



## Northeast Waste Management Officials' Association

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OSWER Docket, EPA Docket Center, Mail Code 28221T  
Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460  
Attention: Docket ID No. EPA-HQ-RCRA-2010-0742

and

Office of Information & Regulatory Affairs  
Office of Management and Budget  
Attn: Desk Officer for EPA  
725 17<sup>th</sup> Street  
Washington, DC 20503

RE:NEWMOA's Comments on the Proposed Rule for the Definition of Solid Waste  
(Docket ID No. EPA-HQ-RCRA-2010-0742)

Dear Sir or Madam:

The Northeast Waste Management Officials' Association (NEWMOA) appreciates the opportunity to comment on the proposed revisions to the Definition of Solid Waste (DSW), as published in the July 22, 2011, Federal Register (76 FR 44094). NEWMOA is submitting these comments on behalf of Connecticut, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont. The Maine Department of Environmental Protection (ME DEP) will be submitting a separate comment letter.

The proposed revisions are intended to encourage recycling of hazardous secondary materials while at the same time reducing the likelihood of harm to human health and the environment due to improper management of these materials. In general, NEWMOA is supportive of the proposed revisions and offers the following comments.

### **Transfer-Based Exclusion**

EPA has proposed to withdraw the exclusion at 40 CFR 261.4(a)(24) and (25) for hazardous secondary materials (HSMs) that are transferred for the purpose of legitimate reclamation. NEWMOA strongly supports this withdrawal and agrees with EPA's rationale for the withdrawal. NEWMOA agrees with the results of EPA's analysis, which found that the transfer-based exclusion may pose significant risks to human health and the environment from HSMs that may become discarded, and that the 2008 DSW final rule has serious gaps that create the potential for adverse effects to human health and the environment. On page 44110, EPA indicates that it is seeking ideas for waste streams

or recycling practices that would be appropriate for exclusion. NEWMOA believes the exclusion is a flawed concept that should not be applied to any hazardous waste.

As an alternative to withdrawing the transfer-based exclusion, EPA has requested comment on providing alternative approaches that would address the concerns raised about the exclusion, such as requiring reclamation facilities to be inspected every five years or to self-certify annually that no releases have occurred. NEWMOA does not support these alternatives because they are not adequately protective of human health or the environment and because they would require the expenditure of state resources at a time when those resources are scarce.

It is worth noting that New Jersey is the only state in Northeast that has implemented the 2008 DSW rule. To date, the NJ DEP has not experienced any difficulties with the transfer-based exclusion. However, only permitted TSDFs have been involved, and Agency staff frequently inspects commercial TSDFs, at least once a month and sometimes once a week. They have not had any 'secondary facilities' involved and no situations with tolling agreements.

If EPA does keep any form of the exclusion, the Agency should address the existing problem of interstate waste shipments. The 2008 proposal does not allow a facility in a state that has adopted the rule to receive waste from a facility in a state that has not. This is a barrier to interstate commerce that unreasonably punishes both the generator and the destination facility.

EPA has proposed to replace the transfer-based exclusion with alternative Subtitle C standards for hazardous recyclable materials (HRMs). The alternative Subtitle C standards, as proposed in 40 CFR 266 Subpart D, include notification, a reclamation plan, management standards, and transportation. NEWMOA thinks that the proposed alternative standards encourage recycling of HRMs and at the same time ensure that systems are in place to discourage mismanagement. As stated above, NEWMOA strongly believes that this is much more preferable than the transfer-based exclusion in the existing regulations.

#### Notification & Reclamation Plans

EPA is proposing to require generators to: notify before operating under the alternative standards, re-notify every two years, and notify when they stop managing HRMs. NEWMOA supports the notification requirement, including requiring the generator to notify in order to qualify for the alternative standards.

NEWMOA supports the reclamation plan concept, as well as the information proposed to be included in the reclamation plan, except that the generator should be required in §266.30(b)(2) to revise the reclamation plan within a certain timeframe when there are changes to the information in the plan.

