

EPA Issues Proposed Revisions to Definition of Solid Waste

Manufacturing Today, March/April 2007

Lynn L. Bergeson

The definition of "solid waste" under the federal Resource Conservation and Recovery Act (RCRA) is unquestionably one of the most difficult environmental concepts to get one's head around. Even after 27 years, the U.S. Environmental Protection Agency (EPA) is still tinkering with revisions to the definition to better define the types of recycling activities that fall within the scope of the definition, and those that fall outside of its scope. In March, EPA announced issuance of a sweeping and long-awaited proposal to modify the RCRA definition of solid waste. The proposal seeks to streamline regulation of so-called hazardous "secondary" materials, and revise the all-important definition of solid waste to exclude certain secondary materials, such as solvents, metals and certain other chemicals, from RCRA regulation to promote the legitimate recycling of such materials.

EPA anticipates that the proposal will impact a wide and diverse cross-section of manufacturing sectors, including chemical manufacturing, coating and engraving, semiconductor and electronics manufacturing, pharmaceutical manufacturing and industrial waste management. EPA estimates about 4,600 facilities, handling more than half-a-million tons of hazardous secondary materials annually, may be affected by the proposal. Intended to encourage the safe and environmentally sound recycling of hazardous secondary materials, the proposal also responds to several court decisions mandating that EPA revise its approach to regulating certain reclamation activities under RCRA.

According to EPA, the proposal is "deregulatory in nature because certain recyclable materials that have heretofore been subject to the hazardous waste regulations would no longer be regulated as hazardous waste." EPA states the proposed revisions are "not intended to bring new wastes into the RCRA regulatory system." The proposed rule is available on the EPA's Web site and comments are due on or before May 25.

Key Elements of the Proposal

The publication of the revised definition of the solid waste proposal follows EPA's efforts in 2003, at which time the agency proposed to exclude certain types of recycling activities involving hazardous secondary materials from the federal hazardous waste regulations.

Manufacturing sectors have long believed that application of the RCRA rules to reclamation operations created significant disincentive to reclamation and recycling, all to the detriment of achieving goals Congress hoped RCRA would fulfill. Environmental groups claim the opposite, and lawsuits have been ongoing for years.

According to the 2007 pre-publication version of the proposal, the revised regulatory scheme would provide several important exclusions including materials that are generated and reclaimed under the "control of the generator"; materials that are generated and transferred to another party for reclamation under specific conditions; and materials that EPA deems non-waste through a case-by-case petition process.

Integral to these proposed revisions is EPA's definition of "legitimate recycling." EPA defines legitimate recycling activity to ensure that the streamlined requirements will benefit only this activity, rather than treatment or disposal under the guise of recycling. To be recycled

legitimately, EPA provides that the material must provide a useful contribution to the recycling process, and the recycling must yield a valuable product or intermediate.

Significantly, EPA has not proposed changes for recycled materials that are considered inherently waste-like, used in a manner constituting disposal or burned for energy recovery. Any currently regulated material managed in these ways must still comply with the federal hazardous waste regulations. These changes are discussed below.

Non-land-based Units

Proposed provisions to the definition of solid waste would exclude certain hazardous secondary materials (i.e., spent materials, listed sludges and listed byproducts) that are generated and legitimately reclaimed within the United States and are handled only in non-land-based units. This exclusion would apply to hazardous secondary materials that are reclaimed under the control of the generator and that are not speculatively accumulated.

Hazardous secondary materials would be considered "under the control of the generator" when they are generated and then reclaimed at the generating facility; generated and reclaimed by the same company, if the generator certifies it is under the same ownership as the reclaimer; or generated and reclaimed pursuant to a written agreement between a tolling contractor and batch manufacturer, if the tolling contractor retains ownership of, and responsibility for, the hazardous secondary materials that are generated during the manufacture.

EPA is soliciting comment on whether additional requirements (e.g., recordkeeping or limitations on storage standards) might be necessary to demonstrate the absence of "discard" when hazardous secondary materials are recycled. land-based units EPA is proposing to exclude certain hazardous secondary materials that are generated and legitimately reclaimed within the United States and handled in land-based units, such as waste impoundments or waste piles.

The provision would require that hazardous secondary materials managed in land-based units be contained and not released. EPA is not proposing any particular design requirement, or that the hazardous secondary materials in the unit be managed in a certain way. It is soliciting comment on whether additional requirements might be necessary to demonstrate the absence of "discard" when hazardous secondary materials are recycled.

Conditional Exclusion

Conditional exclusion would apply to hazardous secondary materials that are generated and subsequently transferred to a different person or company for the purpose of reclamation. The exclusion would not apply to recycled materials that are regulated as hazardous wastes for other reasons, such as inherently waste-like materials, materials that are used in a manner constituting disposal or materials burned for energy recovery. The provision also would not address materials that are currently excluded from the definition of solid waste according to other existing provisions of 40 C.F.R. Part 261, such as the wood preserving exclusion in 40 C.F.R. Section 261.4(a)(9). If promulgated, the proposal would not supersede, or otherwise affect, the fact that such hazardous secondary materials would need to continue to be managed in accordance with these existing exclusions. EPA has proposed specific conditions that are intended to ensure such materials are handled as commodities rather than wastes.

One restriction would be that materials that are speculatively accumulated would not be eligible for the exclusion. A second restriction proposed would require that the excluded hazardous secondary materials be transferred directly from the generator to the reclaimer and not be handled by anyone other than a transporter. The third proposed specific condition is that for all hazardous secondary materials that would be excluded, generators and reclaimers that are currently subject to the hazardous waste regulations would need to submit a one-time notification of recycling activity to EPA or the authorized state.

The Implications

EPA's proposed revisions promise greater opportunities to recycle hazardous secondary materials by proposing to remove unnecessary and burdensome restrictions on certain recycling practices. Interested readers are urged to comment on the proposal, support those provisions that will promote beneficial recycling and monitor the rule's progress to ensure that important opportunities to promote beneficial recycling are not overlooked. MT

Lynn L. Bergeson is managing director of Bergeson & Campbell P.C., a Washington, D.C., law firm focusing on chemical product approval and regulation. She can be reached at 202-557-3800.