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EPA Revises Definition of Solid Waste to Encourage Recycling of Hazardous Secondary Materials

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Introduction

On October 30, 2008, the United States Environmental Protection Agency (EPA) published a final rule revising the definition of "solid waste" to exclude certain hazardous secondary materials from regulation under Subtitle C of the Resource Conservation and Recovery Act (RCRA). The new rule was promulgated to "encourage safe, environmentally sound recycling" of hazardous secondary material generated during industrial production processes. The rule will become effective on December 29, 2008.

"Hazardous secondary material" is defined as secondary material (e.g., spent material, by-product, or sludge) that, when discarded, would be identified as hazardous waste. Under the new rule, hazardous secondary materials are excluded from regulation as a hazardous waste if the material will be reclaimed. There are two primary exclusions in the rule: (1) an exclusion for certain hazardous secondary materials legitimately reclaimed under the control of the generator within the United States and its territories; and (2) a conditional exclusion for hazardous secondary materials that are transferred for the purpose of legitimate reclamation. Both exclusions require the relevant parties to notify EPA and/or the state authority prior to operating under the exclusions and by March 1 of each even-numbered year. Also, owners and operators of reclamation facilities and intermediate facilities must satisfy financial assurance requirements for disposal and facility closure activities, as well as liability coverage requirements for bodily injury and property damage to third parties. Finally, the rule establishes a voluntary non-waste determination process that provides generators with an administrative process for receiving formal determination that their hazardous secondary materials are not discarded solid wastes when reclaimed.

Hazardous Secondary Material Reclaimed Under the Control of the Generator

"Solid waste" is generally defined as any "discarded material." A material that is not solid waste cannot be regulated as hazardous waste under RCRA. The new rule provides that a hazardous secondary material is not discarded and, therefore, not solid waste, if it is generated and reclaimed under the control of the generator and meets other requirements.

Hazardous Secondary Material Reclaimed Under the Control of the Generator in Non-Land-Based Units

"Hazardous secondary material generated and reclaimed under the control of the generator" means that (1) the material is generated and reclaimed at the generating facility; (2) the material is generated and reclaimed at different facilities, if the reclaiming facility is controlled by the generator or if both the generating facility and the reclaiming facility are controlled by the same person (with "control" meaning the power to direct policies of the

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facility); or (3) the material is generated pursuant to a written contract between a tolling contractor and a toll manufacturer and is reclaimed by the tolling contractor.

In addition to meeting one of the three criteria above, other conditions also must be satisfied to show that a hazardous secondary material is not discarded. First, the material must not be speculatively accumulated. Hazardous secondary materials are speculatively accumulated if the person accumulating them cannot show that the material is potentially recyclable. Second, the material must be handled only in non-land-based units and must be contained in such units. Third, the material must be generated and reclaimed within the United States and its territories. Fourth, the material cannot otherwise be subject to material-specific management conditions (as specified in the regulations) when reclaimed. Fifth, the material cannot be a spent lead acid battery or meet the listing description for a K171 or K172 waste. Sixth, the reclamation of the material must be "legitimate."

With respect to the sixth condition, the new rule contains a provision for determining whether recycling is "legitimate." Legitimate recycling involves a hazardous secondary material that provides a "useful contribution" to the recycling process or to a product or intermediate of the recycling process, and the recycling process produces a "valuable product or intermediate." A "useful contribution" meets one of the following criteria: (1) it contributes valuable ingredients to a product, (2) it replaces a catalyst or carrier in the recycling process, (3) it is the source of a valuable constituent recovered in the recycling process, (4) it is recovered or regenerated by the recycling process, or (5) it is used as an effective substitute for a commercial product. The product or intermediate is "valuable" if: it is (1) sold to a third party; or (2) used by the recycler or generator as an effective substitute for a commercial product or as an ingredient or intermediate in an industrial process. Finally, additional factors must be considered in determining whether a hazardous secondary material is legitimately recycled, including whether the material is managed as a valuable commodity and whether the product of the recycling process contains significant concentrations of hazardous constituents, as well as other factors tending to show that the recycling process is legitimate.

Hazardous Secondary Material Reclaimed Under the Control of the Generator in Land-Based Units

The new rule also provides an exclusion for hazardous secondary material reclaimed under the control of a generator in land-based units. A "land-based unit" means an area where hazardous secondary materials are placed in or on the land before recycling, such as surface impoundments or piles. This does not include land-based production units. The requirements for land-based units generally are identical to those that apply to hazardous secondary materials reclaimed under the control of the generator in non-land-based units.

