

Legal Lookout: Settling on a Definition for DSW

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EPA announces next steps on revising the definition of solid waste with regard to what is meant by discard, and what's an emission-comparable fuel.

EPA announced on May 5, 2009, the next steps on two hazardous waste rules issued under the Resource Conservation and Recovery Act (RCRA), both addressing the definition of solid waste (DSW). This column provides background on the shape of things to come.

Revised definition of solid waste

Last October, EPA issued a final rule amending the DSW rule. The rule reflects a series of opinions in the U.S. Court of Appeals for the D.C. Circuit on the meaning of the term "discard." The rule established two self-implementing exclusions for certain hazardous secondary materials that are legitimately recycled. The rule contains a procedure for applying for a case-by-case non-waste determination, and includes provisions for assessing the "legitimacy" of hazardous secondary material recycling practices under the new exclusions. The final rule became effective Dec. 29, 2008.

Since publication of the DSW rule, the Sierra Club has raised concerns about its effectiveness and protectiveness, and submitted an administrative petition urging EPA to rescind the rule and stay its effective date. Various industry groups have filed letters opposing the Sierra Club's administrative petition. In addition, the Sierra Club and the American Petroleum Institute have filed judicial petitions for review in the U.S. Court of Appeals for the D.C. Circuit.

EPA announced its intent to convene a public meeting at the end of June to discuss possible revisions to the DSW rule in response to the Sierra Club's administrative petition.

EPA expects that stakeholders' input at the public meeting will assist it in deciding whether to make revisions to the rule and how such revisions would ensure that the DSW rule appropriately encourages resource conservation for those hazardous secondary materials that are conditionally excluded.

Emission-comparable fuels rule

EPA also is planning to propose a rule withdrawing the Emission Comparable Fuels rule, which became effective on Jan. 20, 2009. The proposal is expected to outline EPA's concerns with the final rule and request public comment on targeted issues.

The final rule added a new group of materials to this exclusion. These materials are hazardous secondary materials that, as generated, are not discarded but are treated as valuable commodities through all phases of management through operation of conditions on their storage and burning,

and based on their substantial physical identity with fuel oil. Such excluded fuels are referred to as "emission-comparable fuels" (ECF). These fuels are produced from a hazardous waste, but generate emissions when burned in an industrial boiler that are comparable to emissions from burning fuel oil. The materials must also be stored under specific, and some argue overly burdensome, requirements.

The ECF rule was intended to remove regulatory costs by reclassifying certain manufacturing byproducts as non-wastes. Specifically, 40 C.F.R. Section 261.38 hazardous secondary materials that have fuel value and whose hazardous constituent levels are comparable to those found in fuel oil that could be burned in their place are not solid wastes and thus are not hazardous waste under Subtitle C of RCRA. These materials are called "comparable fuels."

The final rule has been criticized for allowing hazardous waste to evade the hazardous waste regulatory system, and also for being difficult to administer. Industry members have also criticized it because of the detailed and prescriptive conditions for reclassification, which industry advocates state will limit the rule's utility.

Readers with interests in the DSW and the ECF rules should be on the alert for EPA initiatives on both rules. How EPA addresses public comment will have a substantial impact on whatever final rules are issued. As a result, both rules will have a significant impact on facility operations and RCRA compliance costs. PE

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