

Suggested Changes to Proposed Rule and Preamble - FR 44094 (July 22, 2011)

Note: All of these suggestions returns the proposed rule to the language of the current rule.

Final Rule Clarifications

40 CFR Part 261.4 (Exclusions)

§ 261.4(a)(13) Excluded scrap metal (processed scrap metal, unprocessed home scrap metal, and unprocessed prompt scrap metal) being ~~legitimately recycled as specified in §260.43 of this chapter.~~

§ 261.4(a)(14) Shredded circuit boards being ~~legitimately recycled as specified in §260.43 of this chapter~~ provided that they are:

40 CFR Part 261.6 (Requirements for Recyclable Materials)

§ 261.6(a)(3) The following recyclable materials are not subject to regulation under parts 262 through parts 268, 270, or 124 of this chapter and are not subject to the notification requirements of section 3010 of RCRA ~~when legitimately recycled as specified in §260.43 of this chapter.~~

40 CFR Part 260.43 (Legitimate Recycling of Hazardous Secondary Materials)

§ 260.43(a) Recycling of hazardous secondary materials for the purpose of the exclusions or exemptions from the hazardous waste regulations or alternate regulatory standards must be legitimate. Hazardous secondary material that is not legitimately recycled is discarded material and is a solid waste. In determining if their recycling is legitimate, except for determinations with respect to materials excluded under 40 CFR 261.4(a)(13) and (14) and exempted under 40 CFR 261.6(a)(3)(ii) persons must address all the requirements of this paragraph.

Final Rule Preamble Clarifications

In today's rule, the Agency is retaining the longstanding scrap metal exemptions under 40 CFR 261.6(a)(3)(ii) and the exclusions under 40 CFR 261.4(a)(13) and (14). Additionally, scrap metal recyclers operating under the above exclusions or exemptions are not required to meet the criteria set forth in 260.43 for determining if their scrap metal recycling is legitimate. Instead, in this rule the agency agrees with commenters who suggested that scrap metal is a commodity with markets, pricing and demand, similar to commodities used in other manufacturing processes.

The reason for this clarification is as follows. One of the factors that the Agency considered in developing the proposed rule was an assessment of damages from facilities operating under the various exclusions in 40 CFR Part 261.4 and exemptions in 40 CFR Part 261.6. Our assessment of damages from these facilities was addressed in the Agency's 1996 Land Disposal Restrictions, Supplemental Proposal to Phase IV (61 Fed. Reg. 2338, Jan. 25, 1996), when we concluded that "The Agency's review of damage incidents on both the Superfund (RODS) database and Damage Incident Data Base (DIDB) related to hazardous waste recycling, consultation with Bureau of Mines commodity trade specialists and relevant literature and on-line searches failed to reveal any incidents where releases to the environment of hazardous constituents were attributable to the management of processed scrap metal itself." In 2008 when the Agency promulgated revisions to the definition of solid waste (73 Fed. Reg. 64,668, Oct. 30, 2008), the Agency again examined a number of sites to determine the extent that hazardous secondary material recycling practices have resulted in environmental problems in recent years. In that rule the Agency concluded that "despite the fact that we did not conduct an exhaustive review of all possible sources of damage case information, we believe that the restrictions and conditions of today's exclusions are sufficient to ensure safe recycling activities." In the proposal to today's rule, the Agency again reviewed damage cases, and cited 52 damage cases, which it believed justified extending the proposed rule to those entities covered by 40 CFR 261.6(a)(3)(ii) and 40 CFR 261.4(a)(13) and (14). Based on further review and comments, the Agency has concluded that none of the damage cases cited arise from the operation of scrap metal facilities covered by the exclusions or exemptions.

For these reasons, the Agency has decided that it is not appropriate to make any changes to the Definition of Solid Waste rule that would apply to scrap metal recyclers subject to 40 CFR 261.6(a)(3)(ii) and 40 CFR 261.4(a)(13) and (14). Instead the Agency is reaffirming its position dating back to 1996 in the Land Disposal Restrictions, Supplemental Proposal to Phase IV (61 Fed. Reg. 2338, Jan. 25, 1996), and again in 1997 (62 Fed. Reg. 25998, May 12, 1997) and in 2008 (73 Fed. Reg. 64668, Oct. 30, 2008), "that processed scrap metal being recycled is distinct from other secondary materials defined as wastes when recycled due to established markets for the material's utilization, inherent positive economic value of the material, the physical form of the material, and absence of damage incidents attributable to the material, and is therefore sufficiently product-like that maintaining RCRA regulatory jurisdiction over this material is not necessary."