#### Legitimacy

EPA has proposed revisions to the definition of legitimacy in 40 CFR 260.43, including applying the codified definition to recycling activities regulated under 40 CFR 260-266; making all legitimacy factors mandatory; and requiring documentation of legitimacy. NEWMOA generally supports this proposal, but has concerns about applying them to certain recycling exclusion categories.

### Management Standards for HRMs

NEWMOA supports the proposed management standards in §266.30(b)(3) and (4), including the alternative labeling requirement and storage of HRMs for up to one year. The Association recommends that storage units, including containers and tanks, be labeled to indicate the start date of accumulation.

EPA requests comment on the possibility of limiting the maximum volume accumulated on site at any one time to no more than two standard shipments to the designated facility, as identified in the generator's reclamation plan. NEWMOA supports the establishment of an upper limit, if the recycler can show that there is no speculative accumulation occurring. NEWMOA is, however, concerned about basing a maximum accumulation limit upon shipment size, especially since the size of the shipments are specified in a reclamation plan that is not required to be updated when circumstances change. We are concerned that this combination of provisions would be difficult to enforce and would lead to unnecessary confusion. We suggest that EPA require the reclamation plan to be updated when circumstances change and set a time limit and not a quantity limit on the accumulation of HRMs.

### Transportation

NEWMOA supports the proposed transportation requirements, including the applicability of 40 CFR 262 Subparts B and C. EPA has requested comment on whether to devise an alternative manifest system specifically for HRMs. NEWMOA does not support an HRM-specific alternative manifest system. Such a system would be costly to develop and implement and would not provide enough benefit to the regulated community and state regulatory agencies to justify the expense.

Use of the existing hazardous waste manifest, with an adjustment, would be simpler and familiar to generators. EPA could require the use of a code, such as "HRM," in box 13 of the manifest instead of the waste code that would apply to the material if it were shipped as a hazardous waste. Such a requirement would help distinguish shipments of HRMs from shipments of hazardous wastes and non-hazardous wastes, benefiting both the generator and regulatory agencies.

### Other Major Areas of Generator Standards

NEWMOA recommends that generators be required to follow the usual requirements for on-site management of hazardous wastes except that while accumulated on-site, each container and tank should be labeled or marked clearly with the words "hazardous recyclable material," rather than being marked as "hazardous waste."

EPA has requested comment on counting HRMs toward a generator's status and on the applicability of other major areas of the generator standards. NEWMOA thinks that the HRMs should count toward a generator's status since by definition they would be a hazardous waste. In addition, there is no way for a regulator or others to know what percentage of the generated hazardous waste is to be managed as an HRM.

NEWMOA recommends that the other major generator standards should apply without any watering down of Subtitle C requirements. Further reduction of requirements beyond those proposed in 40 CFR 266 Subpart D (*i.e.*, notification, reclamation plan, management, and

transportation) would resemble too closely the transfer-based exclusion that EPA is rightly proposing to repeal.

Our specific comments on the major areas of the generator standards are as follows:

- We do not support employing the contained standard (§260.10) in place of the requirements for containers, tanks, containment buildings, and drip pads. We think that the contained standard is not protective enough for HRMs that will not be reclaimed under the control of the generator.
- We do not support the use of shipping papers in lieu of manifests because shipping papers do not provide the regulatory mechanism for tracking, returning copies, and rejecting shipments. The use of shipping papers would make inspection and enforcement more time-consuming and difficult.
- We do not support a reduction of requirements for personnel training, contingency plans, and emergency procedures for several reasons. Generators should have trained personnel onsite who can implement procedures to handle emergency situations. The HRMs are still hazardous wastes by definition, as EPA points out in Section VIII.C (page 44112, column 1) of the preamble, and are not less dangerous than hazardous wastes managed as such. In addition, having different training and contingency plan requirements for hazardous wastes versus HRMs would be especially confusing for facilities if they generate both hazardous wastes and HRMs. And finally, if the HRMs have to be disposed instead of reclaimed, the generator could be in violation of the major RCRA program requirements until the wastes are removed from the site.

