

Reversing Course, EPA Tightens Its RCRA HAZARDOUS WASTE Recycling Rules

New EPA rule redefines solid waste.

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A long-term project by the U.S. Environmental Protection Agency (EPA) to reform, reduce, and relax the regulatory obstacles to the reclamation and recovery of valuable byproducts generated by industrial operations appears to have come to an end. In January 2015, EPA promulgated a final rule that again revised the agency's regulatory definition of "solid waste," which is the linchpin of EPA's authority under the Resource Conservation and Recovery Act (RCRA) to regulate the management of hazardous waste (see January 13, 2015, *Federal Register*).

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This action appears to change the direction of the path taken in the October 2008 rules, which encouraged more recycling of “hazardous secondary materials” that would otherwise be subject to EPA’s RCRA hazardous waste rules. The agency explains this change of direction as a response to the concern that the application of the 2008 rules, without additional safeguards, would increase risk to human health and the environment from discarded hazardous secondary materials. Others say that the latest rules appear to conflict with RCRA’s basic goals of resource conservation and recovery.

RCRA Revisited

RCRA, enacted in 1976, sets forth criteria for the management of solid waste and hazardous waste and establishes strict requirements applicable to those who generate, transport, treat, store, or dispose of hazardous waste. Most states have been delegated the authority to execute these programs, subject to EPA oversight.

On May 19, 1980, EPA promulgated the first major set of hazardous waste regulations, frequently described as a “cradle-to-grave” management system. Over the years, the program has become ever more complex, but the 1980 rules remain the heart of the RCRA system. The key-stone of EPA’s regulatory program is the agency’s definition of “solid waste.” A material cannot be a hazardous waste unless, first of all, it is a solid waste. A solid waste that exhibits one of the characteristics of a hazardous waste, or has been listed or otherwise defined as a hazardous waste, and is not otherwise excluded from the definition of a hazardous waste, is a hazardous waste and is subject to EPA’s hazardous waste management system. The statute itself defines “solid waste” as “any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility and other discarded material...”

The regulatory definition of “solid waste” focuses

on discarded materials, yet the meaning of the term “discarded” became a source of confusion and debate when applied to typical industrial practices that involved the generation and reuse of secondary materials. In the midst of the confusion, EPA was concerned that “sham” recycling operations could result in mismanagement of secondary materials intended for reuse and instead create hazardous waste disposal sites or other environmental problems.

Accordingly, in 1985, EPA overhauled its 1980 definition of “solid waste” to specifically address certain recycling activities. Under the 1985 revisions, materials are considered to be “solid wastes” if they are discarded, abandoned, inherently waste-like, or recycled as described in the rule. Five categories of hazardous secondary materials, if recycled in a manner described in the rule, constituted a solid waste and also a hazardous waste. The 1985 rule also contained a few recycling exclusions: materials that were recycled by being reused as an ingredient or as an effective substitute for a commercial product, or returned to the original manufacturing process as a substitute for a raw material feedstock.

The 1985 definition was challenged in the courts, resulting in a number of significant decisions, and inspiring EPA to mount another effort in 2003 to revise its definition of solid waste. The agency stated that the proposed revisions would be consistent with the court rulings, and that EPA would “clarify in a regulatory context the concept of legitimate recycling.”

In October 2008, EPA finalized the rules it had proposed in 2003. These rules added two new, more general exclusions to the definition of solid waste to encourage increased recycling of valuable secondary materials. These two exclusions are popularly known as the “generator-controlled exclusion” and the “transfer-based exclusion,” and they became the 23rd and 24th, respectively, exclusions to EPA’s definition of “solid waste.” In addition, EPA promulgated new rules that established standards for a new administrative procedure by which a generator could seek a non-waste determination for its hazardous secondary


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materials that were not already specifically excluded by rule.

However, the October 2008 rules provoked considerable controversy, and EPA revisited them with a proposal published in 2011. EPA stated that this action was prompted by “concerns raised by stakeholders about potential increases in risks to human health and the environment.”

In EPA’s most recent final rule defining a “solid waste” published in January, EPA: (1) amended the “generator-controlled exclusion,” (2) replaced the “transfer-based exclusion” with a new “verified recycler exclusion,” (3) established a new “remanufacturing exclusion” to permit the controlled reclamation of specifically listed solvents, (4) codified the agency’s long-standing policy that hazardous secondary materials determined to have been “sham recycled” are automatically considered to be discarded and solid waste, (5) revised the 2008 definition of “legitimate recycling,” and

(6) substantially revised the procedures by which a solid waste variance or non-waste determination will be made. The agency also deferred, for the time being, any additional review of the pre-2008 recycling exclusions.

Additional Challenges

EPA’s decision to reduce the scope of the new recycling exclusions by adding new conditions to their use may present additional challenges to generators seeking to recover, recycle, and reuse valuable materials as an alternative to their disposal. Environmental professionals should determine whether their state is immediately affected by this federal rule or whether the rule has no effect in the state until the agency administering the RCRA program takes action to incorporate these rules. Professionals should also carefully evaluate the implications of these federal rules, which will become effective on July 13, 2015, and watch for upcoming developments in EPA’s latest regulatory efforts to define a “solid waste.” **em**