Hazardous Secondary Material That Is Generated and Transferred for the Purpose of Reclamation

The new rule provides that hazardous secondary material that is generated and then transferred to another person for the purpose of reclamation is not solid waste. Certain conditions must be satisfied for this exclusion to apply. First, the material must not be speculatively accumulated. Second, the material cannot be handled by any person other than the hazardous secondary material generator or transporter, an intermediate facility (i.e., any facility that stores hazardous secondary material for more than 10 days), or a reclaimer. Moreover, while in transport, the material cannot be stored for more than 10

days at a transfer facility. Third, the material cannot otherwise be subject to material-specific management conditions when reclaimed, cannot be a spent lead acid battery, and cannot be a K171- or K172-listed waste.

In addition to the conditions listed above, the hazardous secondary material generator must perform due diligence on the reclamation facility and the intermediate facility. The generator must make “reasonable efforts” to ensure that the reclaimer intends to properly and legitimately reclaim the hazardous secondary material. The generator must also make “reasonable efforts” to ensure that both the reclamation facility and the intermediate facility will manage the hazardous secondary material in a manner that is protective of human health and the environment. Moreover, the generator must make contractual arrangements with the intermediate facility to ensure that the hazardous secondary material is sent to the reclamation facility selected by the generator.

Under the new rule, the “reasonable efforts” of due diligence required by the generator must be repeated at a minimum of every three years for the generator to claim the exclusion from the definition of solid waste. In making the “reasonable efforts,” the generator may use any “credible evidence” available. Moreover, the generator must be able to affirmatively answer each of the following questions with respect to the reclamation facility and the intermediate facility: (1) Does the publicly available information indicate that the reclamation process is legitimate? (2) Does the publicly available information indicate that the reclamation facility and the intermediate facility properly notified the relevant regulatory agencies of reclamation activities and that they meet financial assurance conditions? (3) Does the publicly available information indicate that the reclamation facility and any intermediate facility have not been the subject of any RCRA Subtitle C enforcement actions in the previous three years? (4) Does the available information indicate that the reclamation facility and the intermediate facility have the equipment and personnel to safely recycle the hazardous secondary material? and (5) If residuals are generated from the reclamation process, does the reclamation facility have the required permits to manage the residuals? The regulations concerning each of these questions further detail the individual requirements and what the generator must show in the event that any of the questions cannot be answered affirmatively.

The new rule also contains document-retention obligations applying to generators, reclaimers, and intermediate facilities. The hazardous secondary materials generator must maintain for three years documentation and certification concerning its “reasonable efforts” made for due diligence, as well as records of all off-site shipments of hazardous secondary materials and confirmations of receipt from each reclaimer and intermediate facility. The reclamation facility and the intermediate facility must also maintain documentation for three years and must meet financial assurance requirements detailed in the regulations.

Hazardous secondary material that is exported from the United States and reclaimed in a foreign country is not solid waste, provided that the generator complies with the requirements discussed above. In addition, the generator must notify EPA of an intended export at least 60 days before the hazardous secondary material leaves the United States. This notification covers export activities over a 12-month period. The generator must include other detailed information on the notification to EPA. EPA will provide a complete notification to the country receiving the material and any transit countries. The export of hazardous secondary material is prohibited unless the receiving country consents to the intended export. If the country consents, EPA will send the generator an Acknowledgement of Consent indicating that the intended receiving country will accept the material. Hazardous secondary material generators must maintain copies of each notification of intent to export and each Acknowledgement of Consent for three years. By March 1 of each year, generators must file with EPA a report summarizing the types, quantities,

frequency, and ultimate destination of all hazardous secondary materials exported during the previous calendar year.

Required Notification Regarding Management of Hazardous Secondary Material

Hazardous secondary material generators, tolling contractors, toll manufacturers, reclaimers, and intermediate facilities operators must send notification prior to operating under the exclusions in the new rule and by March 1 of each even-numbered year to EPA on a designated form. If any of the aforementioned persons subsequently stops managing hazardous secondary materials, the facility must notify EPA within 30 days. For purposes of cessation, a facility has stopped managing hazardous secondary materials if the facility no longer generates, manages, and/or reclaims hazardous secondary materials under the exclusions and does not expect to manage and/or reclaim any amount of hazardous secondary materials for at least one year.

