

**U.S. Department of Energy  
Scrap Metal Management**

**U.S. Environmental Protection Agency - Comprehensive Environmental Response, Compensation, and Liability Act**

<b>Line of Inquiry and Source</b>	<b>Expectations</b>
<b>1.0 General</b>	
1.1 List the length of time that the facility has been engaged in the business of recycling scrap metal.	
<b>2.0 Exercise Reasonable Care When Selecting A Recycling Facility.</b>	In order to qualify for CERCLA liability exemption under the Superfund Recycling Equity Act (the Act), scrap metal generators must "exercise reasonable care to determine that the facility where the recyclable material was handled, processed, reclaimed or otherwise managed by another person ... was in compliance with substantive (not procedural or administrative) provisions of Federal, State, or local environmental law or regulation, or compliance order or decree ... applicable to the handling, processing, reclamation, storage, or other management activities associated with recyclable material." S. 1948, 106 <sup>th</sup> Cong., 1 <sup>st</sup> Sess. § 127(C)(5) (1999).

**U.S. Environmental Protection Agency - Comprehensive Environmental Response, Compensation, and Liability Act**

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<p>2.1 Learn the compliance history: Inquire with the U.S. Environmental Protection Agency, state environmental, and local agencies to learn which permits, compliance orders, or consent decrees cover the facility, and whether the facility has a history of non-compliance. S. 1948, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess. § 127(C)(6)(c) (1999).</p>	<p>The Act contemplates that recyclers will inquire with environmental agencies. The Act’s legislative history states that the Act “requires a responsible person who arranges for the recycling of a recyclable material to inquire of the appropriate environmental agencies as to the compliance status of the consuming facility.” CONG. REC. S15050 (Nov. 29, 1999). And, suggesting that such inquiries may satisfy a recycler’s responsibilities, it explains further that recyclers may rely on “the result of inquiries made to the appropriate Federal, State, or local environmental agency (or agencies) regarding the consuming facility’s past and current compliance.” <i>Id.</i></p> <p>The Act’s legislative history puts the burden on the agency to provide, rather than on the generator to uncover, compliance information. It states that “Federal, State, and local agencies may not respond quickly (or not at all) to inquiries made regarding a specific facility’s compliance record. [The Act] only requires a person to make reasonable inquiries.” <i>Id.</i></p> <p>The Act’s legislative history also limits the frequency and breadth of compliance inquiries. It states that “inquiries need not be made before every transaction. And, it states further that “inquiries need only be made to those agencies having primary responsibility over environmental matters related to the handling, processing, etc. of the secondary materials involved in the recycling transaction.” <i>Id.</i></p>
<p>2.2 Investigate current compliance: Perform RCRA, CWA, CAA, TSCA, and NRC audits as applicable.</p>	<p>As a factor to judge whether a generator has exercised reasonable care, the Act considers the “ability of the person to detect the nature of the consuming facility’s operations.” S. 1948, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess. § 127(C)(6)(a) (1999). Because of its vast resources, DOE will likely be considered to have a great ability to detect the nature of a consuming facility. Thus, in addition to gathering compliance data from environmental agencies, DOE should perform its own audits of recycling facilities.</p>

U.S. Environmental Protection Agency - Comprehensive Environmental Response, Compensation, and Liability Act

Line of Inquiry and Source	Expectations
2.3. Compare current compliance with compliance history.	<p>According to the Act's legislative history, a showing of current compliance works most powerfully as evidence that a person arranging for recycling exercised reasonable care when choosing a recycler.</p> <p>The legislative history explains that "[t]he person arranging for the transaction must exercise reasonable care at the time of the transaction." And "[s]hould a consuming facility's compliance record indicate past non-compliance with the environmental laws, but at the time the person arranged for the transportation the person exercised reasonable care to determine that the consuming facility was in compliance with all applicable laws, the transaction would qualify for relief [from CERCLA liability]." CONG. REC. S15049 (Nov. 29, 1999).</p>
2.4 When performing audits or collecting compliance history data, focus on material handling, processing, reclamation, and storage of the recyclable material, rather than the eventual production of the product.	<p>The Act requires investigations of compliance related to the "handling, processing, reclamation, storage, or other management activities associated with recyclable material." S. 1948, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess. § 127(C)(5). The legislative history further explains that "[t]he person must only determine the status of the consuming facility's compliance with laws, regulations, or orders, which directly apply to the handling, processing, reclamation, storage, or other management activity associated with the recyclable material ... A person who arranges for recycling of scrap metal to a consuming facility would not be responsible for determining the consuming facility's compliance with regulations governing the consuming facility's production of its product." <i>Id.</i></p>

