



A Sham, a Waste? EPA's New Recycling and Hazardous Waste Rules Finalized

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Last week, on January 13, 2015, EPA issued its new "Definition of Solid Waste" Final Rule in the [Federal Register at 80 Fed. Reg. 1694](#). This new rulemaking will have significant impacts regarding how secondary hazardous materials are recycled and exempted from the hazardous waste regulations. Unless challenged (and by all accounts it appears at least certain aspects may be litigated based on initial comments by various industrial sectors) the rule becomes effective on July 13, 2015, where EPA is the authorized implementing agency (Iowa, Alaska, American Samoa, and Puerto Rico and the U.S. Virgin Islands). Because RCRA is a federally delegated program, other states will have to adopt the more stringent aspects of the rule discussed below.

All Recycling Must Be Legitimate

Perhaps the Rule's biggest impact will be the codified prohibition on "sham recycling" per the new 40 CFR 261.2(g). EPA is codifying a requirement that all recycling must be "legitimate" by adding this prohibition on sham recycling. According to EPA in the final rulemaking at page 1720 "EPA has determined that the four legitimacy factors being codified in 40 CFR 260.43 are substantively the same as the existing legitimacy policy. These factors are a simplification and clarification of the policy statements in the [1989 Lowrance Memo](#) and in various DSW Federal Register notices."

The four legitimacy factors set forth in the new [40 CFR 260.43](#) are:

- Factor 1: Legitimate recycling must involve a hazardous secondary material that provides a useful contribution to the recycling process or to a product or intermediate of the recycling process.
- Factor 2: The recycling process must produce a valuable product or intermediate.
- Factor 3: The generator and the recycler must manage the hazardous secondary material as a valuable commodity when it is under their control.
- Factor 4: The product of the recycling process must be comparable to a legitimate product or intermediate.

Notably, EPA is also requiring documentation on the legitimacy criteria for Factor 4 when "the hazardous constituents in the recycled products are not comparable or unable to be compared to those in analogous products (unless the recycled product meets widely recognized commodity specifications or the hazardous secondary material is returned to the production process)." As noted by EPA at page 1736 "[i]n this case, the person performing the recycling must conduct the necessary analysis and prepare documentation stating why the recycling is still legitimate."

Required Documentation to Avoid Speculative Accumulation

Another significant change EPA has finalized regarding recycling of hazardous secondary materials is a new requirement for recordkeeping in accumulation situations to "allow inspectors and other regulatory authorities to quickly ascertain how long a facility has been storing an excluded hazardous secondary material[.]" Speculative accumulation is essentially the concept where a generator holds a significant percentage of hazardous secondary materials for a period of time more than one year without a market or ability to recycle the material which EPA believes is indicia of storage of hazardous waste rather than recycling. Under the [new 40 CFR 261.1\(c\)\(8\)](#), "Materials must be placed in a storage unit with a label indicating the first date that the material began to be accumulated. If placing a label on the storage unit is not practicable, the accumulation period must be documented through an inventory log or other appropriate method."

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Exclusions for Reclamation and Other Revisions

A bulk of EPA's final rulemaking deals with provisions that, although significant, will likely have less wide-spread impact on the recycling of secondary materials. EPA has made modifications to the exclusions in 40 CFR 261.4 for materials that are legitimately "reclaimed" under (1) the control of the generator and (2) a verified recycler exclusion replacing the transfer based exclusion from the 2008 DSW final rule. There is also a remanufacturing exclusion for certain higher-value solvents and revisions to the solid waste variances and non-waste determinations.

Again, the Final Rule will take effect July 13, 2015, and comments may be submitted to the electronic docket at www.regulations.gov.