v)(B)(3)]

[P]ublicly available compliance data are a reasonable starting point for evaluating a facility's environmental performance. Facility-specific enforcement data on compliance status, ongoing enforcement actions by both EPA and states, and specific case information for formal enforcement actions are readily available on EPA's public Web site at <http://www.epa.gov/echo>. [73 FR 64688]

While a facility designated as a significant non-complier and the subject of a formal enforcement action does not mean that the facility would not reclaim the hazardous secondary materials properly, it does raise questions that [EPA] believes the hazardous secondary material generator should investigate. That is, if any formal enforcement actions were taken against the facility in the previous three years for such noncompliance and the facility was alleged to be a significant non-complier, [EPA] would expect that the reclaimer would adequately explain to the hazardous secondary material generator how it has resolved any issues or how the reclamation facility will properly manage the hazardous secondary materials to avoid future violations and/ or enforcement actions. Additionally, if the generator obtains reasonable information that the enforcement matters are unrelated to the facility's commitment to manage the hazardous secondary materials properly or that the violation has been corrected and the facility is back in compliance, then that would satisfy this aspect of the reasonable efforts determination. [73 FR 64688]

The generator also may wish to make a similar investigation of facilities designated as significant non-compliers by EPA or a state even if no formal enforcement action has been taken. [73 FR 64688]

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Definition of “formal enforcement” and “significant non-complier”

“Formal enforcement” is a written document that mandates compliance and/or initiates a civil or administrative process, with or without appeal rights before a trier of fact that results in an enforceable agreement or order and an appropriate sanction. For EPA, formal enforcement action is a referral to the U.S. Department of Justice for the commencement of a civil action in the appropriate U.S. District Court, or the filing of an administrative complaint, or the issuance of an order, requiring compliance and a sanction. For states, formal enforcement action is a referral to the state’s Attorney General for the commencement of a civil or administrative action in the appropriate forum, or the filing of an administrative complaint, or the issuance of an order, requiring compliance and a sanction. [73 FR 64688]

“Significant non-complier” is a defined term in EPA’s *Hazardous Waste Civil Enforcement Response Policy* and means the violators have caused actual exposure or a substantial likelihood of exposure to hazardous waste or hazardous waste constituents; are chronic or recalcitrant violators; or deviate substantially from the terms of a permit, order, agreement, or from the RCRA statutory or regulatory requirements. In evaluating whether there has been actual or likely exposure to hazardous waste or hazardous waste constituents, EPA and the states consider both the environmental and human health concerns, including the potential exposure of workers to hazardous waste or hazardous waste constituents. [73 FR 64688]

For both terms, see EPA’s Hazardous Waste Civil Enforcement Response Policy (Dec. 2003) at <http://www.epa.gov/compliance/resources/policies/civil/rcra/finalerp1203.pdf>. [73 FR 64688]

Question 4—Equipment & Trained Personnel

Does the available information indicate that the reclamation facility and any intermediate facility that is used by the hazardous secondary material generator have the equipment and trained personnel to safely recycle the hazardous secondary material? In answering this question, the generator may rely on a description by the reclamation facility or by an independent third party of the equipment and trained personnel to be used to recycle the generator’s hazardous secondary material. [73 FR 64687; §261.4(a)(24)(v)(B)(4)]

Question 4 concentrates on the technical capability of the recycler or intermediate facility, the most basic requirement for ensuring proper and legitimate recycling of hazardous secondary materials. If a reclamation or intermediate facility was found to have no equipment or inadequate equipment for storing the hazardous secondary material or was found to have personnel who have not been trained for reclaiming the hazardous secondary materials, it raises serious questions as to whether the facility would properly manage such materials and avoid discarding them to the environment. [73 FR 64688]

EPA is [...] allow[ing] the generator to rely on the reclamation facility to explain why its equipment and personnel are appropriate. Of course, the generator must have an objectively reasonable belief based on this information that the reclamation facility’s equipment and trained personnel are adequate for safe recycling. Accordingly, if the

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equipment and personnel described by the reclamation facility would be, to an objective and reasonable person, clearly inadequate for safe recycling of the generator's hazardous secondary material, then the generator would not have met this condition. However, EPA does not require or expect the generator to have specialized knowledge or expertise of the recycling process. [73 FR 64688]

Of course, generators of hazardous secondary materials also are already familiar with equipment and personnel needed to manage their hazardous secondary materials properly at their own site. Therefore, a generator may also choose to answer question (4) using its existing knowledge of the physical and chemical properties of the hazardous secondary materials, technologies involved with managing and recycling such materials, and applicable regulations or industry standards based on the generator's experience producing and managing such materials. [73 FR 64689]

Generators may also at their discretion use[:]

