

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes an amendment to §335.1, Definitions.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The primary purpose of the proposed amendment is to revise the state rule to expand the number of exemptions from the definition of a solid waste currently allowed under Chapter 335. The proposed amendment and the following discussion focus on the recycling of certain nonhazardous materials. A conforming change is also proposed, which would add an exclusion from the definition of solid waste for certain condensates, promulgated by the United States Environmental Protection Agency (EPA) on April 15, 1998. The proposed amendment also includes a change to conform to 40 Code of Federal Regulations (CFR) §261.2(a)(2)(iv) concerning military munitions and corrections to cross-references.

Historically, the primary means of dealing with industrial and hazardous wastes have been to dispose of them (e.g., in landfills, down a deep well, through incineration etc.). The result has been that the commission has focused its efforts to protect human health and the environment primarily on the regulation of the disposal of such wastes (as well as on their storage, processing, and treatment prior to disposal).

However, in recent years both the commission and the regulated community have begun to look at alternatives to disposal as a means of dealing with such wastes. The result has been an increasing emphasis on both source reduction and recycling. The increase in recycling activities has highlighted the fact that revisions need to be made to the definition of “solid waste” in §335.1(124).

In discussions with industry groups during a review of requests for exemptions, the executive director and his staff have identified common concerns among these groups. Chief among these concerns are that the materials bear a stigma if they are designated as solid waste and the perceived notion that deed recordation is required for all land applied wastes under §335.5.

The commission notes that, interpreted strictly, §335.1(124)(D)(i) regulates as solid waste materials that are recycled by being applied to the land, placed on the land, or which are contained in products that are applied to or placed on the land. However, beginning in April 1995, the executive director has granted case-by-case exemptions from the definition of a solid waste for several nonhazardous materials that are recycled by being applied to the land or used in products which are applied to the land. To be granted such an exemption, all of the materials had to meet two conditions. First, the generator(s) of the materials had to demonstrate that the materials posed no significant threat to human health or the environment. This demonstration was made based upon both process knowledge and analytical test results. Second, the materials had to meet criteria that demonstrated that they were “co-products.” The criteria referred to here are similar to those now listed in TNRCC Regulatory Guidance document RG 240, “Helpful Recycling Facts For Materials that Could Be Considered Industrial and/or Hazardous Wastes.” Examples of materials which have been granted exemptions from being a solid waste by the executive director are certain types of foundry sand used as an ingredient in cement, concrete, brick, asphalt, pipe, geo-technical support, road base and asphalt roads; ash, bottom ash and desulfurization (FGD) materials used as ingredients in concrete and concrete products, cement/fly ash blends, lightweight and concrete aggregate, soil cement, road construction materials, blasting grit, roofing material, insulation material, wall board/sheet rock, mineral filler, masonry, and waste stabilization and

solidification; and steel slag generated by Texas steel mills used as an ingredient in cement, concrete, stabilizing material in road banks and shoulders, road base and paving material, as paving material in uncovered driveways, surface roads and walkways, as railroad ballast, as a fluxing agent, as a trench aggregate in drain fields and as a fill material.

The proposed rule is designed to be protective of human health and the environment, while at the same time introducing greater flexibility and "common sense" into the commission's rules by adding a self-implementing exemption from the definition of "solid waste" for certain recycling activities involving application of nonhazardous materials to the land or involving their use in materials which are applied to the land. In addition, the self-implementing aspect of the proposed rule will alleviate the need for case-by-case determinations.

This proposal would not authorize materials to be applied to the land that would otherwise be prohibited from land application. The proposed rule would only exempt recycled materials that meet all of the specified criteria from requirements such as manifesting and notification to the executive director.

This proposal would apply only to materials that are legitimately and beneficially recycled, and not to materials being land disposed. Nor would it apply to materials which are themselves applied to the land (e.g., as fertilizers or soil amendments) where the beneficial components would be applied at more than their maximum beneficial rates, nor would it apply to materials which, if applied to the land, would be subject to the Texas Commercial Fertilizer Act.

#### SECTION BY SECTION DISCUSSION

The definition of “solid waste” in §335.1(124)(A)(iv) is proposed for amendment to include the exclusion from the definition of solid waste found at 40 CFR §261.4(a)(15), promulgated by EPA in the April 15, 1998 *Federal Register* in 63 FedReg 18504. This proposed amendment would exclude condensates derived from the overhead gases from kraft mill steam strippers that are used to comply with 40 CFR §63.446(e), relating to the National Emission Standards for Hazardous Air Pollutants from the Pulp and Paper Industry.

