NEBRASKA ADMINISTRATIVE CODE

Title 128 - Department of Environmental Quality

Chapter 5 - VARIANCES

001 Non-waste determinations and v~~V~~ariances from classification as a solid waste.

001.01 In accordance with the standards and criteria in Sections 001.02 and 004 and the procedures in Section 003 of this Chapter, the Director may determine on a case-by-case basis that the following recycled materials are not solid wastes:

001.01A Materials that are accumulated speculatively without sufficient amounts being recycled (as defined in Chapter 2, 002.07);

001.01B Materials that are reclaimed and then reused within the original production process in which they were generated;

001.01C Materials that have been reclaimed but must be reclaimed further before the materials are completely recovered.

001.01D Hazardous secondary materials that are reclaimed in a continuous industrial process; and

001.01E Hazardous secondary materials that are indistinguishable in all relevant aspects from a product or intermediate.

001.01F Hazardous secondary materials that are transferred for reclamation under Chapter 2, Section 008.26 and are managed at a verified reclamation facility or intermediate facility where the management of the hazardous secondary materials is not addressed under a RCRA Part B permit or interim status standards.

001.02 Standards and criteria for variance from classification as a solid waste.

001.02A The Director may grant requests for a variance from classifying as a solid waste those materials that are accumulated speculatively without sufficient amounts being recycled if the applicant demonstrates that sufficient amounts of the material will be recycled or transferred for recycling in the following year. If a variance is granted, it is valid only for the following year, but can be renewed, on an annual basis, by filing a new application. The Director's decision will be based on the following criteria:

001.02A1 The manner in which the material is expected to be recycled, when the material is expected to be recycled, and whether this expected disposition is likely to occur (for example, because of past practice, market factors, the nature of the material, or contractual arrangements for recycling);

001.02A2 The reason that the applicant has accumulated the material for one or more years without recycling 75 percent of the volume accumulated at the beginning of the year;

001.02A3 The quantity of material already accumulated and the quantity expected to be generated and accumulated before the material is recycled;

001.02A4 The extent to which the material is handled to minimize loss; and

001.02A5 Other relevant factors.

001.03 The Director may grant requests for a variance from classifying as a solid waste those materials that are reclaimed and then reused as feedstock within the original primary production process in which the materials were generated if the reclamation operation is an essential part of the production process. This determination will be based on the following criteria:

001.03A How economically viable the production process would be if it were to use virgin materials, rather than reclaimed materials;

001.03B The prevalence of the practice on an industry-wide basis;

001.03C The extent to which the material is handled before reclamation to minimize loss;

001.03D The time periods between generating the material and its reclamation, and between reclamation and return to the original primary production process;

001.03E The location of the reclamation operation in relation to the production process;

001.03F Whether the reclaimed material is used for the purpose for which it was originally produced when it is returned to the original process, and whether it is returned to the process in substantially its original form;

001.03G Whether the person who generates the material also reclaims it; and

001.03H Other relevant factors.

001.04 The Director may grant requests for a variance from classifying as a solid waste those hazardous secondary materials that have been partially reclaimed but must be reclaimed further before recovery is completed, if~~, after initial~~ the partial reclamation~~, the resulting material is~~ has produced a commodity-like material~~(even though it is not yet a commercial product, and has to be reclaimed further)~~. ~~This determination will be based on the following factors:~~ A determination that a partially-reclaimed material for which the variance is sought is commodity-like will be based on whether the hazardous secondary material is legitimately recycled as specified in Section 009 of this Chapter and on whether all of the following decision criteria are satisfied:

001.04A ~~The degree of processing the material has undergone and the degree of further processing that is required;~~ Whether the degree of partial reclamation the material has undergone is substantial as demonstrated by using a partial reclamation process other than the process that generated the hazardous waste;

001.04B ~~The value of the material after it has been reclaimed;~~ Whether the partially-reclaimed material has sufficient economic value that it will be purchased for further reclamation;