**U.S. Environmental Protection Agency - Comprehensive Environmental Response, Compensation, and Liability Act**

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<p>2.5. Verify that the consuming facility will pay a reasonable price for DOE recyclables. S. 1948, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess. § 127(C)(6)(a)</p>	<p>In determining whether the generator exercised reasonable care when selecting a recycling facility, the Act considers the price paid in the recycling transaction. S. 1948, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess. § 127(C)(6)(a) (1999). Ultimately, therefore, the generator must make sure that it receives a fair price for its recyclables, so the transaction does not appear to be a disposal disguised in the cloak of a recycling transaction. The legislative history provides some guidance on this. It explains that “[o]ne should look not only at whether the price bore a reasonable relationship to other transactions for similar materials at the time of the transaction in question but should also take into account the circumstances surrounding the individual transaction such as whether it was part of a long term deal involving significant quantities.” CONG. REC. S15050 (Nov. 29, 1999).</p>
<p><b>3.0 Verify That The Sale Of Material To The Recycling Facility Qualifies As “Arranging For Recycling.”</b></p>	<p>Only persons who “arrange for recycling” enjoy liability protection. According to the Act, “[t]ransactions ... shall be deemed to be arranging for recycling ... [if] all of the following criteria [as listed in 3.1 - 3.4 below] were met at the time of the transaction.” S. 1948, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess. § 127(C) (1999).</p>
<p>3.1 Determine whether the recyclable material (e.g. scrap metal) meets a commercial specification grade. S. 1948, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess. § 127(C)(1) (1999).</p>	<p>According to the Act’s legislative history, a commercial specification grade “[c]an include specifications as those published by industry trade associations, or other historically or widely utilized specifications are acceptable.” CONG. REC. S15049 (Nov. 29, 1999).</p>
<p>3.2 Determine whether a market exists for the recyclable material. S.1948, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess. § 127(C)(2) (1999).</p>	<p>According to the Act’s legislative history, “evidence of a market can include, but is not limited to: a third-party published price (including a negative price), a market with more than one buyer or one seller for which there is a documentable price, and a history of trade in the recyclable material.” The burden here is on the generating facility. In order to show that a market exists, the site auditor should obtain documentation from the consuming facility which shows that a market does indeed exist. For example, if the consuming facility published a price that it typically pays for the recyclable material, the auditor should obtain it.</p>

**U.S. Environmental Protection Agency - Comprehensive Environmental Response, Compensation, and Liability Act**

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<p>3.3 Determine whether recyclable material will be used as a feedstock for the manufacture of a new saleable product. S.1948, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess. § 127(C)(3) (1999).</p> <p>3.3.1 Make sure the facility can accept and process the recyclable materials that you intend to send, and that those materials will contribute to the manufacture of a new saleable product.</p> <p>3.3.2 Evaluate the percent of the recyclable material that will be recovered and processed to make a new product, i.e. the percent recovery.</p>	<p>By making the Act’s liability exclusion contingent upon a material’s use as a feedstock, this provision seeks to ensure that the Act only covers truly recyclable material. Rather than holding the generator wholly responsible for the fate of the material it sends off-site, the Act, at least according to the legislative history, only requires a demonstration from the generator that it sold its material “with the intention that the material would be used as a raw material... [t]he fact that [it] was not, for some reason beyond the control of the person who arranged for recycling, ... should not be evidence that the requirements of this [provision] were not met. CONG. REC. S15049 (Nov. 29, 1999). In order to demonstrate an intent to have recyclable material used as feedstock, auditors should make sure that the recycling facilities operations can accept and process their recyclable material, and they should ensure that it will contribute to the production of a saleable product. Attorneys for the generators of the recyclable material should draft an agreement in which the recycling facility promises to use the recyclable material as feedstock for the manufacture of a new product.</p> <p>The legislative history also discusses the recovery rate, or percent recycled, that would qualify a recyclable material as feedstock. However, it only states that no single benchmark exists and that a common sense evaluation is appropriate. CONG. REC. S15049 (Nov. 29, 1999). Though additional language within the legislative history does not make it clear, a good measure might compare the value that the recyclable material adds to the eventual product versus the recyclable material’s cost. If the value of the reclaimed product exceeds the cost of the recyclable material, the recovery rate is probably significant. Auditors should determine the recovery rate that the facility will yield for the material that it will send there. Then, along with legal counsel, management for the generating facility should decide whether the Act’s requirements are satisfied.</p>

