

Legal Lookout: Redefining Solid Waste

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Some hazardous secondary materials excluded from EPA's revised definition under RCRA.

The definition of solid waste has long been the subject of controversy. At the heart of the debate is what constitutes "discard," versus legitimate recycle or reuse such that RCRA regulation should not apply. This question has been especially vexing for secondary materials, including spent materials, listed sludges and listed byproducts.

Summary overview

The rule establishes two self-implementing exclusions for certain hazardous secondary materials that are legitimately recycled. One exclusion streamlines management requirements for hazardous secondary materials legitimately reclaimed under the control of the generator. The other exclusion streamlines requirements for hazardous secondary materials that are transferred for legitimate reclamation, provided certain conditions are met. The rule also contains a procedure for applying for a case-by-case non-waste determination, and provisions for assessing the legitimacy of hazardous secondary material recycling practices.

The final rule contains an important provision intended to determine which recycling activities are legitimate. To be legitimately recycled, the hazardous secondary material: (1) must provide a useful contribution to the recycling process; and (2) the recycling must make a valuable new intermediate or final product.

Two additional factors must also be taken into account: (1) whether the recycled material is managed as a valuable product; and (2) whether the recycled product contains toxic constituents at significantly greater levels than a non-recycled product made from virgin materials. EPA states that these exclusions are not available for materials that are: (1) considered inherently waste-like; (2) used in a manner constituting disposal; or (3) burned for energy recovery.

The restrictions for the exclusions in the final rule are substantially similar to those contained in the March 2007 supplemental proposal, with certain modifications regarding reporting and recordkeeping; reasonable efforts required of generators to ensure that their hazardous secondary materials are safely and legitimately recycled; intermediate facilities storing hazardous secondary materials for more than ten days are eligible under the transfer-based exclusion; and tailoring the financial assurance requirements to intermediate facilities and reclaimers of hazardous secondary materials.

Discussion

Many in industry see the final rule as a welcome refinement of the definition of solid waste that will genuinely encourage beneficial recycle or reuse of certain secondary materials and remove certain activities from stringent RCRA regulation. The perhaps inadvertent capture of certain industrial activities within the scope of RCRA regulation has proven to be a formidable deterrent to beneficial recycle and reuse. In this regard, the final rule offers important clarity on key issues.

Another important topic that the final rule addresses is its codification of "legitimacy." EPA has long distinguished between legitimate and sham recycling, and EPA has identified certain factors to apply in determining the difference between the two. The final rule officially codifies these factors.

A FAQ on the rule is available at www.epa.gov/epawaste/hazard/dsw/dsw-faq2.htm. The final rule was effective Dec. 29, 2008. *PE*

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