

# Overview of the Definition of Solid Waste Proposed Rule

*Signed June 30, 2011*

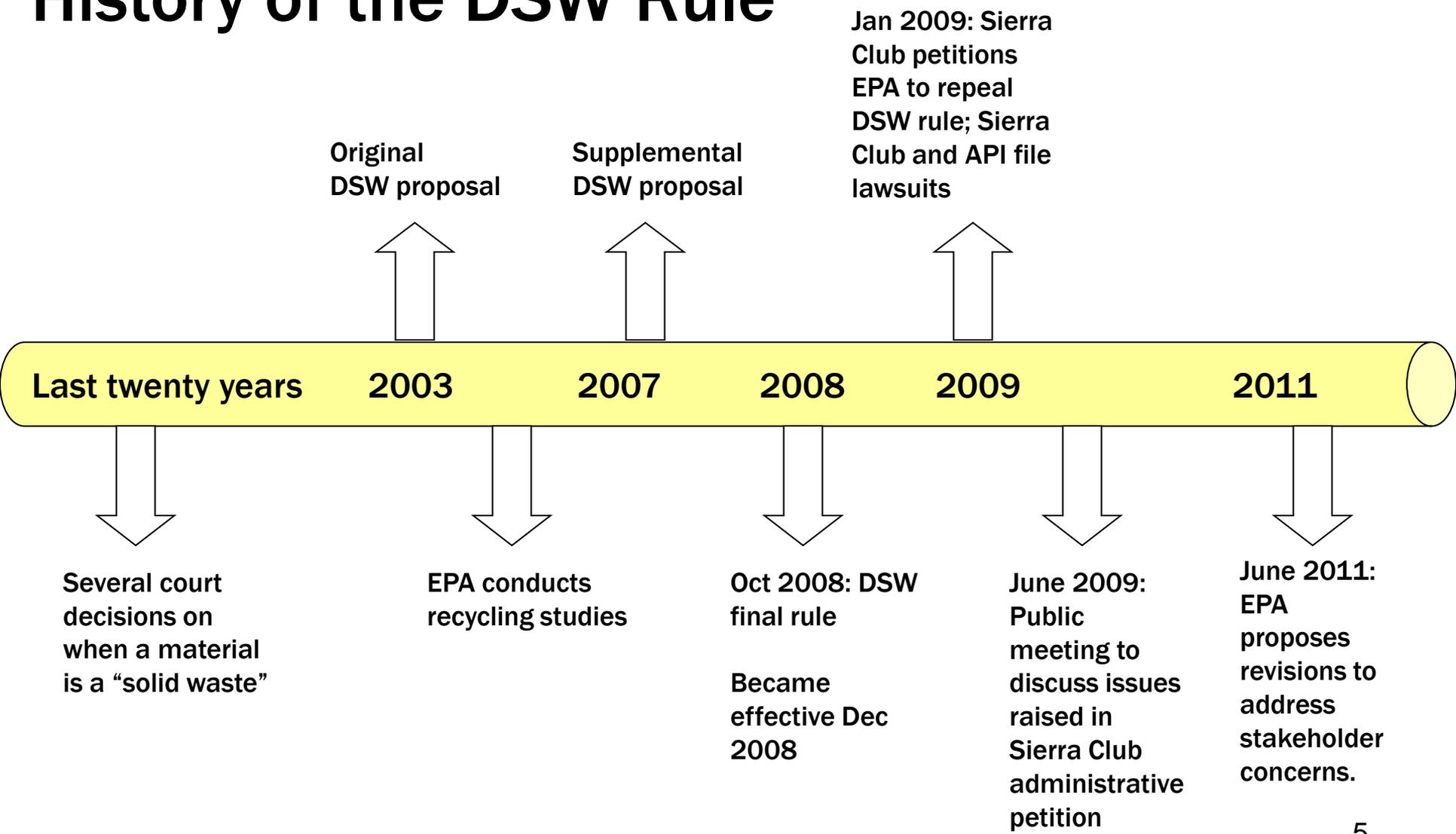
# 2011 DSW Proposed Rule

- On June 30, 2011, the EPA Administrator signed a rule proposing new safeguards for recycling hazardous materials to protect public health and the environment.
- The proposal modifies EPA's 2008 Definition of Solid Waste (DSW) rule, which revised hazardous waste regulations to encourage recycling of hazardous materials.
- The proposal will improve accountability and oversight of hazardous materials recycling, while allowing for important flexibilities that will promote its economic and environmental benefits.

