

# Complying with the USEPA's New Solid & Hazardous Waste Regulations via Recycling



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**F**ROM THE FIRST PRO-mulgation of regulations under the Resource Conservation and Recovery Act (RCRA) in 1980, the U.S. Environmental Protection Agency (EPA) has grappled with protecting the environment while encouraging the beneficial reclamation and recycling

of by-products, spent solvents and other materials previously discarded as wastes. The latest regulatory amendment became effective on both a federal level and here in New Jersey on July 13, 2015.

In general, the 2015 amendment increased agency oversight of reclamation and recycling activities to protect the environment and ensure that companies reclaiming and recycling materials are prepared to deal with potential environmental or safety emergencies. It eliminated one reclamation-related exclusion and made others more difficult to obtain. A new exclusion was added for the remanufacture of certain high-value used solvents.

When pursuing recycling and reuse instead of disposal, care must be taken to work through the complicated RCRA regulatory scheme to ensure that any required approval, notice, recordkeeping or other requirement has been identified and satisfied.

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We now take a look at the "entrance ramp" established in the RCRA that leads to regulation of by-products, spent solvents or other used materials (collectively referred to by the EPA as "secondary materials") as wastes even when they are used, reused, recycled or reclaimed for their beneficial value. We also pinpoint the regulatory "exit ramps" that allow some secondary materials to escape classification as a solid or hazardous waste.

**The Entrance Ramp.** The quest to determine whether any material, including a secondary material, is regulated as a waste under the RCRA begins with the definition of solid waste (the DSW). Hazardous or universal wastes under the RCRA are solid wastes that are sufficiently hazardous to require a higher level of regulation than that required of non-hazardous solid wastes. Once a material is determined to be a solid waste, it must be further examined to ascertain whether it is a hazardous or universal waste.

The DSW defines solid waste as any "discarded material" that is not specifically excluded by regulation or a variance or non-waste determination granted by the EPA or an authorized state agency. In addition to these exclusions, the DSW has some built-in limitations that function for all practical purposes, as if they were exclusions. These "built-in" exclusions will be covered along

with other exclusions in our subsequent discussion of the "exit ramps" from waste regulation.

The first question under the DSW is whether the material being evaluated is a discarded material, defined as any material that is abandoned, recycled, inherently waste-like, a military munition waste or sham recycled. These terms are defined as follows:

**Abandoned.** Materials are abandoned if they are disposed of, burned or incinerated. They are also abandoned if they are accumulated, stored or treated (but not recycled) before or in lieu of being disposed, burned or incinerated.

**Recycled.** Unless one qualifies for one of the DSW exit ramps, the decision to recycle a secondary material subjects it to regulation as a solid waste.

A material is recycled for purposes of the discarded material definition if: the material is used, reused or reclaimed, as those terms are defined in 40 C.F.R. §261.1(c); the recycling activity, including the accumulation, storage or treatment of the material before recycling, meets the criteria specified in 40 C.F.R. §261.2(c)(1) through (4); and the recycling activity does not qualify for the "built-in exclusion" provided in 40 C.F.R. §261.2(e).

As with any environmental regulatory program, each component of a definition has to be carefully tracked to piece together the definition's overall mean-

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*continued on page 50*

# Clearing the Obstacles

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*continued from page 48*

ing. Generally speaking, a material is used or reused if it is employed as an ingredient in an industrial process to make a product or an effective substitute for a commercial product. It is reclaimed if the material is processed to recover a usable product, such as the recovery of lead from a lead battery, or is regenerated.

**Sham Recycling.** Sham recycling is recycling that is not legitimate recycling as defined in the DSW. Companies that rely on recycling that turns out to be sham are vulnerable to enforcement for treating the materials as legitimately recycled materials instead of solid waste.

**The Exit Ramps.** Before discussing the various exclusions to the DSW, it is important to note that anyone claiming an exclusion has the burden of supporting that claim with appropriate documentation if challenged by the EPA. They must demonstrate that there is a known market or disposition for the secondary material, and that they meet the terms of the exclusion. They must show that they have the equipment to do the claimed recycling. Finally, they must show that the recycling or reclamation relied upon is legitimate.

**Exclusions with "No Strings Attached."** The following DSW exit ramps are self-implementing. If one meets the requirement for the exclusion or functional equivalent, the exclusion is effective without the need for notification to the EPA, recordkeeping (other than the documentation previously discussed), prior agency approval, permit or other regulatory bells or whistles. For this reason, these are the preferred exit ramps to pursue.

**Co-Products.** This is not an exclusion, but functions like one. Co-products, like by-products, are materials that are not a primary or separately produced product of a production process. Unlike by-products, however, co-products are "produced for the general public's use and [are] ordinarily used in the form [they are] produced by the process." Asphalt and kerosene are examples of co-products from the petroleum industry, while distillation column bottoms are examples of by-products. By-products are considered solid wastes unless

they meet one of the recycling exclusions. Co-products, on the other hand, are treated like products and are, therefore, not regulated as wastes.

**The Section 261.2(c) Recycling Table.** Subject to certain limited exceptions, the following categories of secondary materials are not considered solid wastes when they are reclaimed: sludges exhibiting a characteristic of hazardous waste; by-products exhibiting a characteristic of hazardous waste; and commercial chemical products listed in 40 C.F.R. §261.33. The commercial chemical products are also excluded when speculatively accumulated.