### **Generator-Controlled Exclusion**

The 2008 DSW rule provided an exclusion in §261.4(a)(23) from the definition of solid waste for “hazardous secondary material generated and reclaimed under the control of the generator,” as defined in §260.10. “Under the control of the generator” can mean one of three things:

- hazardous secondary materials (HSMs) are generated and then reclaimed at the generating facility;
- HSMs are generated and reclaimed at different facilities (as long as the reclamation facility is under the control of the generator or both the generator and the reclamation facility are under common control); or
- HSMs are generated and reclaimed pursuant to a tolling agreement.

The current proposal would make changes to five areas: 1) the contained standard; 2) notification as a condition; 3) recordkeeping for speculative accumulation; 4) recordkeeping for the tolling provision; and 5) clarifying edits. NEWMOA is pleased to provide comments on each of those areas.

NEWMOA agrees with EPA’s proposal to retain the exclusion for HRMs reclaimed under the control of the generator, with notification as a condition of the exclusion, and with adding a recordkeeping requirement for speculative accumulation in 40 CFR 261.1(c)(8). The Association believes that the proposed changes are positive because the addition of a definition of “contained” is crucial to making sure the regulations prevent releases from storage in containers that are incompatible or in poor condition. The 2008 regulations had no such definition and, therefore, the container requirements were not enforceable. Making notification a condition of exclusion is important because if the advantages of the exclusion are afforded to non-notifiers, there is little incentive to notify. The additional recordkeeping requirements for

speculative accumulation are important in order to reduce the burdens on already strained state inspection resources and to help ensure that the generators maintain compliance and do not excessively accumulate materials.

#### Contained Standard

The proposed revisions to the contained standard make that provision much clearer and more easily enforceable. NEWMOA would prefer that HSMs were managed under the traditional Subtitle C requirements for containers, tanks, containment buildings, and drip pads, for which much precedent has been established through regulatory interpretations. However, we are satisfied that the proposed contained standard is protective of human health and the environment, may ease the regulatory burden for generators that recycle HSMs, is easier to implement and enforce than the 2008 version, and will provide state programs with flexibility to make a determination about whether a material is contained or discarded. NEWMOA supports providing a definition of “contained” in the regulatory text at §260.10. We are also pleased that EPA is proposing to replace the 2008 language on “significant” releases with language that will clarify the regulatory status of units from which releases have occurred.

#### Notification

NEWMOA strongly agrees that notification should be a condition of the exclusion. NEWMOA supports a one-time notification provision as a condition of the generator-controlled exclusion in 40 CFR 261.4(a) (23). Under the 2008 DSW, notification is simply another requirement under the exclusion instead of one of the mechanisms that allows the generator to take advantage of the provision. As EPA explains in preamble Section IX.B.2.b., (page 44115, column 3), the 2008 rule created an unintended incentive for generators, intermediate facilities, and reclaimers not to notify, since they could evade oversight until caught and then face only a paperwork violation. Notification would make state programs aware of a generator’s intent to recycle and provide evidence that the generator is aware of the responsibilities that come with the exclusion. If a generator fails to notify, states could use enforcement discretion to determine whether the lack of notification was intentional, taking into consideration how they are managing their HSMs on site.

#### Recordkeeping for Speculative Accumulation

NEWMOA supports requiring persons operating under the generator-controlled exclusion to either label the storage unit with the first date that the excluded HSMs began to be accumulated, or record that date in an inventory log. We agree with EPA’s reasoning in preamble Section IX.B.3 (page 44116, column 2) that this is not unduly burdensome and that it will clarify whether a facility is operating in compliance with the exclusion. EPA requested comment on other methods of measuring storage durations or identifying start dates, such as a requirement to post accumulation start dates in storage areas, within a specified number of feet of the storage unit. NEWMOA thinks that the two recordkeeping options presented by EPA in the draft rule provide sufficient flexibility to generators, while at the same time providing clear information for compliance assessment purposes.

EPA has also requested comment on whether the recordkeeping provision should be added not only to the generator-controlled exclusion in §261.4(a)(23), but also to the speculative accumulation provision in §261.1(c)(8). NEWMOA strongly supports that idea. Having the accumulation start date readily available provides assurance to generators and to inspectors that

the generator is in compliance with the speculative accumulation provision. In addition, since the language of 261.1(c)(8) would need to be altered to add this recordkeeping requirement, we suggest that EPA consider amending the language of that provision to address the long-existing loophole that its rules allow up to *two* years of storage for the materials having a start-accumulation date of January 2 or later.