# Background of the DSW Rule

- Under the Resource Conservation and Recovery Act (RCRA), EPA has the authority to regulate solid wastes. RCRA defines solid waste as:  
  
“...any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and *other discarded material*... resulting from industrial, commercial, mining, and agricultural operations, and from community activities...” (RCRA Section 1004 (27) (emphasis added)).
- A key issue since the 1980’s is when recycling or reuse constitutes “discard” and therefore is potentially subject to RCRA regulation.
- Several court decisions and hundreds of public comments have provided direction about when recycling of hazardous secondary materials resembles manufacturing and when it resembles discard.

# History of the DSW Rule



# Status of the 2008 DSW Rule

- The 2008 DSW final rule was published on October 30, 2008 (73 FR 64668) and became effective on December 29, 2008.
- The rule remains and will remain effective as part of the federal program throughout this current rulemaking process.
- The rule is currently effective in six states (AK, IA, ID, IL, NJ, and PA), in many territories, and on tribal lands.

## Improving Safeguards

Replacing the transfer-based exclusion with alternate hazardous recyclable materials standard.

Adding a regulatory definition of “contained” and additional recordkeeping requirements for generator-controlled exclusion.

Making all four legitimacy factors mandatory and requiring documentation.

Applying the regulatory definition of legitimate recycling to all hazardous waste and hazardous secondary material recycling.

Requesting comment on applying the contained standard, notification, and recordkeeping for speculative accumulation to existing recycling exclusions.

## Encouraging Recycling

Alternative standard allows generators longer accumulation time (one year) if there is a reclamation plan in place.

Retaining the generator-controlled exclusion for recycling performed on-site, at the same company, or under certain tolling agreements.

Providing a petition process for instances where legitimacy factors are not met, but recycling is still legitimate.

Requesting comment on a targeted exclusion for higher-value hazardous solvents which are re-manufactured into commercial-grade products.

# **Replacing Transfer-Based Exclusion with Alternative Subtitle C Regulation for Hazardous Recyclable Materials**

**Preamble Sections VII and VIII**

- EPA is proposing to replace the exclusion for hazardous secondary materials transferred for the purpose of reclamation with an alternative Subtitle C regulation for hazardous recyclable materials.
- Under alternative requirements, hazardous recyclable materials are generally managed according to the current RCRA Subtitle C requirements, including manifesting and hazardous waste permits for storage.

- However, generators may label these materials as “hazardous recyclable materials,” and accumulate them up to a year without a RCRA permit.
  - The generator must make advance arrangements for legitimate reclamation and document those arrangements in a reclamation plan.
  - EPA also requests comment on setting an upper limit on the amount of hazardous recyclable material accumulated at the generator site at any one time.
- EPA is also requesting comment on other ways to streamline generator standards under the alternative recycling scheme (storage requirements, manifests, personnel training, contingency plan, emergency procedures, and reporting).

# Generator-controlled Exclusion

## Preamble Section IX

- EPA is proposing to retain the generator-controlled exclusion for hazardous secondary materials reclaimed by the generator:
  - On-site
  - Within the same company
  - Within certain tolling agreements
  
- EPA is also proposing four changes to the generator-controlled exclusion:
  1. Revising the “contained” standard
  2. Making notification a condition of the exclusion
  3. Adding recordkeeping requirements for tolling
  4. Documenting compliance with speculative accumulation storage limits

- (1) We are proposing to revise the “contained” standard to clarify it and make it more effective in preventing releases. Hazardous secondary material would be “contained” if:
- Unit is in good condition with no leaks or continuing or intermittent releases of the hazardous secondary materials;
  - Is designed as appropriate to prevent releases such as precipitation runoff, releases to groundwater, dust, fugitive air emissions, and catastrophic unit failures;
  - Is properly labeled or has a system to identify the materials in the unit; and
  - Does not hold incompatible materials and addresses risks of fires or explosions.
- Units that meet applicable requirements of Parts 264 or 265 are considered contained.

- (2)** We are proposing to make notification a condition, rather than a requirement, of the generator-controlled exclusion.
- Facilities that do not notify may lose the exclusion and become subject to hazardous waste regulation.
  - The goal is to provide more incentive for facilities to notify, enable more effective oversight, and encourage more accurate public reporting of recycling information.
- (3)** We are proposing to add recordkeeping requirements for tolling contractors and manufacturers.
- Facilities must maintain records of shipments for three years and may use routine business records to meet this requirement.
  - The goal is to enable more effective compliance monitoring.

- (4)** We are proposing to add a requirement that generators document compliance with speculative accumulation storage limits.
- Generators must document the first date that the hazardous secondary material is accumulated.
  - This will enable more effective oversight and compliance monitoring.

# Legitimate Recycling Provision

Preamble Section X

- EPA has long distinguished between sham recycling and legitimate recycling (or true recycling) for the purpose of hazardous waste recycling regulations.
- EPA's guidance and preambles have discussed the need to ensure that recycling is legitimate since 1985.
- EPA promulgated a regulatory definition of legitimate recycling as part of the 2008 final rule for the 2008 reclamation exclusions.

