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Environmental and Utilities Legal Update

New Rule Modifies RCRA Solid Waste Definition

The United States Environmental Protection Agency (EPA) recently published a final rule that modifies the definition of solid waste by excluding some additional hazardous secondary materials that are recycled from regulation as solid (and therefore, hazardous) wastes. In 2003, EPA proposed a regulatory exclusion from the definition of solid waste that would streamline the requirements for the recycling of hazardous secondary materials and subsequently published a supplemental proposal in 2007 based on public comments. The new rule finalizes, and is substantially the same, as the 2007 proposed rule.

The rule goes into effect on December 29, 2008 in unauthorized states; however, potentially affected parties should ensure that RCRA-authorized states have adopted this new, less stringent rule into their regulatory programs.

Who Is Affected

This rule may apply to any facility that generates or recycles hazardous secondary materials that are currently regulated as RCRA Subtitle C hazardous wastes (e.g., secondary materials, such as industrial co-products, by-products, and residues) and may increase opportunities to recycle certain secondary materials by removing unnecessary controls over such materials and providing explicit and consistent factors for determining the legitimacy of recycling practices.

At a Glance

The final rule establishes two new self-implementing exclusions from the definition of solid waste for certain hazardous secondary materials that are legitimately recycled:

1. Generator Control-Based Exclusion - applies to hazardous secondary materials legitimately reclaimed under the control of the generator
2. Transfer-Based Exclusion - applies to hazardous secondary materials transferred for legitimate reclamation, provided certain conditions are met

The final rule also contains a procedure for applying for a case-by-case nonwaste determination and includes provisions for assessing the "legitimacy" of hazardous secondary material recycling practices under the new exclusions.

Generator Control-Based Exclusion

This exclusion applies to hazardous secondary materials (i.e., listed sludges, listed by-products, and spent materials) generated and legitimately reclaimed under the control of the generator through (1) recycling on-site at the generating facility or (2) off-site recycling within the same company or (3) recycling through a tolling agreement.

Secondary materials handled under a tolling agreement will be excluded if (1) the tolling company certifies that the contract specifies that the tolling company owns and has responsibility for the recyclable material once it is generated and (2) the material is returned to the tolling company for reclamation and subsequently recycled.

Generators, intermediate facilities, and reclaimers must notify EPA or the authorized state prior to operating under the exclusion and by March 1st every even numbered year thereafter. All materials must be reclaimed within the United States or territories.

Transfer-Based Exclusion

This exclusion applies to hazardous secondary materials generated by one company and transferred to an intermediate facility or to another company for legitimate reclamation, with the following conditions: (1) generators must provide the same notification required for materials reclaimed under the exclusion for on-site, same-company, and tolling arrangements; (2) they must contain all hazardous secondary materials managed under the exclusion; and (3) they must maintain records of off-site shipments for three years. In addition, generators must make "reasonable efforts" to ensure that their materials are safely and legitimately reclaimed.

The final rule clarifies what action constitutes "reasonable efforts" and requires reasonable efforts to be repeated every three years at a minimum for the hazardous secondary material generator to claim the exclusion and to send the hazardous secondary materials to each reclaimer and any intermediate facility.

Types of Hazardous Waste Not Eligible for the New Exclusions

1. Hazardous secondary materials burned for energy recovery or used to produce a fuel or otherwise contained in fuels (40 CFR 261.2(c)(2))
2. Hazardous secondary materials used "in a manner constituting disposal" or used to produce products applied to or placed on the land (40 CFR 261.2(c)(1))
3. Hazardous secondary materials inherently waste-like under 40 CFR 261.2(d)

Materials currently excluded from the definition of solid waste according to other, existing provisions of 40 CFR Part 261 are also not eligible. For example, the exclusion under 40 CFR 261.4(a)(22) requires broken cathode ray tubes to be transported in closed containers. The new exclusions do not supersede or otherwise affect other exclusions; such hazardous secondary materials must be managed in accordance with existing exclusions.

Legitimacy Criteria Established

The final rule also contains a procedure for applying for a case-by-case nonwaste determination and codifies provisions for assessing the "legitimacy" of hazardous secondary material recycling practices under the new exclusions. The legitimacy provisions apply only to the exclusions and nonwaste determinations being promulgated under the final rule. Current exclusions and other prior solid waste determinations or variances, including determinations made in letters of interpretation and inspection reports, remain in effect.

Nonwaste determinations are available for materials (1) reclaimed in a continuous industrial process or (2) indistinguishable in all relevant aspects from a product or intermediate.

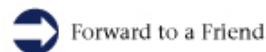
For More Information

The final rule may be accessed at 73 Fed. Reg. 64668-64788 (Oct. 30, 2008) or via the following link: <http://edocket.access.gpo.gov/2008/pdf/E8-24399.pdf>.

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