001.04C ~~The degree to which the reclaimed material is like an analogous raw material;~~ Whether the partially-reclaimed material is a viable substitute for a product or intermediate produced from virgin or raw materials which is used in subsequent production steps;

001.04D ~~The extent to which an end market for the reclaimed material is guaranteed;~~ Whether there is a market for the partially-reclaimed material as demonstrated by known customer(s) who are further reclaiming the material (e.g., records of sales and/or contracts and evidence of subsequent use, such as bills of lading);

001.04E ~~The extent to which~~ Whether the partially-reclaimed material is handled to minimize loss.~~; and~~

~~001.04F Other relevant factors.~~

001.05 The Director may grant requests for a variance from classifying as a solid waste those hazardous secondary materials that are transferred for reclamation under Chapter 2, Section 008.26 and are managed at a verified reclamation facility or intermediate facility where the management of the hazardous secondary materials is not addressed under a RCRA Part B permit or interim status standards. The Director's decision will be based on the following criteria:

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001.05A The reclamation facility or intermediate facility must demonstrate that the reclamation process for the hazardous secondary materials is legitimate pursuant to Section 009 of this Chapter;

001.05B The reclamation facility or intermediate facility must satisfy the financial assurance condition in 40 CFR § 261.4(a)(24)(vi)(F), as adopted and incorporated by reference in Chapter 2, Section 008.26 of this Title;

001.05C The reclamation facility or intermediate facility must not be subject to a formal enforcement action in the previous three years and not be classified as a significant non-complier under RCRA Subtitle C, or must provide credible evidence that the facility will manage the hazardous secondary materials properly. Credible evidence may include a demonstration that the facility has taken remedial steps to address the violations and prevent future violations, or that the violations are not relevant to the proper management of the hazardous secondary materials;

001.05D The intermediate or reclamation facility must have the equipment and trained personnel needed to safely manage the hazardous secondary material and must meet

emergency preparedness and response requirements under 40 CFR part 261 subpart M, as adopted and incorporated by reference in Chapter 3, Section 025 of this Title;

001.05E If residuals are generated from the reclamation of the excluded hazardous secondary materials, the reclamation facility must have the permits required (if any) to manage the residuals, have a contract with an appropriately permitted facility to dispose of the residuals or present credible evidence that the residuals will be managed in a manner that is protective of human health and the environment, and

001.05F The intermediate or reclamation facility must address the potential for risk to proximate populations from unpermitted releases of the hazardous secondary material to the environment (i.e., releases that are not covered by a permit, such as a permit to discharge to water or air), which may include, but are not limited to, potential releases through surface transport by precipitation runoff, releases to soil and groundwater, wind-blown dust, fugitive air emissions, and catastrophic unit failures), and must include consideration of potential cumulative risks from other nearby potential stressors.

002 Variance to be classified as a boiler. In accordance with the standards and criteria in Chapter 1, 013 and the procedures in Section 003 of this Chapter, the Director may determine on a case-by-case basis that certain enclosed devices using controlled flame combustion are boilers, even though they do not otherwise meet the definition of boiler contained in Chapter 1, 013 after considering the following criteria:

002.01 The extent to which the unit has provisions for recovering and exporting thermal energy in the form of steam, heated fluids, or heated gases;

002.02 The extent to which the combustion chamber and energy recovery equipment are of integral design;

002.03 The efficiency of energy recovery, calculated in terms of the recovered energy compared with the thermal value of the fuel;

002.04 The extent to which exported energy is utilized;

002.05 The extent to which the device is in common and customary use as a "boiler" functioning primarily to produce steam, heated fluids, or heated gases; and

002.06 Other factors, as appropriate.

003 Procedures for variances from classification as a solid waste or to be classified as a boiler or for non-waste determinations. The Director will use the following procedures in evaluating applications for variances from classification as a solid waste, ~~or~~ applications to classify particular enclosed controlled flame combustion devices as boilers, or applications for non-waste determinations:

003.01 The applicant must apply to the Director for the variance or non-waste determination. The application must address the relevant criteria contained in Sections 001.02, ~~or~~ 002, or 004 of this Chapter.