- The definition of legitimate recycling consists of four legitimacy factors:
  1. Materials must provide a useful contribution to the recycling process or to a product or intermediate.
  2. Recycling must produce a valuable product or intermediate.
  3. Materials must be managed as valuable commodities.
  4. Products of recycling must contain levels of hazardous constituents comparable to those in analogous products.

EPA is proposing five changes regarding the definition of legitimate recycling.

**(1) Applying the legitimacy provision to all hazardous secondary material and hazardous waste recycling**

- Legitimate recycling has always been required but the current regulatory provision only applies to the 2008 DSW exclusions.
- EPA believes that most current recycling is legitimate and would already meet the codified legitimacy standards.
- This would make the legitimate recycling regulations more transparent and enforceable and would reduce the risk of environmental damage from sham recycling operations.

## (2) Making all four factors in the legitimacy provision mandatory

- A petition process would allow flexibility if a legitimate recycling process does not meet either factor 3 or factor 4.
- We are requesting comment on how frequently this would happen. (Please include enough information so EPA can evaluate whether the recycling is legitimate even though the recycling does not meet factor 3 or 4.)

## (3) Proposing new text be added to legitimacy factor 3 language:

- Where there is an analogous raw material, the hazardous secondary material must be managed in a manner consistent with the management of the raw material *or in an equally protective manner*.
- If there is no analogous raw material, the hazardous secondary material must be contained.
- Allows additional flexibility in the regulations while maintaining protectiveness.

#### (4) Proposed change to legitimacy factor 4 language:

- The legitimacy language codified for the 2008 exclusions stated that the levels of toxics in products from recycling must not be **significantly elevated** compared to analogous products.
- We are proposing to revise the wording to state that levels have to be **comparable or lower than** those found in analogous products.
- EPA considers these terms to be operationally the same.

#### (5) Recyclers must document legitimacy determinations.

- Documentation would describe how the recycling process meets the four legitimacy factors.
- No specific format is required; could also be a copy of legitimacy determination issued by the regulatory authority.
- This will make oversight and enforcement of legitimacy more effective.

# **Variances and Non-waste Determinations**

## **Preamble Section XI**

- We are proposing five changes to the variances from the definition of solid waste and non-waste determinations in 40 CFR 260.31(c), 40 CFR 260.33 and 40 CFR 260.34:
  1. Require facilities to re-notify every other year using the Site ID form;
  2. Require facilities that receive a variance to re-apply in the event of a change in circumstances that affects how the material meets the variance criteria;
  3. Require that all of the criteria for the partial reclamation variance must be reviewed and met for a variance to be granted;
  4. Require petitioners for non-waste determinations to explain why their hazardous secondary material cannot meet, or should not have to meet, an existing DSW exclusion; and
  5. Designate the Regional Administrator as the EPA recipient of petitions for variance and non-waste determinations.

# Re-manufacturing Exclusion

## Preamble Section XII

- EPA is proposing to exclude high-value solvents used for reacting, extracting, blending, or purifying chemicals in the pharmaceutical, organic chemical, plastics and resins, or the paint and coatings sector.
  - Studies by EPA's Green Engineering Program identified these industry sectors and reuse of these solvents as chemical manufacturing and processing aids as a potential opportunity to obtain large environmental benefits.
  - The solvents identified as possible candidates for a re-manufacturing exclusion are highly energy-intensive and carbon-intensive at their creation and destruction and are used in very high volumes.
  - It takes significantly less energy to bring solvents used as chemical manufacturing aids back to commercial grade than to bring solvents used as cleaners and degreasers back to functionality.
  - More environmental benefits will be obtained by maximizing the number of times a high-purity grade chemical product can be used as an aid to chemical manufacturing and processing.

- Conditions of the re-manufacturing exclusion:
  - The hazardous secondary material must be one 18 solvents that originated and is re-manufactured for use in one of four industry sectors for reacting, extracting, blending, and purifying purposes. (The solvent cannot be used for cleaning or degreasing.)
  - The generator and re-manufacturer must:
    - Notify their regulatory authority prior to using the exclusion and every other year thereafter.
    - Develop a re-manufacturing plan.
    - Maintain records of shipments and confirmations of receipt.
    - Store the spent solvents in tanks or containers that meet the same technical standards as those in 40 CFR 264 Subparts I and J.
    - Comply with air emission standards (NESHAP and 40 CFR 264 subparts AA, BB, and CC).
    - Meet speculative accumulation storage limits.
- We also request comment on other opportunities for re-manufacturing of hazardous secondary materials.