- [R]elevant third-party information sources to answer questions about a facility's equipment and personnel, including audit reports;
- [I]nformation provided by industry or waste management associations related to the reclamation or intermediate facility;
- [D]ocuments provided by the reclaimer or intermediate facility; [and]
- [A]n evaluation by a qualified engineer. [73 FR 64689]

Question 5—Management of Residuals

If residuals are generated from the reclamation of the excluded hazardous secondary materials, does the reclamation facility have the permits required (if any) to manage the residuals? If not, does the reclamation facility have a contract with an appropriately permitted facility to dispose of the residuals? If not, does the hazardous secondary material generator have credible evidence that the residuals will be managed in a manner that is protective of human health and the environment? In answering these questions, the hazardous secondary material generator can rely on publicly available information from EPA or the state, or information provided by the facility itself. [73 FR 64687; §261.4(a)(24)(v)(B)(5)]

This question relates to discard through the concept that a generator or reclaimer may actually be discarding hazardous secondary materials through the release of residuals from the recycling process. While the product made from recycling may be a legitimate product, the whole recycling process could be considered a discard activity if hazardous constituents from the recycled hazardous secondary materials are released to the environment. Because the residuals from recycling can contain the hazardous constituents that originated with the hazardous secondary materials, it is important that the hazardous secondary material generator understands how a reclamation facility will manage any residuals generated. [73 FR 64689]

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Many generators of hazardous waste already understand and comply with the requirements for residuals management. Therefore, they may rely on their existing knowledge to answer question (5) and [EPA does] not anticipate that answering it will pose a significant challenge to them. [EPA] also anticipate[s] that new generators will use the same resources that are publicly available to current hazardous secondary material generators for determining applicable regulatory requirements. In addition, a reclamation facility would likely assist the generator in understanding any requirements applicable to residuals management. For example, the reclamation facility could identify the types of residuals generated by the recycling process and explain to the generator

- how [the residuals] are managed,
- whether any requirements apply, and
- how the requirements are met. [73 FR 64689]

To answer question (5), a generator should determine that the reclamation facility has practices in place to ensure that residuals are managed in a manner that is protective of human health and the environment and according to applicable federal or state standards.

- If a residual is a hazardous waste, generators could access information about a facility's permit for managing the material on EPA's public Web site at <http://www.epa.gov/enviro/html/rcris> (or successor Web sites) or through a state Web site, if such information is made publicly available.
- If a residual is a non-hazardous waste, a generator could access permit information from state agencies or a state Web site if available.
- A reclamation facility may also send its residuals to a waste management facility, in which case, a generator could ask about contracts with appropriately permitted disposal facilities.
- If a reclamation facility does not have permits for managing residuals or disposal contracts with permitted facilities, then the generator should determine that a reclamation facility has a system in place for managing residuals in a manner that is protective of human health and the environment. [73 FR 64689]

When asking about residuals management options

Any inquiry into a reclamation facility's system for analyzing options for residuals management should acknowledge that various options exist and that price fluctuations may be a determining factor for selecting an option. [73 FR 64689]

Additional Information

Of course, a generator could choose to seek additional information or ask additional questions to determine that its hazardous secondary materials will not be discarded due to concerns about [Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)] liability. One example of additional information that

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many responsible generators currently seek from recyclers, but that EPA [did] not include in [the] final rule, is information about a reclamation facility's financial health. These inquiries can include reviews of[:]

- [L]iability insurance coverage[;]
- [C]ompany annual reports[;]
- [B]ankruptcy filings[;]
- [I]nvestments in capital improvements[;]
- [M]arkets for recycled products[; and]
- [B]usiness reports, such as Dun & Bradstreet reports. [73 FR 64686]

Frequency

EPA is requiring that hazardous secondary material generators make reasonable efforts every three years, at a minimum, in order to ensure that the generators adequately manage their risk and are attune to changes at reclamation and intermediate facilities with which they are partners. [EPA] believe[s] that this schedule reflects an average time frame for re-evaluating facilities [...] although [EPA] acknowledge[s] that shorter time frames could be appropriate for certain industries. [73 FR 64689]

By specifying periodic updates for reasonable efforts every three years at a minimum, EPA in no way intends to limit a generator to conducting evaluations only every three years. In fact, EPA expects that any generator who has concerns about a reclamation or intermediate facility, or who gains new knowledge of significant changes or extraordinary situations at such facilities, would conduct reasonable efforts regardless of the required schedule. For example, if a hazardous secondary material generator conducted reasonable efforts in the first year it took advantage of the exclusion, prior to transferring materials to an intermediate facility, and then again conducted reasonable efforts in the second year upon learning about a significant change at the intermediate facility (such as bankruptcy), the hazardous secondary material generator would be required to update reasonable efforts three years later during the generator's fifth year of taking advantage of the exclusion. [73 FR 64689]