003.02 The Director will evaluate the application and issue a draft notice tentatively granting or denying the application. Notification of this tentative decision will be provided by newspaper advertisement and radio broadcast in the locality where the recycler or boiler is located. The Director will accept comment on the tentative decision for 30 days, and may also hold a public hearing upon request or at the Director's discretion. The Director will issue a final decision after receipt of comments and after the hearing (if any).

003.03 In the event of a change in circumstances that affect how a hazardous secondary material meets the relevant criteria contained in Sections 001.02, 002, or 004 of this Chapter upon which a variance or non-waste determination has been based, the applicant must send a description of the change in circumstances to the Director. The Director may issue a determination that the hazardous secondary material continues to meet the relevant criteria of the variance or non-waste determination or may require the facility to re-apply for the variance or non-waste determination.

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003.04 Variances and non-waste determinations shall be effective for a fixed term not to exceed ten years. No later than six months prior to the end of this term, facilities must re-apply for a variance or non-waste determination. If a facility re-applies for a variance or non-waste determination within six months, the facility may continue to operate under an expired variance or non-waste determination until receiving a decision on their re-application from the Director.

003.05 Facilities receiving a variance or non-waste determination must provide notification as required by Section 008 of this Chapter.

004 Standards and criteria for non-waste determinations.

004.01 An applicant may apply to the Director for a formal determination that a hazardous secondary material is not discarded and therefore not a solid waste. The determinations will be based on the criteria contained in Sections 004.02 and 004.03, as applicable. If an application is denied, the hazardous secondary material might still be eligible for a solid waste variance or exclusion (for example, one of the solid waste variances under Section 001.02 of this Chapter). Determinations may also be granted by the State if the State is either authorized for this provision or if the following conditions are met:

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004.01A The State determines the hazardous secondary material meets the criteria in Sections 004.02 and 004.03, as applicable;

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004.01B The State requests that EPA review its determination; and

004.01C EPA approves the State determination.

004.02 The Director may grant a non-waste determination for hazardous secondary material which is reclaimed in a continuous industrial process if the applicant demonstrates that the hazardous secondary material is a part of the production process and is not discarded. The determination will be based on whether the hazardous secondary material is legitimately recycled as specified in Section 009 of this Chapter and on the following criteria:

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004.02A The extent that the management of the hazardous secondary material is part of the continuous primary production process and is not waste treatment;

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004.02B Whether the capacity of the production process would use the hazardous secondary material in a reasonable time frame and ensure that the hazardous secondary material will not be abandoned (for example, based on past practices, market factors, the nature of the hazardous secondary material, or any contractual arrangements);

004.02C Whether the hazardous constituents in the hazardous secondary material are reclaimed rather than released to the air, water or land at significantly higher levels from either a statistical or from a health and environmental risk perspective than would otherwise be released by the production process; and

004.02D Other relevant factors that demonstrate the hazardous secondary material is not discarded, including why the hazardous secondary material cannot meet, or should not have to meet, the conditions of an exclusion under Chapter 2, Sections 003 or 008 of this Title.