# Other Recycling Exclusions and Exemptions

## Preamble Section XIII

- EPA is requesting comment on adding notification, containment, and recordkeeping for speculative accumulation to other (pre-2008) exclusions and exemptions from hazardous waste regulations.
  - We analyzed 218 recycling damage cases documented for the 2008 DSW final rule and determined that over half of these damage cases were probably associated with an existing recycling exclusion or exemption from the hazardous waste regulations.
- We are **not** reopening comment on any substantive provisions of the regulatory exclusions or exemptions.

# List of pre-2008 recycling exclusions and exemptions

#	Citation	Description
<i>260 &amp; 261 Definition of Solid Waste</i>		
1	260.30	Procedures for variances and non-waste determinations
2	261.2 (e)	Use/Reuse
3	261.2 Table 1	Characteristic sludges being reclaimed
4	261.2 Table 1	Characteristic by-products being reclaimed
5	261.2 Table 1	Commercial chemical products being reclaimed
<i>261.4(a) Exclusions from the Definition of Solid Waste</i>		
6	261.4(a)(6)	Pulping Liquors
7	261.4(a)(7)	Spent Sulfuric Acid
8	261.4(a)(8)	Closed-Loop Recycling
9	261.4(a)(9)	Spent Wood Preservatives
10	261.4(a)(10)	Coke By-Product Wastes
11	261.4(a)(11)	Splash Condenser Dross Residue
12	261.4(a)(12)	Hazardous Oil-Bearing Secondary Materials and Recovered Oil from Petroleum Refining Operations
13	261.4(a)(13)	Processed Scrap Metal
14	261.4(a)(14)	Shredded Circuit Boards
15	261.4(a)(16)	Comparable Fuels
16	261.4(a)(17)	Mineral Processing Spent Materials
17	261.4(a)(18)	Petrochemical Recovered Oil
18	261.4(a)(19)	Spent Caustic Solutions from Petroleum Refining
19	261.4(a)(20)	Hazardous Secondary Materials Used to Make Zinc Fertilizers

20	261.4(a)(21)	Zinc Fertilizers Made from Recycled Hazardous Secondary Materials
21	261.4(a)(22)	Used Cathode Ray Tubes (CRTs)
<i>261.4(b) Solid wastes which are not hazardous wastes</i>		
22	261.4(b)(12)	Spent Chlorofluorocarbon Refrigerants
23	261.4(b)(14)	Used Oil Distillation Bottoms used to manufacture asphalt products
<i>261.6 Requirements for recyclable materials (hazardous wastes)</i>		
24	261.6(a)(3)(ii)	Scrap metal
25	261.6(a)(3)(iii)	Waste-derived fuels from refining processes
26	261.6(a)(3)(iv)	Unrefined waste-derived fuels and oils from petroleum refineries
27	261.6(c)(2)	Reclaimers that do not store
<i>261.7 Residues of hazardous waste in empty containers</i>		
28	261.7	Residues of hazardous waste in empty containers
<i>Part 266 Standards for the Management of Specific Hazardous Wastes</i>		
29	266 Subpart C	Recyclable Materials Used in a Manner Constituting Disposal
30	266 Subpart F	Materials Utilized for Precious Metal Recovery
31	266 Subpart G	Spent Lead-Acid Batteries Being Reclaimed
32	266 Subpart H	Hazardous Waste Burned in Boilers and Industrial Furnaces

# Environmental Justice Analysis

## Preamble Section VI

- In 2009, EPA agreed to perform an expanded environmental justice analysis in response to concerns about the 2008 DSW final rule's potential impact on communities. EPA developed an innovative methodology that incorporated sound science and community engagement.
- EPA began by soliciting input from the public through roundtables, conference calls and webinars.
- The Agency then identified potential hazards to communities from the recycling of hazardous secondary materials and from the facilities that may take advantage of the 2008 DSW rule.
- EPA then analyzed the demographics of the communities surrounding the facilities.

- EPA determined that certain population groups could be disproportionately adversely impacted under the 2008 DSW rule.
- EPA incorporated these considerations in the revised 2011 proposed rule to mitigate these potential adverse impacts, as allowed under applicable authorities.
- EPA requests public comment on the environmental justice analysis as well as on suggested changes received from peer review. The analysis and peer review comments will be available in the docket for this rulemaking once the proposal is published.

# Next Steps on the Proposed Rule

- EPA will accept public comments once the proposed rule is published in the Federal Register on July 22, 2011.
- Comments may be submitted by going to [regulations.gov](http://www.regulations.gov) and following the instructions for submitting comments. You will need the rulemaking docket number for this proposed rule: EPA-HQ-RCRA-2010-0742.
- EPA plans to conduct webinars and public meetings to solicit comment on the proposed rule. Information regarding these meetings (as well as on the proposal) can be found at: <http://www.epa.gov/epawaste/hazard/dsw/rulemaking.htm>.
- EPA has agreed to publish a final rule by December 31, 2012.