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NEWSLETTER

New "Definition of Solid Waste" Rule Brings More Recycling Confusion

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In mid-January, the U.S. Environmental Protection Agency (EPA) released its long-awaited revisitation of recycling elements of the definition of solid waste. 80 Fed. Reg. 1694 (Jan. 13, 2015). That definition is the cornerstone of rules implementing the Resource Conservation and Recovery Act (RCRA). As explained below, the newly-promulgated rule purports not to affect most exemptions from RCRA regulation relied upon by industry, municipalities, and others to facilitate product stewardship programs for potentially-hazardous products. In fact, however, it threatens, and at the very least opens the door for, more mischief.

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Background

The new rule reverses a deregulatory action by the departing Bush Administration: an October 2008 rule that expanded RCRA regulatory exclusions and exemptions to facilitate recycling by the chemical industry and other large-volume industrial waste generators. *See* 73 Fed. Reg. 64,668 (Oct. 30, 2008). EPA formally proposed reconsideration of the 2008 rule in 2011, after an administrative challenge to the 2008 rule by the Sierra Club. *See* 76 Fed. Reg. 44,094 (July 22, 2011).

The exemptions created by the 2008 rule are generally known as the "generator controlled" and "transfer based" exemptions. They joined over 20 other exclusions and exemptions already embodied in the rules ("pre-2008 exclusions and exemptions"). Those exclusions and exemptions included many specific materials generally headed for recycling, such as scrap metals, shredded circuit boards, used batteries, sludges, and fertilizers. *See, e.g.*, 40 C.F.R. § 261.4. Many of the earlier exclusions and exemptions had been negotiated by

industry groups seeking to facilitate specific product stewardship-oriented recycling programs. *See, e.g.*, 40 C. F.R. § 266.80 (lead-acid batteries); 40 C.F.R. Part 273 (lamps, pesticides, thermostats, consumer batteries).

While the 2008 rule had been targeted particularly at waste streams handled in bulk, EPA's 2011 Federal Register notice announcing its revisitation suggested that the Agency might also revisit some pre-2008 exclusions and exemptions. Numerous interest groups objected, essentially telling EPA those rules were not broken, and thus need not be fixed.

EPA Says It Has Not Changed Pre-2008 Exclusions and Exemptions

EPA repeatedly asserts in the preamble to the new rule and its Response to Comments Document that it is not changing the pre-2008 exclusions and exemptions. For example, the preamble flatly states: "EPA is not revising the pre-2008 exclusions and exemptions to include a legitimacy requirement." 80 Fed. Reg. at 1720. Similarly, the Response to Comments Document states: "EPA is not specifically applying the contained standard to the pre-2008 existing exclusions and is, instead, deferring action until we can more adequately address commenters' concerns." Response to Comments Document: Revisions to the Definition of Solid Waste, Docket ID No. EPA-HQ-RCRA-2010-0742-0372, at 253. EPA further says:

[W]e did not intend to raise questions about the status of general legitimacy determinations that underlie these existing [pre-2008] exclusions from the definition of solid waste, or about case-specific determinations that have already been made by EPA or the states. As noted in the comments, EPA generally considered the legitimacy of the recycling process when the original determinations were promulgated, and the Agency did not intend to force companies to have to reexamine long standing legitimate recycling practices. [80 Fed. Reg. at 1765.]

However, the Agency may have made more mischief than it admits, because the pre-2008 exclusions and exemptions previously were not subject to the legitimacy requirements of the old regulations. In contrast, the Agency's new codified "legitimate recycling" standard is explicitly applicable to those exclusions and exemptions. The Agency appears to believe this regulatory change does not amount to a change in practice but others may disagree. The rationale for the Agency's conclusion is critical to understanding why established recyclers may be concerned: EPA concluded it was not changing the exclusions and exemptions because, in the Agency's view, the new "legitimate recycling" criteria were already embodied in those exclusions and exemptions:

EPA has determined that the four legitimacy factors being codified in 40 C.F.R. § 260.43 are substantively the same as the existing legitimacy policy . . . . This policy is well understood throughout the regulated community and among the state implementing agencies. By providing one standard of legitimacy for all recycling, the Agency expects there will be more clarity, consistency, and predictability for making legitimate recycling

determinations. [80 Fed. Reg. at 1720.]

So, despite its protestations, EPA seems to be saying that the final rule *does* adopt a new standard for "legitimate recycling" that *does* apply to regulated materials addressed in pre-2008 exclusions and exemptions. As the first sentence of new 40 C.F.R. § 260.43(a) states: "Recycling of hazardous secondary materials for the purpose of the exclusions or exemptions from the hazardous waste regulations must be legitimate." 80 Fed. Reg. at 1773.

In Fact, EPA Either Has Changed, or Has Laid the Foundation for Changing, Existing Exclusions and Exemptions

The conclusion that the new rule does not change anything as to pre-2008 exclusions and exemptions is undercut by the fact that EPA also found it necessary to amend the factors in the new rulemaking. Proponents of recycling will thus be well advised to study carefully new Section 260.43 to make sure it is consistent with the workings of their programs.