#### Tolling Provision

EPA is proposing to require entities operating under the tolling provision to maintain shipping records for all shipments of HSMs. EPA has requested comment on whether this recordkeeping requirement would make the exclusion easier to enforce. NEWMOA would prefer to see the entire tolling provision concept eliminated for two reasons: we do not think it would be frequently utilized, and we do not think it is sufficiently protective of human health and the environment. NEWMOA suggests that persons operating under tolling agreements are more appropriately regulated under the alternative Subtitle C standards for HRMs transferred to a third party for reclamation. However, we think that the recordkeeping requirement is a step in the right direction. A fundamental flaw lies in the requirement that the tolling contractor must certify that it retains ownership of, and liability for, the HSMs generated during manufacturing, including any releases of HSMs during the manufacturing process at the toll manufacturer's facility. We think that a person acting as a tolling contractor would put themselves at great financial risk by signing such a certification, since there is less incentive for the toll manufacturer to manage the HSMs appropriately when the liability for mismanagement falls to another party. If a release of HSMs caused harm or posed a significant threat of harm to human health or the environment, the tolling contractor and tolling manufacturer would likely end up in litigation. The financial responsibility for any necessary environmental remediation could be tied up in the courts for years.

EPA has also requested comment on whether a recordkeeping requirement should be applied to HSMs that are generated and reclaimed at different facilities where both facilities are under the control of the generator. NEWMOA supports the application of the recordkeeping requirement to those entities. A recordkeeping requirement would enable state inspectors to verify that HSMs have indeed been shipped to a facility under the control of the generator. Such a requirement would also provide assurance to the generator that the type and quantity of HSMs shipped between their facilities are well documented. We also note that since only one corporate entity would be held responsible if HSMs were mismanaged, the likelihood of mismanagement is decreased even though the HSMs are generated and reclaimed at different facilities.

#### Clarifying Edits

EPA is proposing to improve the clarity of the requirements pertaining to the generator-controlled exclusion by moving to 40 CFR 261.4(a)(23) the requirements for non-land-based units (currently at 40 CFR 261.2(a)(2)(ii)) and the applicable definitions, which include the certification requirements (currently at 40 CFR 260.10). NEWMOA supports this proposal.

#### Definition of Legitimacy

The 2008 DSW rule codified at §260.43 established four factors for distinguishing between legitimate recycling and sham recycling of the materials covered under the 2008 DSW exclusions and non-waste determinations. Factor 1 is that the HSM must provide a useful contribution to the recycling process or to a product of the recycling process. Factor 2 is that the

recycling process must produce a valuable product or intermediate. Factor 3 is that the generator and recycler should manage the HSM as a valuable commodity. Factor 4 is that the product of the recycling process does not: contain significant concentrations of hazardous constituents that are not found in analogous products; contain concentrations of hazardous constituents that are significantly elevated from those found in analogous products; and exhibit a hazardous characteristic that analogous products do not exhibit. The first two factors in determining legitimacy are mandatory (*i.e.*, the factors must be met for the recycling process to be legitimate), while the second two factors have to be considered but not necessarily met. In the 2011 proposed rule, EPA is proposing to revise §260.43(a) to make all four legitimacy factors mandatory, instead of requiring factors 3 and 4 to be considered but not requiring that they be met.

NEWMOA strongly supports making all four factors mandatory. Having the legitimacy factors in rule (instead of only in rule preamble and in policy documents) would provide clearer instruction to the regulated community and would strengthen the ability of state programs to enforce the criteria in situations where recycling is not legitimate. This will reduce the potential risk to human health and the environment from mismanagement and from elevated concentrations of contaminants in recycled products. This will also remove a serious flaw in the enforceability of legitimacy as codified under the 2008 DSW rule.

EPA is also proposing several other changes, including applying legitimacy criteria to all recycling activities, revising the language for two of the factors, and requiring documentation of legitimacy.