**The Section 261.2(e) Recycling Exemption.** Subject to a few specified exceptions, recycled materials are not solid wastes when the recycling process can be shown to: use or reuse the materials as ingredients in an industrial process to make a product, provided the materials are not being reclaimed; or use or reuse the materials as effective substitutes for commercial products; or return the materials to the original process from which they

are generated, without first being reclaimed or land disposed.

**Closed Loop Recycling with Reclamation.** The Section 261.2(e) recycling exemption is not available if the secondary material is being reclaimed prior to use or reuse. However, a separate exclusion covers recycling that requires reclamation, but only if the reclamation/recycling process is a closed loop. Only tank storage is allowed and storage time prior to reclamation is limited to a maximum of 12 months. The materials must be conveyed only through pipes or similar enclosed means. The reclamation cannot involve combustion and the materials cannot be used to produce fuel or a product that is used in a manner constituting disposal.

**Specialized Exclusions.** The regulations also provide several "no strings attached" exclusions that are restricted to specific secondary materials, industries and recycling process scenarios. They include materials such as spent wood preserving solutions, oil bearing hazardous secondary materials and shredded circuit boards.

Hazardous or universal wastes under the RCRA are solid wastes that are sufficiently hazardous to require a higher level of regulation than that required of non-hazardous solid wastes.



*continued on page 60*

continued from page 58



**EisnerAmper, LLP**

By Hubert Klein, CPA, ABV, CFF, CGMA, CFE, CVA, Partner

EisnerAmper was asked to review some suspicious activity by a newly hired president of a national company. We performed a forensic analysis on the computerized accounting records which uncovered some unusual patterns and trends that were not authorized by management. This resulted in a referral to and successful prosecution by law enforcement.



continued on page 62

continued from page 58

at all levels. But do we prepare to respond? Always. From the newest road trooper to the elite members of our T.E.A.M.S. Unit, we train to respond to the events we hope will not occur.

**Q.** Post 9/11, what keeps you up at night? What do you worry about?

**A.** I always worry about the safety of our troopers. You never want to get the call about an injured trooper or worse, and I've gotten those calls at all hours. Like all first responders, my troopers are the ones heading toward the emergencies that everyone else is running away from. There's always



continued on page 62

HAZARDOUS MATERIALS

continued from page 50

**Exclusions with "Strings Attached."** Unlike the prior group of exclusions, the following exclusions trigger additional notice, recordkeeping, prior agency approval and/or other requirements.

**Secondary Materials Reclaimed under Control of Generator.** This exclusion covers hazardous secondary materials generated and reclaimed under the control of the generator, even if the reclamation takes place at a different facility. Hazardous secondary materials are those that would be hazardous wastes if discarded. A facility operated by a tolling contractor could qualify as under the control of the generator. A suite of restrictions and requirements apply, including prior notification to the agency, recordkeeping requirements and arrangements for emergency preparedness and response.

**Verified Recycler Exclusion.** This exclusion, substantially modified by the 2015

amendment, allows a generator to transfer hazardous secondary materials to another person for legitimate reclamation. The reclaimer and any intermediary must either have a RCRA permit or obtain prior agency approval as a "verified recycler." An extensive list of additional requirements is imposed, including prior notification to the agency, financial assurance, containment of secondary materials and emergency preparedness.

**Specialized Exclusions.** A few other "strings attached" exclusions are restricted to specific secondary materials, industries and recycling process scenarios. These include materials used to make zinc fertilizers and the recycling of used solvent-containing wipes. The 2015 amendment added an exclusion for the "remanufacture" of "higher-value" solvents transferred from one manufacturer to another for the purpose of extending the useful life of the



continued on page 62

continued from page 60



**Grant Thornton LLP**

By Craig P. Casey, CPA, CFF, National Practice Leader of Litigation & Dispute Services

Well-trained forensic investigators are able to assess allegations and, with a skeptical mindset, raise questions and conduct substantive procedures with financial and accounting evidence to make judgements and ultimately report a series of findings based on the alleged criminal activities.



continued on page 64

continued from page 60

the potential for injuries—it’s just the nature of the job. This past year, troopers have jumped off a bridge into water to rescue a victim, gone into a burning home to save a life and constantly placed themselves in harm’s way every time they responded to a crash. That’s not to mention the obvious dangers of arresting drug dealers on city streets, or pulling over a driver for a simple infraction that could escalate to a life-and-death struggle.

**Q.** *What can be done to help citizens and police work together to protect our state and its infrastructure?*



continued on page 64

**HAZARDOUS MATERIALS**

continued from page 60

original solvent. This exclusion, however, is only available for a specified list of solvents, including toluene, xylenes and ethylbenzene, and to companies in the pharmaceutical, organic chemical, plastics and resins, and paints and coatings manufacturing sectors.

*Variance Petitions and Non-Waste Determinations.* The DSW excludes any materials that the EPA or an authorized state agency determines is not a solid waste based on a case-by-case analysis of a generator’s application using specified criteria.

**Proceed with Caution.** RCRA is a complex law. Legitimate recycling is and should be encouraged, but when taking advantage of any of the exit ramps identified above, care should be taken to look closely at all aspects of the exclusion to ensure that it applies and that all ongoing restrictions and requirements have been met. The advice of a specialist should be sought about any specific circumstance. ■

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