**U.S. Environmental Protection Agency - Comprehensive Environmental Response, Compensation, and Liability Act**

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<p>3.4 Determine whether the recyclable material will replace a virgin raw material, or whether the product to be made from the recyclable material replaces a product made, in whole or in part, from a virgin raw material. S. 1948, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess. § 127(C)(4)(1999).</p>	<p>The Act, as explained by the legislative history, conditions a generator’s liability protection upon a showing that its recyclable material replaces virgin feedstock or upon a showing that the product produced from its recyclable material competes in the market with products made from virgin feedstock. Thus, auditors should learn whether and which virgin material their recyclable material would replace. If the recycling facility uses only recyclable material (and thus no direct replacement of virgin material exists), then auditors should seek to learn the nature of the product produced at the facility and the types of products it competes with in the market. Then, the management for the generator can determine whether the Act’s criteria have been met.</p>
<p><b>4.0 Make Sure That The Recycling Transaction Will Not Be Excluded From the Act’s Liability Protection.</b></p>	
<p>4.1 Determine whether the recyclable material will actually be recycled. S. 1948, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess. § 127(f)(1)(A)(1) (1999).</p>	<p>If material will not be recycled, generators will not be immune from CERCLA liability. Unfortunately, the Act does not set any guidelines that discuss the meaning of recycled. The legislative history only states that “it is not necessary that every component of the recyclable material be recycled and actually find its way into a new product in order to meet this requirement.” CONG. REC. S15050 (Nov. 29, 1999).</p>
<p>4.2 Inspect process to learn if it qualifies as one where material would be burned as fuel, or for energy recovery, or incineration. S. 1948, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess. § 127(f)(1)(A)(ii) (1999).</p>	<p>RCRA regulations provide a meaning of these terms. 40 CFR 261.2(c). If the facility does qualify as one of these facilities, generators who send their recyclable materials there do not qualify for the CERCLA liability exemption.</p> <p>“Smelting, refining, sweating, melting, and other operations which are conducted by a consuming facility for purposes of materials recovery are not considered incineration, nor would they be categorized as burning as fuel or for energy recovery.” CONG. REC. S15050 (Nov. 29, 1999).</p>

U.S. Environmental Protection Agency - Comprehensive Environmental Response, Compensation, and Liability Act

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<b>5.0 Management Practices</b>	CERCLA liability will not be imposed if a release does not occur at the recycling facility. Thus, in addition to satisfying the statutory requirements set forth above in sections 1 through 4, generators should investigate facilities for the likelihood that release will occur.
5.1 Pre-recycling Storage	RCRA does not impose storage requirements on scrap metal, thus RCRA standards do not govern its storage prior to recycling. However, in order to be prudent, inspectors should evaluate scrap metal storage practices and evaluate the potential for a release to occur. CERCLA inspections should also evaluate the potential for release that may occur from storm water that runs off of the facility. RCRA and CWA audit checklists should provide valuable guides in this regard.
5.2 Prior releases into the environment.	Auditors should learn whether this facility or another owned or operated by the facility's owners has ever been ordered to engage in a clean up of wastes, either under RCRA, CERCLA, the Safe Drinking Water Act, or another environmental statute. If so, auditors should learn the circumstances surrounding that prior release of hazardous substances. Management for the generators should then use this information to weigh the risk of future releases from facilities where they may send their recyclable materials.
5.3 Residuals management	Make sure that by products of the recycling processes are managed in a way that minimizes the release of hazardous substances. RCRA audit checklists should prove valuable in this regard.