Section 335.1(124)(B) is proposed to be amended by adding clause (iv), which adds military munition identified as a solid waste under 40 CFR §266.202 to the list of materials which are considered to be discarded material. This proposed amendment is a change to conform to the federal regulations promulgated by EPA on February 12, 1997 in 62 FedReg 6621.

Section 335.1(124)(D)(iii), the footnote 2 of Table 1 in (iv), and (F)(iii), is proposed to be amended to correct the reference 40 CFR §261.4(a)(16) by changing it to 40 CFR §261.4(a)(17). The purpose of this change is to correct the reference to the conditions for exclusion of certain secondary materials generated within the primary mineral processing industry found in 40 CFR §261.4(a)(17). This amendment conforms with renumbering of these paragraphs promulgated by EPA on May 11, 1999 in 64 FedReg 25408.

Table 1 in §335.1(124)(D)(iv) is proposed to be corrected to delete the superfluous underlined space in the heading entitled "Reclamation," and delete the superfluous superscript "2" in the heading entitled "Speculative Accumulation."

Section 335.1(124)(D) and (G) is proposed to be amended to include the language, "Except for materials described in subparagraph (H) of this paragraph, materials..." This would account for the addition of the exemption from the definition of a solid waste found in §335.1(124)(H). The exemption is proposed in subparagraph (H) rather than subparagraph (F) in order to avoid extending the exemption to hazardous waste because subparagraph (F) applies to both nonhazardous industrial and hazardous waste.

Section 335.1(124)(H) is proposed to be amended, beginning with the insertion of the following language: "With the exception of contaminated soils which are being relocated for use under 30 TAC §350.36 of this title (relating to Relocation of Soils Containing Chemicals of Concern for Reuse Purposes) and other contaminated media, materials that would otherwise be identified as nonhazardous solid wastes if disposed of are not considered solid wastes when recycled by being used or used as ingredients in products that are applied to the land, provided these materials can be shown to meet all of the following criteria:." Contaminated soils and other contaminated media are excluded from the scope of the proposed rule in order to avoid potential conflict with the Texas Risk Reduction Program rules found in Chapter 350. The purpose of this language is to specifically allow materials that are applied to the land or products produced from such materials to be excluded from being a "solid waste" if they meet criteria (i) - (viii). This will create an exception to §335.1(124)(D)(i)(I) and (II).

In addition, §335.1(124)(H) is proposed to be amended to include the following criteria: (i) a legitimate market exists for the recycling material as well as its products; (ii) the recycling material is managed and protected from loss as would be raw materials or ingredients or products; (iii) the quality of the product is not degraded by substitution of raw material/product with the recycling material; (iv) the use of the recycling material is an ordinary use and it meets or exceeds the specifications of the product it is replacing without treatment or reclamation, or if the recycling material is not replacing a product, the recycling material is a legitimate ingredient in a production process and meets or exceeds raw material specifications without treatment or reclamation; (v) the recycling material is not burned for energy recovery, used to produce a fuel or contained in a fuel; (vi) the recycling material can be used as a product itself or to produce products as it is generated without treatment or reclamation; (vii) the recycling material must not present an increased risk to human health, the environment, or waters in the state when applied to the land or used in products which are applied to the land. Generators can demonstrate that materials do not present an increased risk to human health, the environment, and waters in the state by showing that each constituent found in the recycling material is a constituent normally found in the raw material that it is replacing in approximately the same concentrations. Alternatively, generators can show that the material meets the waste classification standard found in §335.507 of this title (relating to Class 3 Waste Determination) as a Class 3 industrial waste; and (viii) no more than 25% (by weight or volume) of the annual production of the recycling material as it is generated may accumulate at the site of generation or at a subsequent site for a total of 365 days from the time of generation. If the recycling material is placed in protective storage, such as a silo or other protective enclosure, the material may be accumulated for up to a total of two years from the time of generation.

All of the aforementioned case-by-case exemptions granted by the executive director to date have been based upon criteria that are the same as or similar to the proposed criteria. The basis for all eight proposed criteria can be found in one or more of the following sources: (a) the January 4, 1985 issue of the *Federal Register*; (b) a memorandum on recycling dated April 26, 1989, from Ms. Sylvia Lowrance of EPA; or (c) the TNRCC Regulatory Guidance document RG 240, "Helpful Recycling Facts For Materials that Could Be Considered Industrial and/or Hazardous Wastes."