Documentation

EPA is requiring that generators maintain documentation showing that they satisfied the reasonable efforts condition under 40 CFR 261.4(a)(24)(v)(B) prior to transferring the hazardous secondary materials to the intermediate facility or the reclamation facility. Such records could include copies of audit reports and/or other relevant information that was used as the basis for affirmatively responding to inquiries about a reclamation or intermediate facility. [73 FR 64689]

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Generators are also required to certify for each reclamation and intermediate facility that reasonable efforts were made to ensure that hazardous secondary materials will be properly and legitimately recycled, and not discarded. This certification should be signed and dated by an authorized representative of the generating company prior to transferring the excluded hazardous secondary materials to a reclamation or intermediate facility under 40 CFR 261.4(a)(24). The certification should also incorporate the certification language in [40 CFR 261.4\(a\)\(24\)\(v\)\(C\)\(2\)](#). [73 FR 64689–64690]

Reasonable efforts certification language

“I hereby certify in good faith and to the best of my knowledge that, prior to arranging for transport of excluded hazardous secondary materials to [insert name(s) of reclamation facility and any intermediate facility], reasonable efforts were made in accordance with Sec. 261.4(a)(24)(v)(B) to ensure that the hazardous secondary materials would be recycled legitimately, and otherwise managed in a manner that is protective of human health and the environment, and that such efforts were based on current and accurate information.” [40 CFR [261.4\(a\)\(24\)\(v\)\(C\)\(2\)](#)]

Documentation of reasonable efforts and the certification statement must be maintained by the generator for a minimum of three years and it must be made available upon request by a regulatory authority within 72 hours, or within a longer period of time as specified by the regulatory authority. [EPA] understand[s] that many generators may maintain this kind of documentation and certification at their company headquarters or at another offsite facility; therefore, [EPA is] not requiring that they be maintained onsite. However, [EPA does] believe that generators, having satisfied the reasonable efforts condition and certified reasonable efforts prior to transferring the hazardous secondary materials, should be able to produce the documentation and certification readily. EPA notes that time frames for producing documentation are generally determined by regulatory authorities on a case-by-case basis and time frames are clearly outlined by authorities within RCRA section 3007 information request letters. [73 FR 64690]

RCRA and CERCLA Liability

EPA intends that if a hazardous secondary material generator has met the reasonable efforts condition prior to transferring hazardous secondary materials to the reclamation or intermediate facility, then the reclaimer or intermediate facility, not the generator, would be liable under RCRA if the materials were discarded (i.e., not properly and legitimately recycled). However, if the generator does not meet the reasonable efforts condition, then the generator is ineligible for the transfer-based exclusion and would be potentially liable in the event its hazardous secondary materials were discarded by a reclamation or intermediate facility. (*See* section VIII.E. [of 73 FR 64668] for more information.) EPA acknowledges that meeting this condition will not affect CERCLA liability. (*See* section XIII [of 73 FR 64668] for more information on CERCLA liability.) [74 FR 64687]

CFR LANGUAGE

261.4(a)(24) Exclusion for Hazardous Secondary Materials That Are Transferred for the Purpose of Legitimate Reclamation.

§[261.4](#)(a)(24): Hazardous secondary material that is generated and then transferred to another person for the purpose of reclamation is not a solid waste, provided that:

[CFR text not included]

(v) The hazardous secondary material generator satisfies all of the following conditions:

[CFR text not included]

(B) Prior to arranging for transport of hazardous secondary materials to a reclamation facility (or facilities) where the management of the hazardous secondary materials is not addressed under a RCRA Part B permit or interim status standards, the hazardous secondary material generator must make reasonable efforts to ensure that each reclaimer intends to properly and legitimately reclaim the hazardous secondary material and not discard it, and that each reclaimer will manage the hazardous secondary material in a manner that is protective of human health and the environment. If the hazardous secondary material will be passing through an intermediate facility where the management of the hazardous secondary materials is not addressed under a RCRA Part B permit or interim status standards, the hazardous secondary material generator must make contractual arrangements with the intermediate facility to ensure that the hazardous secondary material is sent to the reclamation facility identified by the hazardous secondary material generator, and the hazardous secondary material generator must perform reasonable efforts to ensure that the intermediate facility will manage the hazardous secondary material in a manner that is protective of human health and the environment. Reasonable efforts must be repeated at a minimum of every three years for the hazardous secondary material generator to claim the exclusion and to send the hazardous secondary materials to each reclaimer and any intermediate facility. In making these reasonable efforts, the generator may use any credible evidence available, including information gathered by the hazardous secondary material generator, provided by the reclaimer or intermediate facility, and/or provided by a third party. The hazardous secondary material generator must affirmatively answer all of the following questions for each reclamation facility and any intermediate facility:

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(1) Does the available information indicate that the reclamation process is legitimate pursuant to §260.43 of this chapter? In answering this question, the hazardous secondary material generator can rely on their existing knowledge of the physical and chemical properties of the hazardous secondary material, as well as information from other sources (e.g., the reclamation facility, audit reports, etc.) about the reclamation process. (By responding to this question, the hazardous secondary material generator has also satisfied its requirement in §260.43(a) of this chapter to be able to demonstrate that the recycling is legitimate).