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004.03 The Director may grant a non-waste determination for hazardous secondary material which is indistinguishable in all relevant aspects from a product or intermediate if the applicant demonstrates that the hazardous secondary material is comparable to a product or intermediate and is not discarded. The determination will be based on whether the hazardous secondary material is legitimately recycled as specified in Section 009 of this Chapter and on the following criteria:

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004.03A Whether market participants treat the hazardous secondary material as a product or intermediate rather than a waste (for example, based on the current positive value of the hazardous secondary material, stability of demand, or any contractual arrangements);

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004.03B Whether the chemical and physical identity of the hazardous secondary material is comparable to commercial products or intermediates;

004.03C Whether the capacity of the market would use the hazardous secondary material in a reasonable time frame and ensure that the hazardous secondary material will not be abandoned (for example, based on past practices, market factors, the nature of the hazardous secondary material, or any contractual arrangements);

004.03D Whether the hazardous constituents in the hazardous secondary material are reclaimed rather than released to the air, water or land at significantly higher levels from either a statistical or from a health and environmental risk perspective than would otherwise be released by the production process; and

004.03E Other relevant factors that demonstrate the hazardous secondary material is not discarded, including why the hazardous secondary material cannot meet, or should not have to meet, the conditions of an exclusion under Chapter 2, Sections 003 or 008 of this Title.

~~004~~005 Additional regulation of certain hazardous waste recycling activities on a case-by-case basis.

~~004~~005.01 The Director may decide on a case-by-case basis that persons accumulating or storing the recyclable materials described in Chapter 7, 003.04 should be regulated under Chapter 7, 004 through 006. The basis for this decision is that the materials are being accumulated or stored in a manner that does not protect human health and the environment because the materials or their toxic constituents have not been adequately contained, or because the materials being accumulated or stored together are incompatible. In making this decision the Director will consider the following factors:

~~004~~005.01A The types of materials accumulated or stored and the amount accumulated or stored;

~~004~~005.01B The method of accumulation or storage;

~~004~~005.01C The length of time the materials have been accumulated or stored before being reclaimed;

~~004~~005.01D Whether any contaminants are being released into the environment, or are likely to be so released; and

~~004~~005.01E Other relevant factors.

00~~4~~5.02 The procedures for this decision are set forth in Section 00~~5~~6 of this Chapter.

~~005~~006 Procedures for case-by-case regulation of hazardous waste recycling activities. The Director will use the following procedures when determining whether to regulate hazardous waste recycling activities described in Chapter 7, 003.04 under the provisions of Chapter 7, 004 through 006 rather than under the provisions of Chapter 7, 011:

~~005~~006.01 If a generator is accumulating the waste, the Director will issue a notice setting forth the factual basis for the decision and stating that the person must comply with the applicable requirements of Chapters 4, 9, and 10. The notice will become final in 30 days, unless the person served requests a public hearing to challenge the decision. Upon receiving such a request, the Director will hold a public hearing. The Director will provide notice of the hearing to the public and allow public participation at the hearing. The Director will issue a final order after the hearing stating whether or not compliance with Chapters 4, 9, and 10 is required. The order becomes effective 30 days after service of the decision unless the Director specifies a later date.

~~005~~006.02 If the person is accumulating the recyclable material as a storage facility, the notice will state that the person must obtain a permit in accordance with all applicable provisions of Chapters 12 through 15. The owner or operator of the facility must apply for a permit within no less than 60 days and no more than six months of notice, as specified in the notice. If the owner or operator of the facility wishes to challenge the Director's decision, the challenge may be stated in the permit application, in a public hearing held on the draft permit, or in comments filed on the draft permit or on the notice of intent to deny the permit. The fact sheet accompanying the permit will specify the reasons for the Director's determination. The

question of whether the Director's decision was proper will remain open for consideration during the public comment period and in any subsequent hearing.

~~006~~007 Variances from a treatment standard specified in Chapter 20.

~~006~~007.01 Based on a petition filed by a generator or treater of hazardous waste, the Director may approve a site-specific variance from an applicable treatment standard specified in Chapter 20 if:

~~006~~007.01A It is not physically possible to treat the waste to the level specified in the treatment standard, or by the method specified as the treatment standard. To show that this is the case, the petitioner must demonstrate that because the physical or chemical properties of the waste differ significantly from waste analyzed in developing the treatment standard, the waste cannot be treated to the specified level or by the specified method; or

~~006~~007.01B It is inappropriate to require the waste to be treated to the level specified in the treatment standard or by the method specified as the treatment standard, even though such treatment is technically possible. To show that this is the case, the petitioner must either demonstrate that:

~~006~~007.01B1 Treatment to the specified level or by the specified method is technically inappropriate (for example, resulting in combustion of large amounts of mildly contaminated environmental media where the treatment standard is not based on combustion of such media); or

~~006~~007.01B2 For remediation waste only, treatment to the specified level or by the specified method is environmentally inappropriate because it would likely discourage aggressive remediation.

