



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 20 2010

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

Mr. Mike Fusco
North Division EHS Director
Safety-Kleen Systems, Inc.
P.O. Box 2313
Aston, PA 19014

Dear Mr. Fusco,

Thank you for your November 4, 2008, letter and your October 21, 2009, email expressing interest in the October 30, 2008, Revisions to the Definition of Solid Waste final rule. Enclosed are responses to the questions you raised regarding implementation of the final rule. As I am sure you are aware, the rule is currently in effect as part of the federal regulations in states and territories that are not authorized to implement the Resource Conservation and Recovery Act (RCRA) hazardous waste regulatory program, as well as in authorized states that have adopted the rule. (See <http://www.epa.gov/epawaste/hazard/dsw/statespf.htm> for a list of states where the rule is currently in effect.) However, because states may choose to be more stringent than the federal RCRA hazardous waste program, you should also consult with the appropriate state agency for any particular facility wishing to use the rule in an authorized state.

Thank you for your interest in hazardous secondary materials recycling. If you have any further questions, please contact Tracy Atagi (703-308-8672, atagi.tracy@epa.gov) or Amanda Geldard (703-347-8975, geldard.amanda@epa.gov) of my staff.

Sincerely,

A handwritten signature in blue ink, appearing to read "Matt Hale".

Matt Hale, Director
Office of Resource Conservation and Recovery

Enclosures

**Responses to Definition of Solid Waste Final Rule Questions from
Safety-Kleen Letter dated November 4, 2008 and Email dated October 21, 2009**

- 1. Question: Can excluded material be comingled with hazardous waste and maintain the exclusion from the definition of solid waste (“DSW”)? Many Safety-Kleen facilities service multiple states (some of which may adopt the DSW rule at different times or may not adopt it at all). In addition, Safety-Kleen will almost certainly service customers that do not avail themselves of the exclusion from the DSW. Safety-Kleen’s core services (such as picking up mineral spirits from parts washers) typically involve picking up a limited quantity of solvent from each customer. Presently, this solvent (which is chemically identical regardless of customer or regulatory status) from many customers is comingled (bulked) at one of our RCRA permitted intermediate facilities or a ten-day transportation facility. It is then reclaimed at one of our Recycle Centers. Due to the reasons mentioned earlier, this bulking and reclamation could involve the mixing of solvents exempted from the DSW with solvents that are not exempted. The October 30th DSW regulation does not appear to cover this scenario and Safety-Kleen is requesting clarification on the regulatory status of these mixtures.**

Response: No. Excluded hazardous secondary materials cannot be comingled with regulated hazardous waste and still maintain the exclusion from the definition of solid waste. Excluded hazardous secondary materials may be mixed with hazardous waste, but the resulting mixture is a hazardous waste. This follows the general principle that RCRA applicability can not be avoided merely by mixing a hazardous waste with another material.¹

- 2. Question: If a ten-day transfer facility is used as the intermediary can the secondary hazardous material be bulked into stationary tanks?**

Response: No, hazardous secondary materials may not be managed in stationary tanks at transfer facilities. 40 CFR 261.4(a)(24)(ii) addresses the transportation of hazardous secondary materials. Under this provision, hazardous secondary materials in transport may not be stored for more than 10 days at a transfer facility and must be packaged according to applicable Department of Transportation (DOT) regulations. The term transfer facility is defined in 40 CFR 260.10 to mean “... areas where shipments of hazardous waste or hazardous secondary materials are held *during the normal course of transportation*” (emphasis added).

As is explained in the preamble to the Revisions to the Definition of Solid Waste final rule, the storage standard for defining transfer facilities is the same as that used for hazardous waste transportation (73 FR 64690, October 30, 2008). As such, the final rule expanded the existing definition of ‘transfer facility’ in 40 CFR 260.10 so that it applies to transport of hazardous secondary materials, as well

¹ *Horsehead Resource Development Co., Inc. v. EPA*, 16 F3d 1246 (February 1994).

as to the transport of hazardous wastes. Thus, the transfer facility term now applies to the transport of hazardous secondary materials in the same way it has applied to the transport of hazardous wastes. See 45 FR 86966, December 31, 1980 (also enclosed) for a discussion of transfer facility requirements. Specifically, materials at transfer facilities may be consolidated from smaller to larger containers, but may not be managed in stationary tanks because such tanks are not portable and thus are not part of the “normal course of transportation.” Storage in stationary tanks at a transfer facility would not be a normal or routine activity of the transportation industry and thus is prohibited unless the facility has a permit or interim status (45 FR 86967; December 21, 1980), or meets the conditions for an “intermediate facility” under 40 CFR 261.4(a)(24)(vi). In addition, under 40 CFR 261.4(a)(24)(ii), hazardous secondary materials must be packaged according to applicable DOT regulations at 49 CFR Parts 173, 178, and 179, which do not apply to stationary tanks.

- 3. Question: Can a hazardous secondary material using the exclusion from the DSW be transported through a state that has not adopted the DSW exclusion without additional paperwork (e.g., Uniform Hazardous Waste Manifest) that is otherwise not necessary for it?**

Response: RCRA section 3009 allows states to impose standards more stringent than those in the federal program. Thus, a state that has not adopted the DSW rule may impose state requirements, including the uniform hazardous waste manifest requirement, on hazardous secondary materials while the material is being transported through that state. Transporters should contact the state in question to ascertain its policy about shipments that would be excluded in other states. For a discussion on states’ options, see page 64753 of the Revisions to the Definition of Solid Waste final rule (73 FR 64753, October 30, 2008).