Consider, for example, new Section 260.43(a)(3), which sets forth the third factor and reveals the sorts of issues that merit attention. It states:

The generator and the recycler must manage the hazardous secondary material as a valuable commodity when it is under their control. Where there is an *analogous raw material*, the hazardous secondary material must be managed, at a minimum, in a manner *consistent with the management of the raw material or in an equally protective manner*. Where *there is no analogous raw material, the hazardous secondary material must be contained.* Hazardous secondary materials that are released to the environment and are not recovered immediately are discarded. [80 Fed. Reg. at 1773 (to be codified at 40 C.F.R. § 260.43(a)(3)) (italics added).]

Readers should keep in mind that the "hazardous secondary material" to which this provision applies is the product from which materials are being reclaimed—the battery, thermostat, or switch—not the material to be produced (the "product" of recycling). If those products are sold individually packaged, for example in shrink wrap, does the requirement that collected material must be managed "consistent with the management of the raw material or in an equally protective manner" require that every unit collected for recycling be shrink wrapped? One hopes not, but those experienced with Agency interpretations of ambiguous rules are right to be concerned about the phrases "consistent with" and "equally protective."

Moreover, the regulations unfortunately do not provide, at least in a section applicable to this provision, a definition of "analogous raw material." A definition only appears in the "verified recycler" exclusion at 40 C.F.R. § 261.4(a)(24)(vi)(D), not the overall definitions set forth in 40 C.F.R. § 260.10. And that definition is not enormously helpful:

An "analogous raw material" is a raw material for which a hazardous secondary material is a substitute and serves the same function and has similar physical and chemical properties as the hazardous secondary material.

Is a new battery a "raw material?" If not, Section 260.43(a)(3), quoted above, says the collected products must be contained. And the new regulations do include an applicable definition of "contained":

Contained means held in a unit (including a land-based unit as defined in this subpart) that meets the following criteria: (1) The unit is in good condition, with *no leaks* or other continuing *or intermittent unpermitted releases* of the hazardous secondary materials to the environment, and is designed, as appropriate for the hazardous secondary materials, to prevent releases of hazardous secondary materials to the environment. Unpermitted releases are releases that are not covered by a permit (such as a permit to discharge to water or air) and may include, but are not limited to, releases through surface transport by precipitation runoff, releases to soil and groundwater, windblown dust, fugitive air emissions, and catastrophic unit failures; (2) The unit is properly labeled or otherwise has a system (such as a log) to immediately identify the hazardous secondary materials in the unit; (3) The unit holds hazardous secondary materials that are compatible with other hazardous secondary materials placed in the unit and is compatible with the materials used to construct the unit and addresses any potential risks of fires or explosions; and (4) Hazardous secondary materials in units that meet the applicable requirements of 40 C.F.R. parts 264 or 265 are presumptively contained. [80 Fed. Reg. at 1771 (to be codified at 40 C.F.R. § 260.10) (italics added).]

Will all used, potentially hazardous waste "products" collected for recycling meet these requirements? Perhaps not. Each case will have to be evaluated individually.

What, for example, about used automotive batteries, which sometimes "weep" acid from old seals surrounding terminals—that is, are damp with acid, but are not actively leaking? EPA generally considers automotive batteries containers. But are "weeping" batteries really "contained"? The question is not wholly hypothetical. In a paragraph in its Response to Comments Document that seems to say (notwithstanding the discussion above) that the new "legitimacy factors" do not apply to pre-2008 exclusions and exemptions, EPA in fact suggests the issue is very real:

EPA notes that the third factor of the legitimate recycling standard, *which EPA is applying to all hazardous secondary recycling*, includes a reference to the contained standard. The third factor states "the generator and the recycler must manage the hazardous secondary material as a valuable commodity. Where there is an analogous raw material, the hazardous secondary material must be managed, at a minimum, in a manner consistent with the management of the raw material or in an equally protective manner. *Therefore, in cases where batteries have no analogous raw material, they must meet the performance-based contained standard in 40 C.F.R. § 260.10.* [Response to Comments Document at 253-254 (italics added).]

Furthermore, EPA explains (albeit in the context of products characterized as having an analogous product), that "[d]amaged batteries . . . are not 'intact' and thus would not be contained if the batteries were releasing hazardous secondary materials into the environment." Response to Comments Document at 114.

Where Do We Go From Here?

Hopefully, these issues will prove to be of largely academic interest as the Agency clarifies the rule in post-promulgation guidance or amendments. But recyclers should review the new rule carefully, and those who see particular issues of concern should promptly bring them to EPA's attention and seek clarification. They may even want to consider challenging aspects of the new rule in court, if the inconsistencies are fundamentally disruptive and the Agency is unresponsive to the recyclers' concerns. Legal challenges to the new rule must be filed no later than April 13, 2015, and experience shows that such challenges often are resolved when EPA makes prompt rule amendments that moot them.

But that will not be the end of the matter. The Agency also has been clear that it may someday soon directly revisit the pre-2008 exclusions and exemptions. For example, EPA states that:

EPA does not have precise data regarding how many facilities are recycling hazardous secondary materials under these exclusions and exemptions. This lack of data hinders EPA's ability to more precisely estimate the burden on states and whether such a requirement would be environmentally beneficial. Therefore, EPA is deferring action on applying notification to the pre-2008 exclusions and exemptions until we can more adequately address commenters' concerns. [80 Fed. Reg. at 1766.]

At the very least, recyclers should be watching EPA's future efforts to "revisit" the pre-2008 exclusions and exemptions.