The eight proposed criteria are designed to act together to achieve the goals of protecting human health and the environment and establishing a rational basis for evaluating the legitimacy of recycling activities involving nonhazardous industrial materials. While some of the criteria serve both goals, clauses (ii), (v), (vii), and (viii) are focused primarily on ensuring the protection of human health and the environment while the primary focus of clauses (i), (iii), (iv), and (vi) is to ensure the legitimacy of activities in which nonhazardous industrial wastes are recycled by being applied to the land or used in products which are applied to the land.

In order to insert a new subparagraph (H) in §335.1(124), the language currently found in (H) is proposed to be moved to subparagraph (I). The current language of subparagraph (I) is proposed to be moved to subparagraph (J). Section 335.1(124)(K) is proposed to be added to accommodate the language of what is currently subparagraph (J).

#### FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeffrey Grymkoski, Strategic Planning and Appropriations, has determined for the first five-year period the proposed rule is in effect, there will be no significant fiscal implications for state government or units of local governments as a result of administration or enforcement of the proposed amendment. The purpose of the proposed rule is to expand the number of exemptions from the definition of a solid waste currently allowed under Chapter 335 and to make the rule consistent with current practice and guidance. A minor reduction in workload is anticipated for the commission by reducing the number of waste codes to audit and include in the Notice to Registration. There is no anticipated impact on state agencies regarding their waste generation, because state agencies are not industrial waste generators and are not regulated by Chapter 335. It is anticipated that there could be minor positive fiscal implications for the Texas Department of Transportation (TxDOT) and units of local government. The proposed change expands the number of exemptions from the definition of nonhazardous solid waste currently allowed in Chapter 335. This action will exempt certain nonhazardous materials from the definition of solid waste. This proposed change could make it easier for the TxDOT and county governments to accept this exempt material for use as ingredients in road base construction instead of more costly construction material. It is also anticipated that there could be a minor positive impact on small business as well. Reductions in costs to individuals including small businesses are addressed in the Small Business and Micro-Business Assessment section of this preamble.

#### PUBLIC BENEFIT AND COSTS

Mr. Grymkoski also determined for each of the first five years that the proposed rule is in effect, the anticipated public benefit as a result of administration of and compliance with the proposed amendment

will be clarification of exemptions to the definition of solid waste; consistency with current practice; enhanced ease of compliance with solid waste regulations; minor reductions in costs of regulation; and reductions in cost for disposal of the exempt material.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

Compliance with the proposed exception is optional on the part of individual waste generators.

Businesses that choose to use the exemption are only required to document that nonhazardous industrial waste has met the exemption criteria; keep the documentation available for inspection; comply with the general prohibitions in Chapter 335; and comply with the prohibitions on unauthorized discharges contained in Texas Water Code (TWC), Chapter 26.

It is anticipated that disposal costs associated with industrial waste could be reduced because the proposed change may exempt certain materials from regulation and will make disposal of these materials easier. In addition, there may be an opportunity for waste generators to sell some of the exempt waste material for use in road construction or other fill operations. It is anticipated that there will be minor reductions in costs for businesses due to reduced reporting on the exempt material. It is recognized that larger businesses normally produce the larger amounts of waste. The greater the amount of waste that meets the exemption criteria, the greater the potential savings, but any business that meets the exemption criteria can benefit from the proposed change.

#### DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in the act. “Major environmental rule” means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendment will provide an exemption from the definition of a solid waste for certain nonhazardous materials that are recycled in a manner involving land application. This rule does not authorize materials to be applied to the land that would otherwise be prohibited from land application. The rule only exempts certain recycled materials from being labeled a “solid waste,” thereby exempting recycled materials that meet all of the rule’s criteria from requirements such as manifesting and notification to the commission. Additionally, the amendment will provide the ability to make required changes to permits to allow facilities to store hazardous munitions waste in additional types of units. Therefore, the proposal would not adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

Texas Government Code, §2001.0225, requires a state agency to prepare a regulatory analysis of a major environmental rule in certain circumstances. The regulatory analysis must be prepared where the result of the adoption of the rule is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is

specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The commission concludes that the regulatory analysis requirement does not apply to this rulemaking because this proposal does not exceed a standard set by federal law, nor does it exceed an express requirement of state law. In addition, this rule does not exceed a requirement of a delegation agreement or contract between the state and the federal government, nor is this rule adopted solely under the general powers of the agency.