(2) Does the publicly available information indicate that the reclamation facility and any intermediate facility that is used by the hazardous secondary material generator notified the appropriate authorities of hazardous secondary materials reclamation activities pursuant to §260.42 of this chapter and have they notified the appropriate authorities that the financial assurance condition is satisfied per paragraph (a)(24)(vi)(F) of this section? In answering these questions, the hazardous secondary material generator can rely on the available information documenting the reclamation facility's and any intermediate facility's compliance with the notification requirements per §260.42 of this chapter, including the requirement in §260.42(a)(5) to notify EPA whether the reclaimer or intermediate facility has financial assurance.

(3) Does publicly available information indicate that the reclamation facility or any intermediate facility that is used by the hazardous secondary material generator has not had any formal enforcement actions taken against the facility in the previous three years for violations of the RCRA hazardous waste regulations and has not been classified as a significant non-complier with RCRA Subtitle C? In answering this question, the hazardous secondary material generator can rely on the publicly available information from EPA or the state. If the reclamation facility or any intermediate facility that is used by the hazardous secondary material generator has had a formal enforcement action taken against the facility in the previous three years for violations of the RCRA hazardous waste regulations and has been classified as a significant non-complier with RCRA Subtitle C, does the hazardous secondary material generator have credible evidence that the facilities will manage the hazardous secondary materials properly? In answering this question, the hazardous secondary material generator can obtain additional information from EPA, the state, or the facility itself that the facility has addressed the violations, taken remedial steps to address the violations and

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prevent future violations, or that the violations are not relevant to the proper management of the hazardous secondary materials.

(4) Does the available information indicate that the reclamation facility and any intermediate facility that is used by the hazardous secondary material generator have the equipment and trained personnel to safely recycle the hazardous secondary material? In answering this question, the generator may rely on a description by the reclamation facility or by an independent third party of the equipment and trained personnel to be used to recycle the generator's hazardous secondary material.

(5) If residuals are generated from the reclamation of the excluded hazardous secondary materials, does the reclamation facility have the permits required (if any) to manage the residuals? If not, does the reclamation facility have a contract with an appropriately permitted facility to dispose of the residuals? If not, does the hazardous secondary material generator have credible evidence that the residuals will be managed in a manner that is protective of human health and the environment? In answering these questions, the hazardous secondary material generator can rely on publicly available information from EPA or the state, or information provided by the facility itself.

(C) The hazardous secondary material generator must maintain for a minimum of three years documentation and certification that reasonable efforts were made for each reclamation facility and, if applicable, intermediate facility where the management of the hazardous secondary materials is not addressed under a RCRA Part B permit or interim status standards prior to transferring hazardous secondary material. Documentation and certification must be made available upon request by a regulatory authority within 72 hours, or within a longer period of time as specified by the regulatory authority. The certification statement must:

(1) Include the printed name and official title of an authorized representative of the hazardous secondary material generator company, the authorized representative's signature, and the date signed;

(2) Incorporate the following language: "I hereby certify in good faith and to the best of my knowledge that, prior to arranging for transport of excluded hazardous secondary materials to [insert name(s) of reclamation facility and any intermediate facility], reasonable efforts were made in accordance with §261.4(a)(24)(v)(B) to ensure that the hazardous secondary

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materials would be recycled legitimately, and otherwise managed in a manner that is protective of human health and the environment, and that such efforts were based on current and accurate information.”

[Remaining CFR text not included]

261.4(a)(25) Exclusion for Hazardous Secondary Materials Exported for Reclamation.

§[261.4](#)(a)(25): Hazardous secondary material that is exported from the United States and reclaimed at a reclamation facility located in a foreign country is not a solid waste, provided that the hazardous secondary material generator complies with the applicable requirements of paragraph (a)(24)(i)–(v) of this section (excepting paragraph (a)(v)(B)(2) of this section for foreign reclaimers and foreign intermediate facilities)[....]

[Remaining CFR text not included]

ACRONYMS

CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
CFR	Code of Federal Regulations
DSW	definition of solid waste
e-CFR	electronic Code of Federal Regulations
EPA	U.S. Environmental Protection Agency
RCRA	Resource Conservation and Recovery Act

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