#### Legitimacy Codified for All Recycling

EPA is proposing to apply all four legitimacy factors to all recycling activities, including:

- HRMs managed under the alternative Subtitle C standards;
- HSMs that, because they are recycled, are excluded or exempted from Subtitle C regulation (*e.g.*, under §261.4(a));
- Materials determined to be non-wastes under §260.34; and
- Recyclable hazardous wastes that are regulated under Subtitle C prior to recycling or subject to reduced regulation.

NEWMOA is concerned about applying the legitimacy criteria to all of the 32 recycling exclusions, and member state agencies will be providing comments on this part of the proposed rule.

#### Legitimacy Factors

EPA is also proposing to allow a petition process for recycling that does not meet factor 3 or factor 4 or both, but is still legitimate. NEWMOA is concerned that state programs may not have the resources available to administer this petition process.

#### New Language for Legitimacy Factor 3

EPA is proposing to revise factor 3 to make it mandatory and to require the HSM to be managed in a manner consistent with the management of the analogous raw material (if there is one) “or in an equally protective manner”. NEWMOA supports these revisions.

#### *New Language for Legitimacy Factor 4*

EPA is proposing to revise factor 4 to make it mandatory and revise the regulatory language of factor 4 from “significant” and “significantly elevated” to “comparable to or lower than” to better reflect the intent of this factor. NEWMOA supports these revisions based on the discussion provided in preamble Section X.B.4 (page 44124, column 1). In addition, NEWMOA recommends that the “comparable to or lower than” criterion be applied to the HSM itself and not to the product of the recycling process.

#### *Documentation of Legitimacy*

EPA is proposing to require documentation regarding the legitimacy determination to be maintained on site where the recycling occurs. NEWMOA supports the codification of a legitimacy documentation requirement in §260.43. However, we think that the documentation should be maintained at both the site where recycling occurs and at the generator’s site, if the recycler is a third party. While EPA has noted that generators could ask for legitimacy documentation from their recycler, in our members’ experience the delay in obtaining such documentation slows down the compliance evaluation process. In addition, it behooves the generator to obtain, evaluate, and maintain the legitimacy documentation since it serves as assurance that their materials are being legitimately recycled and that they, the generator, are acting as good environmental stewards.

EPA has not proposed a specific format for the documentation of legitimacy, but has provided in preamble Section X.B.5 (page 44125, column 1) detailed descriptions of its expectations for such documentation. NEWMOA suggests that, soon after promulgation of the final rule, EPA prepare a guidance document that provides examples of proper documentation as well as any other acceptable examples received by EPA during the public comment period. A guidance document made available on EPA’s website would be more user-friendly and accessible to the regulated community than a reference to the draft rule preamble.

As stated above, NEWMOA supports the application of the legitimacy criteria, and therefore the documentation of legitimacy, to the recycling of HSMs, not just materials excluded under the 2008 DSW rule. Recyclers should have no trouble in proving their activities are legitimate. If the process of generating such documentation brings to light characteristics of their operation that do not meet the legitimacy criteria, then the recycler has the opportunity to correct those issues before an inspector shows up at their facility. NEWMOA thinks that documentation has always been essential to ensuring legitimacy, and having a documentation requirement codified in rule enables state programs to properly implement and enforce the codified legitimacy criteria.

#### **Revisions to Solid Waste Variances & Non-Waste Determinations**

EPA has proposed several revisions to help ensure consistency and protectiveness in the issuance of solid waste variances and non-waste determinations under the provisions of §260.31(c), §260.33 and §260.34. NEWMOA supports EPA’s efforts in this regard; however, we are concerned about the state agency resources necessary to implement these determinations.

#### *Revisions to Procedures for Variances & Non-Waste Determinations*

EPA is proposing to require recipients of solid waste variances to reapply for the variance if changes occur that affect how the HSMs meet the relevant criteria upon which the original variance was based. Recipients of non-waste determinations are already required to reapply in

such situations. NEWMOA supports this revision and EPA's efforts to ensure clarity and consistency.