With this background in mind, the commission next demonstrates how each of the four circumstances under which a regulatory analysis is required does not apply to this rulemaking:

Exceedance of a standard set by federal law

The requirements of this rule which seek to provide an exemption from the definition of solid waste for land application of recycled nonhazardous materials, are not subject to federal regulation. Accordingly, there are no applicable standards set by federal law that could be exceeded by this portion of the rule.

The requirements of this rule which relate to federal military munitions are being implemented to maintain equivalency with federal law (federal military munitions rule, 62 FedReg 6622 et seq.) and do not exceed any federal law standards.

Exceedance of an express requirement of state law

The requirements of this rule (relating to both recycled nonhazardous materials and military munitions) seek to carry out the commission's statutory responsibility under Texas Health and Safety Code (THSC), §361.017 (relating to the commission's jurisdiction over industrial solid waste and hazardous municipal waste) and THSC, §361.024 (relating to rules and standards). The rule seeks to comply with the relevant specific state law and not to exceed it.

Exceedance of a requirement of a delegation agreement

The commission is not a party to a delegation agreement with the federal government concerning a state and federal program that would be applicable to requirements set forth in the rule. Accordingly, there are no delegation agreement requirements that could be exceeded by this rule.

Adoption of a rule solely under the agency's general powers

The commission is adopting this rule under the specific statutory authority of THSC, §361.017 (relating to the commission's jurisdiction over industrial solid waste and hazardous municipal waste) and THSC, §361.024 (relating to rules and standards), in addition to the general powers of TWC, §5.103 (relating to rules) and TWC, §5.105 (relating to general policy). Accordingly, this rule is not being adopted solely under the general powers of the agency.

**TAKINGS IMPACT ASSESSMENT**

The commission has prepared a takings impact assessment for this proposed rule pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose

of the proposed rule is to update the commission's rule to establish environmentally protective uniform and specific criteria by which materials which would otherwise be regulated as nonhazardous industrial wastes can be exempt from being regulated as such, including when such materials are recycled by being applied to the land or used as ingredients in materials which are applied to the land. The proposed rule would substantially advance this stated purpose by providing a set of environmentally protective criteria to be applied in the determination of whether a material meets the exemption. Promulgation and enforcement of this proposed rule would not affect private real property which is the subject of the rule because the proposed rule creates an exemption which allows greater flexibility in the recycling of certain materials which are currently regulated as nonhazardous industrial wastes. The proposed rule does not affect a landowner's right to property that would otherwise exist in the absence of the rule. In other words, because the rule allows certain nonhazardous industrial materials to be recycled and not have to be regulated as "solid waste," it does not restrict the owner's right to property. Therefore, the rule will not constitute a takings under the Texas Government Code, §2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed this rulemaking and found that the proposal is a rulemaking subject to the Texas Coastal Management Program (CMP) and must be consistent with all applicable goals and policies of the CMP. The commission has prepared a consistency determination for this proposed rule pursuant to 31 TAC §505.22 and has found that the rulemaking is consistent with the applicable CMP goals and policies. The following is a summary of that determination. The CMP goals applicable to the rulemaking are the goals to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs). Applicable policies are construction

and operation of solid waste treatment, storage, and disposal facilities, such that new solid waste facilities and areal expansions of existing solid waste facilities shall be sited, designed, constructed, and operated to prevent releases of pollutants that may adversely affect CNRAs and, at a minimum, comply with standards established under the Solid Waste Disposal Act, 42 United States Code (USC), §§6901 et seq. Promulgation and enforcement of this proposed rule would be consistent with the applicable CMP goals and policies because the rule amendment would update the commission's rule to establish environmentally protective uniform and specific criteria by which materials which are currently regulated as nonhazardous industrial solid wastes (especially when applied to the land or used as ingredients in materials which are applied to the land) can be exempted from being regulated as such without a case-by-case review by commission staff, thereby serving to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of CNRAs, and also thereby serving to ensure that new solid waste facilities and areal expansions of existing solid waste facilities are sited, designed, constructed, and operated to prevent releases of pollutants that may adversely affect CNRAs and, at a minimum, comply with standards established under the Solid Waste Disposal Act, 42 USC, §§6901 et seq. In addition, the proposed rule does not violate any applicable provisions of the CMP's stated goals and policies. The commission invites public comment on the consistency of the proposed rule.

