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Revisions to the Definition of Solid Waste

Twenty-one years after the decision in *American Mining Congress* and five years after the proposal, EPA has issued a final rule revising the definition of solid waste. 73 Fed. Reg. 64668 (Oct. 30, 2008). The stated purpose of the revision is to respond to a series of court decisions that “provided EPA with additional direction regarding the proper formulation of the RCRA regulatory definition of solid waste” and to clarify the concept of ‘legitimate recycling.’

The statutory definition of solid waste encompasses “other discarded material.” The regulatory definition of solid waste builds on the statutory definition by explaining the circumstances in which a material is discarded: “A solid waste is any discarded material” and a “discarded material is any material which is,” among other things, reclaimed. 40 CFR 261.2(a). EPA made it clear that the “concept of “discard” is the central organizing idea behind the revisions.” *Id.*, at p. 64675. According to the long-line of cases which provided the ‘additional direction’ mentioned above, EPA simply has no jurisdiction over materials that are not discarded.

EPA revised the rules to exclude two classes of materials: those that are legitimately reclaimed under the control of the generator and those that are transferred for the purpose of legitimate reclamation. EPA then provide the criteria for determining when legitimate reclamation occurs.

Control of the Generator: Materials that remain under the control of the generator, when legitimately reclaimed, may be excluded from the definition of solid waste. The materials are under the control of the generator when the reclamation occurs at the site of generation, when it occurs at a site under common control of the generator, or when the reclamation occurs under a tolling agreement. There are certain conditions that must be met, including but not limited to: the materials must be ‘contained’ (even when the reclamation occurs in a non-land-based unit), there must be no speculative accumulation, the reclamation must be legitimate, and notification must be provided.

Transfer-Based Exclusion: Materials may be transferred from the generating entity to a different person or company for the purpose of legitimate reclamation. The same conditions and restrictions noted above are applicable to the transfer-based exclusion. However, there are additional requirements. First, the materials must be handled only by the generator, the transporter, an intermediate facility or reclaimer, and, if a transfer station is used during transportation, the materials must spend no more than ten days at a transfer station. Second, the generator must make ‘reasonable efforts’ to ensure that the reclaimer intends to properly and legitimately reclaim the material. EPA establishes specific criteria for the generator’s evaluation (in the form of five questions that must be affirmatively answered), requires that the evaluation be done at least every three years, and requires that the paperwork associated with the evaluation and the off-site shipment be maintained for three years. Third, the reclaimer or intermediate facility have financial assurance as specified in a new regulation, 40 CFR 261.Subpart H.

Legitimate Reclamation: These exclusions are based on the premise that legitimate reclamation, or recycling, is occurring and the material is not simply being discarded. EPA codified some of the ‘sham recycling’ factors



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it has utilized beginning with the 1985 re-definition of solid waste. The material must provide a “useful contribution to the recycling process ... and the recycling process must produce a valuable product or intermediate.” 40 CFR 260.43. A material provides a useful contribution if contributes valuable ingredients, replaces a catalyst or carrier, is the source of a valuable constituent recovered in the recycling process, is recovered or regenerated by the recycling process, or is used as an effective substitute for a commercial product. The product is valuable if it is sold to a third party or used by the recycler or generator as an effective substitute for a commercial product or as ingredient in an industrial process.

EPA also established several factors that must be considered in making a determination as to the overall legitimacy of a specific recycling activity. First, the materials should be managed as a valuable commodity. Second, the product of the recycling process does not contain significant concentrations of constituents that are not found in an analogous raw material. Third, all factors must be evaluated and legitimacy as a whole considered. If one or more of these factors is not met, it may be an indication that the recycling is not legitimate.

Non-waste Determinations: EPA also established an administrative process for materials reclaimed in a continuous industrial process and for materials that are indistinguishable from a product. The demonstration process operates similarly to the process for obtaining a solid waste variance.

EPA’s rule is effective on December 29, 2008. Please note that EPA has taken the position that a state is not required to adopt this rule as it is less stringent. However, EPA also noted that if a state would implement the rule through state waiver authorities in advance of adoption or authorization, EPA would not consider such implementation a concern for enforcement or state authorization. LDEQ should consider the state waiver option to encourage legitimate recycling in the state. 73 Fed. Reg. 64753.

If you believe that you have a material that would qualify, and thus be removed from Subtitle C regulation, you may want to begin preparations for inclusion under the terms of this rule. Please call or e-mail if you have questions. Thank you very much.



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