Financial Assurance and Liability Coverage Requirements for Owners and Operators of Reclamation Facilities and Intermediate Facilities

The new rule contains financial assurance requirements and liability coverage requirements for owners and operators of reclamation facilities and intermediate facilities. The financial assurance requirements are based on a cost estimate for disposing of any hazardous secondary materials or characteristic waste, as well as the potential cost of closing the facility as a treatment, storage, and disposal facility. The estimate must equal the cost of disposal and closure activities "when the extent and manner of the facility's operation would make these activities the most expensive." In addition, the cost must be based on the costs of a third party performing the activities, and may not incorporate any salvage value or a zero cost for material that might have economic value. As a result, the new rule requires the most conservative cost estimate for disposal and closure activities. The cost estimate must be adjusted for inflation as detailed in the regulations and must be kept at the facility during the life of the facility.

Generally, the owner or operator of a reclamation facility or an intermediate facility must maintain financial assurance to ensure that it can meet the most current cost estimate of disposal and closure activities. The owner or operator may choose from the following applicable financial assurance mechanisms: (1) a trust fund, (2) a surety bond guaranteeing payment into a trust fund, (3) a letter of credit, (4) insurance, or (5) a financial test and corporate guarantee. Each of these mechanisms has specific requirements detailed in the new rule. Moreover, the rule allows for an owner or operator to satisfy the financial assurance condition using multiple mechanisms for the same facility.

In addition to maintaining financial assurance for disposal and closure activities, an owner or operator of a reclamation facility or an intermediate facility also must demonstrate responsibility for bodily injury and property damage to third parties caused by sudden and accidental occurrences resulting from operations at the particular facility in the amount of at least $1 million per occurrence with an annual aggregate of at least $2 million. This financial responsibility may be demonstrated by any of the following: (1) obtaining liability

insurance, (2) satisfying a financial test, (3) obtaining a guarantee for liability coverage by a related guarantor, (4) obtaining a letter of credit for liability coverage, (5) obtaining a surety bond for liability coverage, or (6) obtaining a trust fund for liability coverage. The owner or operator may demonstrate liability coverage by using a combination of these mechanisms. The mechanisms for liability coverage for nonsudden accidental occurrences at facilities with land-based units are the same. The owner or operator, however, must maintain liability coverage for nonsudden occurrences in the amount of at least $3 million per occurrence with an annual aggregate of at least $6 million.

Whether the liability coverage is for sudden accidental or nonsudden accidental occurrences, the reclamation facility or the intermediate facility may apply to EPA for a variance if the levels of financial responsibility required are not consistent with the degree and duration of the risk associated with the treatment or storage at the facility. If the variance is approved, the level of required liability coverage will be adjusted.

Finally, the new rule also allows for an owner or operator of a reclamation facility or an intermediate facility to use state-required financial assurance of closure or liability coverage mechanisms that EPA has determined to be at least as stringent as the requirements in the new rule.

Non-Waste Determination Process

The new rule has established a voluntary non-waste determination process. This process provides a formal administrative determination by EPA or a state-delegated authority of whether hazardous secondary material would be considered discarded and, therefore, whether it would be classified as solid waste.

For hazardous secondary material that is part of a continuous industrial-production process, the determination of whether it is discarded material is based on the following: (1) whether the material is legitimately recycled; (2) the extent that the management of the material is part of the continuous primary production process and is not waste treatment; (3) whether the capacity of the production process would use the hazardous secondary material in a reasonable time frame and ensure that the material will not be abandoned; (4) whether the hazardous constituents in the hazardous secondary material are reclaimed rather than released to the air, water, or land at significantly higher levels, from either a statistical or a health and environmental risk perspective, than would otherwise be released by the production process; and (5) other relevant factors demonstrating that the hazardous secondary material is not discarded.

For hazardous secondary material that is indistinguishable in all relevant aspects from a product or intermediate, the determination of whether it is discarded material is based on factors (1), (3), (4), and (5) above, as well as the following: (a) whether market participants treat the hazardous secondary material as a product or intermediate rather than waste; and (b) whether the chemical and physical identity of the hazardous secondary material is comparable to commercial products or intermediates.

Conclusion

The new rule revising the definition of solid waste to exclude certain hazardous secondary materials from RCRA Subtitle C regulation should encourage more recycling activities.

Entities must ensure that they satisfy specific conditions for the exclusion to apply. Hazardous secondary material generators must perform proper due diligence activities on reclamation facilities and intermediate facilities. In addition, reclamation facilities and intermediate facilities must meet certain financial obligations. All relevant parties must meet notification requirements to EPA and/or state authorities. Finally, generators should use the administrative non-waste determination process to avoid any questions of ambiguity with respect to whether their hazardous secondary materials would be classified as solid waste.

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