#### SUBMITTAL OF COMMENTS

Comments may be submitted to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087; faxed to (512) 239-4808. All comments should reference Rule Log Number 1997-174-335-WS. Comments must be received by 5:00

p.m., January 2, 2001. For further information, please contact Ray Henry Austin at (512) 239-6814.

#### STATUTORY AUTHORITY

The amendment is proposed under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rule necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under THSC, Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rule consistent with the general intent and purposes of the Act.

The proposed amendment implements THSC, Chapter 361.

**SUBCHAPTER A: INDUSTRIAL SOLID WASTE AND  
MUNICIPAL HAZARDOUS WASTE IN GENERAL**

**§335.1**

**§335.1. Definitions.**

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly requires otherwise.

(1) - (123) (No change.)

(124) **Solid Waste** -

(A) Any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility, and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations, and from community and institutional activities, but does not include:

(i) - (iii) (No change.)

(iv) a material excluded by 40 Code of Federal Regulations (CFR)

§261.4(a)(1) - (19) as amended May 11, 1999 in 64 FedReg 25408 [(14), as amended through August

6, 1998, at 63 FedReg 42110, by 40 CFR §261.4(a)(16), as amended June 19, 1998 at 63 FedReg 33782], subject to the changes in this clause, [by 40 CFR §261.4(a)(17), as amended May 11, 1999 at 64 FedReg 25408, by 40 CFR §261.4(a)(18) - (19), as amended through August 6, 1998, at 63 FedReg 42110,] or by variance granted under §335.18 of this title (relating to Variances from Classification as a Solid Waste) and §335.19 of this title (relating to Standards and Criteria for Variances from Classification as a Solid Waste). For the purposes of the exclusion under 40 CFR §261.4(a)(16), as amended June 19, 1998 at 63 FedReg 33782, 40 CFR §261.38 is revised as follows, with “30 TAC §335.1(123)(A)(iv)” meaning “§335.1(123)(A)(iv) of this title (relating to Definitions)”:

(I) - (VIII) (No change.)

(B) A discarded material is any material which is:

(i) - (iii) (No change.)

(iv) a military munition identified as a solid waste in 40 CFR

§266.202.

(C) (No change.)

(D) Except for materials described in subparagraph (H) of this paragraph, materials [Materials] are solid wastes if they are "recycled" or accumulated, stored, or processed before recycling as specified in this subparagraph. The chart referred to as Table 1 indicates only which materials are considered to be solid wastes when they are recycled and is not intended to supersede the definition of solid waste provided in subparagraph (A) of this paragraph.

(i) - (ii) (No change.)

(iii) Reclaimed. Materials noted with an asterisk in Column 3 of Table 1 are solid wastes when reclaimed (except as provided under 40 CFR §261.4(a)(17) [(16)]). Materials without an asterisk in Column 3 of Table 1 are not solid wastes when reclaimed (except as provided under 40 CFR §261.4(a)(17) [(16)]).

(iv) Accumulated speculatively. Materials noted with an asterisk in Column 4 of Table 1 are solid wastes when accumulated speculatively.

Figure 1: 30 TAC §335.1(124)(D)(iv)

Figure 1: 30 TAC §335.1(124)(D)(iv)

TABLE 1

	Use Constituting Disposal	Energy Recovery/Fuel	Reclamation	Speculative Accumulation
	S.W. Def. (D)(i)	S.W. Def. (D)(ii)	S.W. Def. (D)(iii)	S.W. Def. (D)(iv)
	(1)	(2)	(3) <sup>2</sup>	(4)
Spent materials (listed hazardous & not listed characteristically hazardous)	*	*	*	*
Spent materials (nonhazardous) <sup>1</sup>	*	*	*	*
Sludges (listed hazardous in 40 CFR §261.31 or §261.32)	*	*	*	*
Sludges (not listed characteristically hazardous)	*	*		*
Sludges (nonhazardous) <sup>1</sup>	*	*		*
By-products (listed hazardous in 40 CFR §261.31 or §261.32)	*	*	*	*
By-products (not listed characteristically hazardous)	*	*		*
By-products (nonhazardous) <sup>1</sup>	*	*		*
Commercial chemical products (listed, not listed characteristically hazardous, and nonhazardous)	*	*		

Scrap metal other than excluded scrap metal (see

§335.17(9)) (hazardous) \* \* \* \*

Scrap metal other than excluded scrap metal (see

§335.17(9)) (nonhazardous)<sup>1</sup> \* \* \* \*

NOTE: The terms "spent materials", "sludges", "by-products", "scrap metal" and "excluded scrap metal" are defined in §335.17 of this title (relating to Special Definitions for Recyclable Materials and Nonhazardous Recyclable Materials).