Proposed revisions would also require facilities receiving variances or non-waste determinations to re-notify every 2 years and to notify within 30 days of stopping management of the materials covered under the variance or non-waste determination. NEWMOA supports this requirement, since it would provide state programs with updated information about the facility's activities, enabling better monitoring of compliance.

EPA is also committing in preamble Section XI.A.2 (page 44128, column 1) to providing an online list of variances and non-waste determinations issued by EPA and state programs to help promote consistency state to state. NEWMOA encourages EPA to develop this resource as soon as is practicable.

#### Revisions to Partial Reclamation Variance

EPA is proposing several revisions to the partial reclamation variance at §260.31(c). The introductory text is being revised for clarity and to require that all criteria are met, and each of the criteria is being reworded to reflect EPA's intent to apply the variance only to commodity-like material. NEWMOA thinks the revisions to the introductory text make the intent of the variance clearer, and we recommend that a material should meet all the criteria in order to qualify for a variance. Regarding the proposed revisions to criterion 1, we support replacing "processing" with "partial reclamation." We understand the rationale for changing the criterion to assess the degree to which the material has been reclaimed and is no longer the original hazardous waste. We are concerned, however, with the use of the subjective term "substantial" in determining whether a material meets criterion 1, as described in §260.31(c)(1). Regarding criteria 2 – 5, as outlined in §260.31(c)(2) – (5), NEWMOA thinks that the proposed revisions better explain the qualities that the material must demonstrate to be eligible for a variance and do not need to be consolidated. We agree with the removal of criteria 6 [§260.31(c)(6)] and can think of no additional characteristics that need to be evaluated.

We expect the revisions to the partial reclamation variance to help resolve national consistency issues for variances issued in the future. We hope that EPA will ensure that variances issued for materials that do not meet the revised criteria are rescinded or at least revised. If EPA is aware of variances it considers inconsistent or inappropriate, we would encourage the Agency to work with state programs to address those issues.

#### Change to Non-Waste Determinations

EPA is proposing to revise the standards and criteria for non-waste determinations at §260.34(b)(4) and (c)(5) to require facilities to explain why they cannot meet or should not have to meet the existing exclusions at §§261.2 or 261.4. The purpose of the revision is to reduce the burden that non-waste determinations put on the states. NEWMOA supports the revision. However, this slight reduction in burden may not be enough of an incentive for states to seek authorization for issuing non-waste determinations.

#### Designating the Regional Administrator to Receive Petitions

EPA is proposing to change "Administrator" to "Regional Administrator" in §260.30 through

§260.34. NEWMOA does not support this change, since it would create the opportunity for inconsistencies to arise among regional interpretations.

#### *Other Possible Steps to Help Ensure National Consistency & Protectiveness*

EPA has requested comment on other ways to promote national consistency in the implementation of the variance and non-waste determination provisions. NEWMOA does not support making variances and non-waste determinations subject to periodic renewal. The proposed revision to §260.33(c) requires the applicant to re-apply if the circumstances surrounding the HSM change how the HSM meets the relevant criteria. That requirement provides sufficient means of oversight without burdening states to completely reevaluate the variance or non-waste determination.

EPA is also requesting comment on whether to formalize an arrangement with authorized states to share with EPA copies of petitions received as well as the state's draft decisions. NEWMOA would welcome such a change.

#### **Re-manufacturing Exclusion**

EPA has requested comment on, but has not provided draft rule language for, an exclusion for the re-manufacturing of certain high-value solvents within specified industries. EPA explains in preamble Section XII.A. (page 44132, column 1) that the goal of the exclusion “would be to encourage sustainable materials management by identifying specific types of transfers of hazardous secondary materials to third parties that, under appropriate conditions, do not involve discard and can result in extending the useful life of a commercial-grade chemical.” We appreciate EPA's arguments that:

- re-manufacturing is a more sustainable way to manage materials;
- solvents covered by the proposed exclusion are highly energy- and carbon-intensive at their creation and destruction and, therefore, their useful life should be extended as much as possible;
- this exclusion could result in less solvent being manufactured and disposed of; and
- transportation costs are reduced when materials are sent for re-manufacturing rather than disposal.