~~006~~007.01C For contaminated soil only, treatment to the level or by the method specified in the soil treatment standards would result in concentrations of hazardous constituents that are below (i.e., lower than) the concentrations necessary to minimize short- and long-term threats to human health and the environment. Treatment variances approved under this paragraph must:

~~006~~007.01C1 At a minimum, impose alternative land disposal restriction treatment standards that, using a reasonable maximum exposure scenario:

~~006~~007.01C1(a) For carcinogens, achieve constituent concentrations that result in the total excess risk to an individual exposed over a lifetime generally falling within a range from 10^{-4} to 10^{-6}; and

~~006~~007.01C1(b) For constituents with non-carcinogenic effects, achieve constituent concentrations that an individual could be exposed to on a daily basis without appreciable risk of deleterious effect during a lifetime.

~~006~~007.01C2 Not consider post-land-disposal controls.

~~006~~007.01D For contaminated soil only, treatment to the level or by the method specified in the soil treatment standards would result in concentrations of hazardous constituents that are below (i.e., lower than) natural background concentrations at the site where the contaminated soil will land disposed.

~~006~~007.01E Public notice and a reasonable opportunity for public comment must be provided before granting or denying a petition.

~~006~~007.02 Each application for a site-specific~~e~~ variance from a treatment standard must include the information in Chapter 6, 001.02A through 001.02D.

~~006~~007.03 After receiving an application for a site-specific variance from a treatment standard, the Director may request any additional information or samples which may be required to evaluate the application.

~~006~~007.04 A generator, treatment facility, or disposal facility that is managing a waste covered by a site-specific variance from a treatment standard must comply with the waste analysis requirements for restricted wastes found under Chapter 20, 005.

~~006~~007.05 During the application review process, the applicant for a site-specific variance must comply with all restrictions on land disposal under Chapter 20 once the effective date for the waste has been reached.

~~006~~007.06 For all variances, the petitioner must also demonstrate that compliance with any given treatment variance is sufficient to minimize threats to human health and the environment posed by land disposal of the waste. In evaluating this demonstration, the Department may take into account whether a treatment variance should be approved if the subject waste is to be used in a manner constituting disposal pursuant to Chapter 7, 007.01 through 007.04.

008 Notification requirement for hazardous secondary materials.

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008.01 Hazardous secondary material generators, tolling contractors, toll manufacturers, reclaimers, and intermediate facilities managing hazardous secondary materials which are excluded from regulation under Chapter 2, Sections 008.25 and 008.26, must send a notification prior to operating under the exclusion(s) and by March 1 of each even numbered year thereafter to the Director using EPA Form 8700-12 that includes the following information:

008.01A The name, address, and EPA ID number (if applicable) of the facility;

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008.01B The name and telephone number of a contact person;

008.01C The NAICS code of the facility;

008.01D The regulation under which the hazardous secondary materials will be managed;

008.01E When the facility began or expects to begin managing the hazardous secondary materials in accordance with the regulation;

008.01F A list of hazardous secondary materials that will be managed according to the regulation (reported as the EPA hazardous waste numbers that would apply if the hazardous secondary materials were managed as hazardous wastes);

008.01G For each hazardous secondary material, whether the hazardous secondary material, or any portion thereof, will be managed in a land-based unit;

008.01H The quantity of each hazardous secondary material to be managed annually; and

008.01I The certification (included in EPA Form 8700-12) signed and dated by an authorized representative of the facility.