<sup>1</sup>These materials are governed by the provisions of §335.24(h) only.

<sup>2</sup>Except as provided in 40 CFR §261.4(a)(17) for mineral processing secondary materials

(E) (No change.)

(F) Materials are not solid wastes when they can be shown to be recycled by

being:

(i) - (ii) (No change.)

(iii) returned to the original process from which they were generated, without first being reclaimed or land disposed. The material must be returned as a substitute for feedstock materials. In cases where the original process to which the material is returned is a secondary process, the materials must be managed such that there is no placement on the land. In cases where the materials are generated and reclaimed within the primary mineral processing industry, the conditions of the exclusion found at 40 CFR §261.4(a)(17) [(16)] apply rather than this provision.

(iv) (No change.)

(G) Except for materials described in subparagraph (H) of this paragraph, the [The] following materials are solid wastes, even if the recycling involves use, reuse, or return to the original process, as described in subparagraph (F) of this paragraph:

(i) - (iv) (No change.)

(H) With the exception of contaminated soils which are being relocated for use under §350.36 of this title (relating to Relocation of Soils Containing Chemicals of Concern for Reuse Purposes) and other contaminated media, materials that would otherwise be identified as nonhazardous solid wastes if disposed of are not considered solid wastes when recycled by being applied to the land or used as ingredients in products that are applied to the land, provided these materials can be shown to meet all of the following criteria:

(i) a legitimate market exists for the recycling material as well as its products;

(ii) the recycling material is managed and protected from loss as would be raw materials or ingredients or products;

(iii) the quality of the product is not degraded by substitution of raw material/product with the recycling material;

(iv) the use of the recycling material is an ordinary use and it meets or exceeds the specifications of the product it is replacing without treatment or reclamation, or if the recycling material is not replacing a product, the recycling material is a legitimate ingredient in a production process and meets or exceeds raw material specifications without treatment or reclamation;

(v) the recycling material is not burned for energy recovery, used to produce a fuel or contained in a fuel;

(vi) the recycling material can be used as a product itself or to produce products as it is generated without treatment or reclamation;

(vii) the recycling material must not present an increased risk to human health, the environment, or waters in the state when applied to the land or used in products which are applied to the land. Generators can demonstrate that materials do not present an increased risk to human health, the environment, and waters in the state by showing that each constituent found in the recycling material is a constituent normally found in the raw material that it is replacing in approximately the same concentrations. Alternatively, generators can show that the material meets the waste classification standard found in §335.507 of this title (relating to Class 3 Waste Determination) as a Class 3 industrial waste; and

(viii) no more than 25% (by weight or volume) of the annual production of the recycling material as it is generated may accumulate at the site of generation, or at a subsequent site, for a total of 365 days from the time of generation. If the recycling material is placed in protective storage, a silo, or other protective enclosure, the material may be accumulated for up to a total of two years from the time of generation.

(I) [(H)] Respondents in actions to enforce the industrial solid waste regulations who raise a claim that a certain material is not a solid waste, or is conditionally exempt from regulation, must demonstrate that there is a known market or disposition for the material, and that they meet the terms of the exclusion or exemption. In doing so, they must provide appropriate documentation (such as contracts showing that a second person uses the material as an ingredient in a production process) to demonstrate that the material is not a waste, or is exempt from regulation. In addition, owners or operators of facilities claiming that they actually are recycling materials must show that they have the necessary equipment to do so and that the recycling activity is legitimate and beneficial.

(J) [I] Materials that are reclaimed from solid wastes and that are used beneficially are not solid wastes and hence are not hazardous wastes under 40 CFR §261.3(c) unless the reclaimed material is burned for energy recovery or used in a manner constituting disposal.

(K) [J] Other portions of this chapter that relate to solid wastes that are recycled include §335.6 of this title (relating to Notification Requirements), §335.17 of this title (relating to Special Definitions for Recyclable Materials and Nonhazardous Recyclable Materials), §335.18 of this title (relating to Variances from Classification as a Solid Waste), §335.19 of this title (relating to Standards and Criteria for Variances from Classification as a Solid Waste), §335.24 of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials), and Subchapter H of this chapter (relating to Standards for the Management of Specific Wastes and Specific Types of Materials).

(125) - (154) (No change.)