

EPA Finally Amends Definition of Solid Waste

Chemical Processing, November 2008

By Lynn L. Bergeson

Rule provides exclusions for reclamation of hazardous secondary materials.

The long-awaited final rule amending the definition of solid waste under the Resource Conservation and Recovery Act (RCRA) was signed by the U.S. Environmental Protection Agency (EPA) on Oct. 7. Because materials considered “hazardous waste” under RCRA are a subset of materials deemed “solid waste,” this rule is critically important to the chemical industry.

Seven Definitions of Waste

The definition of solid waste has caused considerable confusion and litigation for years. When first issued in 1980, one would have thought EPA could precisely define what might be considered a solid waste and thus a hazardous waste.

Think again. Since 1987, there have been seven federal D.C. Circuit Court of Appeals decisions on the definition of solid waste. The final rule seeks to reflect judicial guidance and to “clarify” the RCRA concept of “legitimate recycling,” which is a key component of EPA’s regulatory approach to recycling hazardous secondary materials.

Key Provisions of New Rule

Exclusion for hazardous secondary materials that are legitimately reclaimed in non-land-based units -- Certain hazardous secondary materials (*i.e.*, listed sludges, listed by-products and spent materials) that are generated and legitimately reclaimed within the United States under the control of the generator are excluded from the definition of solid waste when such materials are handled only in non-land-based units (*e.g.*, tanks, containers or containment buildings). The provision applies to hazardous secondary materials that aren’t spent lead-acid batteries or listed wastes K171 or K172, or otherwise subject to the conditions under 40 C.F.R. Section 261.4(a). Under this provision, the generator must send a notification prior to operating under the exclusion and by March 1 of each even-numbered year thereafter to the EPA Regional Administrator or, in an authorized state, to the state director. This exclusion doesn’t include recycling hazardous secondary materials that are inherently waste-like, hazardous secondary materials that are used in a manner constituting disposal or to produce products that are applied to or placed on the land, or hazardous secondary materials burned to recover energy or used to produce a fuel or otherwise contained in fuels.

Exclusion for hazardous secondary materials that are legitimately reclaimed in land-based units -- Hazardous secondary materials generated and legitimately reclaimed under the control of the generator within the United States and handled in non-land-based units, such as surface impoundments or piles, are excluded from the definition.

Exclusion for hazardous secondary materials that are transferred for legitimate reclamation -- The rule conditionally excludes from RCRA Subtitle C regulation hazardous secondary materials (*i.e.*, spent materials, listed sludges and listed by-products) that are generated and subsequently transferred to a different person or company for legitimate reclamation. Provided the conditions and restrictions to the exclusion are satisfied, the hazardous secondary materials wouldn't be subject to RCRA Subtitle C regulation.

Codification of criteria defining legitimate recycling -- EPA codified the four factors defining legitimate recycling proposed in 2007. To qualify as legitimate recycling, secondary materials must provide a useful contribution to a recycling process or to the product of the recycling process; be a valuable product or intermediate that is sold to a third party or otherwise used as an effective substitute for a commercial product; be managed as a valuable commodity; and mustn't contain significant concentrations of any hazardous constituents found in Appendix VIII of 40 C.F.R. Part 261 that aren't found in analogous products or exhibit a hazardous characteristic that analogous products don't exhibit.

The final rule establishes a non-waste determination process that provides persons with an administrative process for receiving a formal determination that their hazardous secondary materials aren't discarded and, thus, not solid waste when legitimately reclaimed. This process is voluntary and is available in addition to the two self-implementing exclusions included in the final rule. There are two types of non-waste determinations: 1) a determination for hazardous secondary materials reclaimed in a continuous industrial process; and 2) a determination for hazardous secondary materials indistinguishable in all relevant aspects from a product or intermediate.

The rule will make some happy, while upsetting others. It will be effective 60 days after publication in the Federal Register. Stay tuned, as some entity is likely to judicially challenge EPA's work.

Lynn is managing director of Bergeson & Campbell, P.C., a Washington, D.C.-based law firm that concentrates on chemical industry issues. The views expressed herein are solely those of the author. This column is not intended to provide, nor should be construed as, legal advice.