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US EPA Revises RCRA Definition of Solid Waste Rule to Comport with D.C. Circuit Rulings

Written by Gary Pasheilich – 7/10/18

On May 30, 2018, US EPA issued a final rule to revise the regulations associated with the 2015 Definition of Solid Waste (DSW) Rule. US EPA performed this rulemaking to bring the regulations in line with the D.C. Circuit's 2017 and 2018 rulings in *American Petroleum Institute v. EPA* (Case No. 09-1038), which vacated and amended certain portions of the 2015 DSW Rule.

The DSW Rule defines under RCRA what materials are subject to Subtitle C regulation as discarded solid waste materials, as opposed to those materials appropriate for beneficial reuse and recycling. The regulations at issue have been the subject of several legal challenges by both industry and environmental groups and have undergone a number of administrative modifications since the 1980s. In 2008, US EPA published a final rule revising the definition of solid waste to include two exclusions for hazardous secondary material recycled under the control of the generator (known as the "generator-controlled" exclusion), and for hazardous secondary material transferred to a third party for recycling (known as the "transfer-based" exclusion). The 2008 rule also codified certain factors for determining when recycling is "legitimate."

The 2015 version of the DSW Rule modified and restructured these exemptions by replacing the transfer-based exclusion with a "verified

recycler” exclusion and by incorporating stronger provisions to ensure legitimate recycling (namely, by making mandatory one of the legitimacy factors that was previously only considered, defining containment of materials, and imposing emergency preparedness and response requirements). However, a legal challenge resulted in portions of the 2015 Rule (including the verified recycler exclusion) being vacated by the U.S. Court of Appeals for the D.C. Circuit in 2017. In March 2018, the Court further modified its decision upon a petition for reconsideration to clarify certain aspects, but left a number of aspects to be addressed by new rulemaking. As a consequence, the 2015 Rule has been left somewhat battered by the removal, replacement and reinstatement of key provisions governing third-party recycling, with several aspects in need of further revision to address omissions or misplaced references.

The new rulemaking addresses these outstanding issues and brings the regulations in line with the Court’s 2017 decision and 2018 decision modification in a couple of key ways. In particular, the final rule removes the verified recycler exclusion and reinstates the transfer-based exclusion, and also reverts the fourth legitimacy requirement to the 2008 revision.

In reinstating the transfer-based exclusion, the Court’s rulings directed that certain requirements from the 2015 Rule would be applied to the reinstated “transfer-based” exclusion, including that:

- K171 and K172 spent petroleum catalysts are eligible for the recycling exclusions;
- Materials must be “contained” prior to recycling; and
- Certain emergency preparedness and response requirements are applicable.

The Court's rulings also confirms that the export notification and reporting requirements at 40 CFR 261.4(a)(125) are also reinstated. In addition, several conforming changes were made to various provisions for consistency with the reinstated transfer-based exclusion.

As to the fourth legitimacy factor, the 2015 Rule had *required* that the product of the recycling process be comparable to a legitimate product or intermediate in terms of hazardous constituents or characteristics. The Court's 2018 modification vacated the mandatory provision and reinstated the 2008 version requiring only that the factor be "considered." Accordingly, US EPA's final rule institutes conforming changes for consistency with the Court's mandate.

US EPA's newly issued changes to the 2015 DSW Rule are being issued final without undergoing public notice and comment, pursuant to Section 553(b)(3)(B) of the Administrative Procedure Act. US EPA cites "good cause" for dispensing with public comment because the rule simply undertakes the "ministerial task" of implementing the prior court orders.

Consequently, for the two states—Alaska and Iowa—and US territories without authorized RCRA programs, the Rule became effective immediately upon issuance. For the majority of states having authorized state RCRA programs, those programs are required to be "equivalent to and at least as stringent" as the federal program. The Rule notes that for states that have adopted rules similar to the 2015 DSW Rule, but have not yet been authorized, the vacatur of the federal rules will not change the authorization status of the state programs, and therefore the authorization status that was established prior to the adoption of the state rules remains in effect.

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