008.02 If a facility managing hazardous secondary materials has submitted a notification, but then subsequently stops managing hazardous secondary materials in accordance with the regulation(s) listed above, the facility must notify the Director within thirty (30) days using EPA Form 8700-12. For purposes of this section, a facility has stopped managing hazardous secondary materials if the facility no longer generates, manages and/or reclaims hazardous secondary materials under the regulation(s) above and does not expect to manage any amount of hazardous secondary materials for at least 1 year.

009 Legitimate recycling of hazardous secondary materials.

009.01 Recycling of hazardous secondary materials for the purpose of the exclusions or exemptions from the hazardous waste regulations 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, persons must address all the requirements of this paragraph.

009.01A Legitimate recycling must involve a hazardous secondary material that provides a useful contribution to the recycling process or to a product or intermediate of the recycling process. The hazardous secondary material provides a useful contribution if it:

009.01A1 Contributes valuable ingredients to a product or intermediate; or

009.01A2 Replaces a catalyst or carrier in the recycling process; or

009.01A3 Is the source of a valuable constituent recovered in the recycling process; or

009.01A4 Is recovered or regenerated by the recycling process; or

009.01A5 Is used as an effective substitute for a commercial product.

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009.01B The recycling process must produce a valuable product or intermediate. The product or intermediate is valuable if it is:

009.01B1 Sold to a third party; or

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009.01B2 Used by the recycler or the generator as an effective substitute for a commercial product or as an ingredient or intermediate in an industrial process.

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009.01C The generator and the recycler must manage the hazardous secondary material as a valuable commodity when it is under their control. Where there is an analogous raw material, the hazardous secondary material must be managed, at a minimum, in a manner consistent with the management of the raw material or in an equally protective manner. Where there is no analogous raw material, the hazardous secondary material must be contained. Hazardous secondary materials that are released to the environment and are not recovered immediately are discarded.

009.01D The product of the recycling process must be comparable to a legitimate product or intermediate:

009.01D1 Where there is an analogous product or intermediate, the product of the recycling process is comparable to a legitimate product or intermediate if:

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009.01D1(a) The product of the recycling process does not exhibit a hazardous characteristic (as defined in Chapter 3, Sections 005 through 010) that analogous products do not exhibit, and

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009.01D1(b) The concentrations of any hazardous constituents found in Appendix I of this Title that are in the product or intermediate are at levels that are comparable to or lower than those found in analogous products or at levels that meet widely-recognized commodity standards and specifications, in the case where the commodity standards and specifications include levels that specifically address those hazardous constituents.

009.01D2 Where there is no analogous product, the product of the recycling process is comparable to a legitimate product or intermediate if:

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009.01D2(a) The product of the recycling process is a commodity that meets widely recognized commodity standards and specifications (e.g., commodity specification grades for common metals), or

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009.01D2(b) The hazardous secondary materials being recycled are returned to the original process or processes from which they were generated to be reused (e.g., closed loop recycling).

009.01D3 If the product of the recycling process has levels of hazardous constituents that are not comparable to or unable to be compared to a legitimate product or intermediate per paragraph 009.01D1 or 009.01D2 of this section, the recycling still may be shown to be legitimate, if it meets the following specified

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requirements. The person performing the recycling must conduct the necessary assessment and prepare documentation showing why the recycling is, in fact, still legitimate. The recycling can be shown to be legitimate based on lack of exposure from toxics in the product, lack of the bioavailability of the toxics in the product, or other relevant considerations which show that the recycled product does not contain levels of hazardous constituents that pose a significant human health or environmental risk. The documentation must include a certification statement that the recycling is legitimate and must be maintained on-site for three years after the recycling operation has ceased. The person performing the recycling must notify the Director of this activity using EPA Form 8700-12.

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Enabling Legislation: Neb. Rev. Stat. §81-1505(13), 81-1513

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