NEWMOA strongly believes that the re-manufacturing exclusion should apply only to the solvents described in the preamble and should not be expanded to include other materials until the utilization, effectiveness, and safety of the exclusion, as well as the compliance rates of facilities taking advantage of the exclusion, have been fully evaluated. There are always unexpected consequences to new regulations, and EPA should wait to see what happens before expanding this exclusion even further. EPA argues in preamble Section XII.B.3 (page 44135, column 1) that the proposed re-manufacturing exclusion should not be available to “commercial recyclers, whose profit depends on maximizing the amount of hazardous secondary material accepted, creating a perverse market incentive to over-accumulate hazardous secondary material, resulting in discard.” We are concerned that given the complexity of corporate ownership structures, solvent (or any other HSM) could be reclaimed by a waste management division of a large corporation whose primary business is manufacturing. If EPA is going to exclude re-manufacturing of certain solvents, the Agency should make it clear whether the exemption is meant to cover only pure formulations of the eight chemicals or include substances, like mineral

spirits, that may contain some of these chemicals. If it were the latter, we believe the designation as a high value material would be questionable.

EPA has requested comment on other issues related to the re-manufacturing exclusion, including direct shipment to the re-manufacturer, imports/exports, financial assurance, public participation, and recordkeeping/reporting of environmental benefits. If the re-manufacturing exclusion is implemented, NEWMOA thinks that spent solvents should be shipped directly from the generator to the re-manufacturer with no intermediate stops. The lack of a proposed accumulation time or quantity limit, other than speculative accumulation, provides ample opportunity for small businesses to accumulate quantities sufficient for shipment directly to re-manufacturers. We also think that the re-manufacturing exclusion should be limited to generation and reclamation within the United States.

EPA is also requesting comment on whether re-manufacturers should be required to have financial assurance and to go through a public participation and/or regulatory agency approval process. NEWMOA supports requirements for financial assurance, public participation, and regulatory agency approval; however, we are concerned about a shortage of state resources to review and approve such requirements for non-RCRA permitted facilities.

#### **Revisions to Other Recycling Exclusions & Exemptions**

EPA has proposed to apply all four legitimacy criteria, recordkeeping for speculative accumulation, the contained standard, and the notification provision to the 32 regulatory provisions listed on page 44139 of the preamble. NEWMOA generally supports this proposal, but has concerns about applying them to certain recycling exclusion categories. The rule would codify the implied conditions under which these materials should currently be recycled (*i.e.*, recycling should be legitimate, and materials should be contained). The proposed revisions also would allow state programs and the regulated community to better ensure that these materials are being handled appropriately, especially by notifying states of their recycling activities and also by keeping records to document compliance with the speculative accumulation provision.

#### **Effect on Other Programs & Provisions**

Under the 2008 DSW final rule, the derived-from rule [§261.3(c)(2)] does not apply to residuals generated from the reclamation of HSMs excluded under the generator-controlled and transfer-based exclusions. Residuals would be considered a new point of generation, subject to a hazardous waste determination. EPA is requesting comment on whether the derived-from rule should be modified to regulate such residuals. NEWMOA does not anticipate the need for such a modification, because most treatment residuals would exhibit a hazardous waste characteristic and/or be a listed hazardous waste themselves.

#### **Implementation Issues**

In preamble Section XV.C (page 44143, column 3), EPA has requested comment on issues of interstate transport of HSMs between two states when one has adopted the 2008 DSW final rule and the other has not. Under the 2008 DSW rule, if the originating state has not adopted the rule, but the receiving state has, the HSMs would have to be managed as hazardous wastes in both states, and the HSMs would not be eligible for the exclusion because the generator (in the state that did not adopt the 2008 rule) would not meet the notification and “reasonable efforts” requirements. EPA acknowledges that this issue would be rendered moot if EPA replaces the

transfer-based exclusion with alternative Subtitle C requirements. However, interstate transport may be a concern for the generator-controlled exclusion and for the re-manufacturing exclusion, if EPA adopts rules for it.