- 4. Question: A RCRA Permit for the intermediate facility or final reclamation facility satisfies the reasonable efforts requirements for the generator of the hazardous secondary material. However, the recycling units of these permitted facilities are often not part of the RCRA Permit. As long as the storage and associated handling equipment for the hazardous secondary material is RCRA permitted, and the reclamation equipment is used as intended for the hazardous secondary materials, this should meet the reasonable efforts requirements of the generator. Is this the correct interpretation of this provision?**

Response: Yes. The reasonable efforts conditions for generators of 40 CFR 261.4(a)(24)(v)(B) and (C) apply when hazardous secondary materials are transferred to intermediate facilities and reclamation facilities where the management of these materials is not addressed under a RCRA Part B permit or interim status standards. The preamble to the Revisions to the Definition of Solid Waste final rule reiterated that reasonable efforts are not required if the intermediate facility or reclaimer’s RCRA Part B Permit or applicable interim

status standards extend to the management of the hazardous secondary materials in question (73 FR 64686, October 30, 2008).

In the case where the intermediate facility or recycler's permit or interim status standards address units used to manage the hazardous secondary materials, the generator is not subject to the reasonable efforts conditions of 40 CFR 261.4(a)(24)(v)(B) and (C). Specific recycling units may or may not be addressed in a facility's RCRA Part B permit or applicable interim status standards due to the operation of various provisions of 40 CFR 261.6.

- 5. Question: *If the company servicing the generator of hazardous secondary materials provides the generator with information certifying that the intermediary facility and final destination facility possess RCRA Permits for the handling of the hazardous secondary material, does this meet the reasonable efforts requirements of the generator?***

Response: This question asks whether a generator may rely on information provided by an intermediate facility or reclamation facility in order to determine that the facility actually does have a RCRA Part B permit (and, thus, the generator would not have to conduct reasonable efforts on the facility). A generator may use any appropriate information to determine that a Part B permit exists, including information provided by the intermediate facility or reclamation facility; however, it is ultimately the responsibility of the generator, itself, to decide whether it needs to conduct reasonable efforts. The generator may also contact the regulatory authority that issued the RCRA Part B permit.

- 6. Question: *A generator of a hazardous secondary material operating under the authority of the DSW final rule must maintain records of off-site shipments and confirmations of receipt by the intermediate facility(ies) and final destination. Instead of using hardcopy confirmations of receipt, can the intermediate facility(ies) and final destination make this available to the generator through an extranet? The extranet allows customers to access data providing information on the tracking and reclamation of hazardous secondary materials that are taking advantage of the DSW exclusion.***

Response: The confirmation of receipts requirements (40 CFR 261.4(a)(24)(v)(E) and 40 CFR 261.4(a)(24)(vi)(C)) may be satisfied by routine business records (e.g., financial records, bills of lading, copies of DOT shipping papers, or electronic confirmations of receipt). As is explained in the preamble to the Revisions to the Definition of Solid Waste final rule, no specific template or format is required for these records (73 FR 64690, October 30, 2008). Thus, reclaimers and intermediate facilities may make confirmations of receipt available to the generator via an extranet; however, the generator is required under 40 CFR 261.4(a)(24)(v)(E) to maintain confirmations of receipt at the generating facility for no less than three years. To meet this requirement, the generator could, for example, print and save information from the extranet or have electronic access to information spanning a minimum of three years. The generator should be prepared to provide the required information upon request.

7. Question: Safety-Kleen operates many RCRA Part B Permitted Branches. These Branches are different from our Recycle Centers. At the Branches we receive a variety of RCRA wastes and hazardous secondary materials (“HSM”). One of the waste streams – used mineral spirits from parts washers at our customers sites – is consolidated into one or more bulk tanks at the Branch. These mineral spirits are subsequently shipped to a Safety-Kleen Recycle Center where they are recycled (distilled) back into a parts washing product for servicing our customers. At our RCRA Part B Permitted Branches we can receive the mineral spirits from our customers as a hazardous waste, a non-hazardous waste, or a HSM depending on the precise use the customer has for the mineral spirits. Regardless of RCRA status, all of the mineral spirits are consolidated and bulked, then shipped off site to one of Safety-Kleen’s Recycle Centers for recycling into a product. Since the Branches [at which] we are initially consolidating and bulking the mineral spirits may be Part B Permitted, we are authorized to terminate any manifest that may be used for a waste shipment, consolidate and bulk all of the mineral spirits, and then ship the consolidated load to our Recycle Center with the Safety-Kleen Branch as the only generator. *The area we are requesting guidance revolves around this Branch operation – since the Branch is the generator of the mineral spirits going to the Recycle Center, we believe that the Branch can take advantage of the transfer based option of the DSW and ship the mineral spirits to the Recycle Center solely as a HSM. We would appreciate any guidance the EPA can provide on this scenario.*

Response: Under 40 CFR 260.10, the definition of *Hazardous secondary material generator* means “any person whose act or process produces hazardous secondary materials at the generating facility...” Because Safety-Kleen’s RCRA Part B permitted Branches, as described above, *collect* hazardous secondary materials from other generators *and do not produce* hazardous secondary materials at their facility, these Branches do not meet the definition of hazardous secondary material generator and thus cannot act as a hazardous secondary material generator under the transfer-based exclusion. These Branches, however, could act as an intermediate facility for hazardous secondary materials managed under the transfer-based exclusion if the Branches meet the conditions and requirements of an intermediate facility under 40 CFR 261.4(a)(24).

As described in the response to Question 1, if the Branches, in the process of consolidating, mix excluded hazardous secondary materials with hazardous wastes received from other generators, the resulting mixture is a hazardous waste. In this case, the Branches would become hazardous waste generators and would have to manage the mixture in accordance with the full RCRA Subtitle C hazardous waste regulations.