As we have stated above, NEWMOA strongly supports the replacement of the transfer-based exclusion with alternative Subtitle C requirements. However, if the transfer-based exclusion is retained, at least some of the NEWMOA member states would consider adopting rules similar to those suggested by EPA in preamble Section XV.C (page 44144, column 1) that would enable generators to transport HSMs to facilities in states that have adopted the transfer-based exclusion.

If a state chooses not to adopt the generator-controlled exclusion, but wants to allow its generators to ship HSMs to a generator-controlled facility in a state that has adopted the exclusion, the generating state would have to adopt rules that would require the generator to notify in accordance with §260.42, to reclaim the waste within the United States or its territories, and to document that the recycling is legitimate per §260.43. The remaining requirements of the generator-controlled exclusion, specifically that the HSMs be contained and not speculatively accumulated, are satisfied through compliance with the generating state's hazardous waste requirements.

NEWMOA believes EPA should allow for the shipment of hazardous secondary materials from a state that does not adopt the "under the control of the generator" exclusion to a state that has adopted that exclusion. For a number of years, states in the NEWMOA region have allowed shipments of waste that may be hazardous in one state and not in another on a hazardous waste manifest provided that appropriate notation is made on the status of the waste in the respective states. There may be some benefit to EPA clarifying this in the rule.

For the same reasons EPA gives for the transfer-based exclusion in preamble Section XV.C. (page 44143, column 3), a generator in a state that has adopted the generator-controlled exclusion could only ship HSMs for reclamation in a state that has not adopted the exclusion if the HSMs were subject to the full hazardous waste requirements of the receiving state and were sent to a RCRA-permitted facility.

NEWMOA asks EPA to consider whether the interstate transport issues associated with the re-manufacturing exclusion could be resolved in a manner similar to those described above for the transfer-based and generator-controlled exclusions. However, since EPA did not provide draft rule text and requested comment on a multitude of variables associated with the exclusion, it is difficult to predict what the interstate transport implications would be and, therefore, how they should be addressed.

### **Conclusion**

In summary, NEWMOA is generally supportive of the revisions EPA has made in this proposal and offers its comments to help improve upon the proposal.

NEWMOA is a nonprofit, nonpartisan interstate association that has a membership composed of the hazardous waste, solid waste, waste site cleanup, and pollution prevention program directors for the environmental agencies in Connecticut, Maine, Massachusetts, New Hampshire, New

Jersey, New York, Rhode Island, and Vermont. NEWMOA was established by the Governors of the New England states as an official regional organization to coordinate interstate hazardous and solid waste, pollution prevention, and waste site cleanup activities, and was formally recognized by the U.S. Environmental Protection Agency (EPA) in 1986.

NEWMOA's mission is to develop and sustain an effective partnership of states that helps achieve a clean, healthy, and sustainable environment by exploring, developing, promoting, and implementing environmentally sound solutions for:

- Reducing materials use and preventing pollution and waste,
- Properly reusing and recycling discarded materials that have value,
- Safely managing solid and hazardous wastes, and
- Remediating contaminated sites.

The group fulfills this mission by providing a variety of support services that:

- Facilitate communication and cooperation among member states, between the states and the U.S. EPA, and between the states and other stakeholders;
- Provide research on and evaluation of emerging issues, best practices, and data to help state programs maximize efficiency and effectiveness; and
- Facilitate development of regional approaches to solving critical environmental problems.

Again, thank you for the opportunity to comment on the proposed revisions to the Definition of Solid Waste. We look forward to EPA's final decision on this important matter. Please contact Terri Goldberg, NEWMOA at (617) 367-8558 x302, [tgoldberg@newmoa.org](mailto:tgoldberg@newmoa.org) if you have any questions about these comments.

Sincerely yours,



Michael J. Wimsatt  
New Hampshire Department of Environmental Services  
NEWMOA Vice Chair & Hazardous Waste Program Area Chair

cc: NEWMOA Board of Directors  
NEWMOA Hazardous Waste Program Steering Committee  
Andrew Bellina, EPA Region 2  
Beth Deabay, EPA Region 1  
Mary Zdanowicz, ASTSWMO