

The Continuing Redefinition of the Definition of Solid Waste

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A Brief History of the Definition

- Statutory definition - “any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and *other discarded material*, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities.” 42 USCA 6903(27)
- Found in Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA)

A Brief History of the Definition

- Regulatory definitions of 'solid waste'

- *Solid waste program

- Generally, follows the statutory definition

- Found at 40 CFR 240.101(y), 241.2, 243.101(y), 246.101(bb), 257.2, and 258.2

- *Hazardous waste program

- Found at 40 CFR 261.2

- For use only within hazardous waste program under RCRA Subtitle C

A Brief History of the Definition

- May 1980 - 45 Fed. Reg. 33084 (May 19, 1980)
 - Original promulgation of definition within Subtitle C
 - Tracks statutory definition, but also attempts to define 'discard'
- January 1985 – 50 Fed. Reg. 614 (January 4, 1985)
 - Familiar formulation
 - Defines what is a 'discarded material'
 - Materials that are abandoned, recycled, inherently waste-like
 - Recycled materials could be subject to regulation
 - Materials – Spent materials, sludges, by-products, CCP, scrap
 - Activities – Use constituting disposal, energy recovery, reclamation, speculative accumulation
 - Authority over recycling does not include activities similar to normal production operations or normal uses of commercial products
 - Preamble to rule discusses 'sham recycling'
 - Amplified via 1989 Lowrance Memo

A Brief History of the Definition

- Proposal to amend in October, 2003
 - EPA criticized for not conducting studies of potential changes
- EPA conducted in-depth recycling studies
- EPA re-proposed changes in March 2007
- October 2008 – 73 Fed. Reg. 64668 (October 30, 2008)
 - Administrative reconsideration filed with EPA
 - Suit for judicial review filed against EPA
 - EPA agreed to address concerns and propose new rule
- July 2011 – 76 Fed. Reg. 44094 (July 22, 2011)
 - Proposed changes to October 2008 Redefinition

Definition's Key Phrase - Other Discarded Material

- Regulatory definition (40 CFR at 261.2):
 - Solid waste is *any discarded material*
 - A *discarded material* is any material which is:
 - (A) Abandoned
 - (B) Recycled
 - (C) Considered inherently waste-like, or
 - (D) A military munition
- Regulatory definition is an amplification, definition, or explanation of what is a *discarded material*

Definition's Key Phrase - Other Discarded Material

- EPA's jurisdiction is not excluded simply because the material will be recycled

-*American Mining Congress v. EPA* (AMC I): Congress used the term 'discarded' in its ordinary sense to mean 'disposed of,' 'abandoned,' or 'thrown away'

-Does not include materials destined for beneficial use in a continuous process by the generating industry because the materials are not yet part of waste disposal problem

-Court did not hold that EPA materials to be recycled could not be 'discarded' or that EPA could not regulate recycling

- Subsequent decisions support EPA's position that recycled material can be 'discarded' and thus regulated

-*API v. EPA*: Can regulate material when sent to reclamation facility

-*AMC II*: Wastes in WWTU are discarded when it is unknown if or when re-use will occur

-*US v. Ilco*: Batteries sent to reclaimer are 'discarded' by entity sending batteries

-*Owen Electric*: Slag untouched on ground for six months before use as a road bed

-*Battery Recyclers*: Re-affirmed AMC I; later decisions did not narrow AMC I

The Redefinition

- EPA conducted at least three major studies to get a clearer idea of recycling practices
 - Found 208 damage cases since 1982
 - Of those 208...
 - 94% were related to third-party recyclers
 - 69% were related to abandoned materials
 - 66% were result of bankruptcy or other business failure
 - 40% were result of mismanagement of materials
 - 34% were result of mismanagement of recycling residuals
- These studies 'informed and supported' EPA's decision-making regarding the Redefinition

The Redefinition

- Issued in October, 2008, effective December, 2008
- Purpose – Consider whether materials are or are not discarded when subject to reclamation
- Main Elements
 - Reclamation by the Generator
Generated and reclaimed by or under the control of generator
 - Legitimacy Criteria
Criteria to determine between 'sham' or 'legitimate' recycling
 - Transfer-based Exclusion
Generated and transferred to another person for reclamation
 - Non-waste Determinations
Formal determinations for materials reclaimed in a continuous process or those indistinguishable in all relevant respects from a product

The Redefinition – Reclamation by the Generator

- Materials generated and reclaimed *under control of generator* are not solid wastes if:
 - No speculative accumulation
 - Material is handled within the United States
 - Material is contained*
 - Not subject to a specific management condition in 261.4(a)
 - Reclamation is legitimate
 - Proper notification is provided
- If met, the reclamation process is akin to manufacturing

Note: There is a land-based v. non-land-based distinction in regulation but requirements are virtually identical

The Redefinition – Reclamation by the Generator

- **‘under control of generator’**

- At the generating facility

- Different facilities if both are controlled by same person and certification is provided

- Control is the power to direct the polices

- Generated under a tolling agreement and reclaimed by the tolling contractor and certification is provided

- **‘material is contained’**

- Placed in a unit that controls movement out of the unit into the environment (like an analogous raw material)

- Upon release to environment, must immediately recover material or released material and material in unit are considered discarded

- Could include unaddressed small releases to environment

- No definition in rule

The Redefinition – Legitimacy Criteria

- **Must meet these two criteria or factors**
- **Must provide a useful contribution to the recycling process or the product**
 - Contributes valuable ingredients,
 - Replaces a catalyst or carrier,
 - Is the source of valuable constituents removed in the recycling process,
 - Is recovered or regenerated by the recycling process, or
 - Is used as an effective substitute
- **Must produce a valuable product**
 - Sold to a third party, or
 - Used by the recycler as an effective substitute for a commercial product or as an ingredient or intermediate in an industrial process

The Redefinition – Legitimacy Criteria

- The following factors must be considered, but not necessarily met:

- The material must be handled as a valuable commodity

- Handled consistent with an analogous raw material
- Material should be contained
- Discarded if not immediately recovered when released

- The product does not

- Contain significant concentrations of constituents not in an analogous products
- Contain concentrations of constituents at levels significantly elevated from those in an analogous raw material
- Exhibit hazardous characteristic not exhibited by the analogous product

- Legitimacy as a whole must be considered

- If one/both not met, may be an indication of sham recycling
- If one/both not met, consider other relevant considerations, such as exposure from toxics, bioavailability of toxics, protectiveness of storage methods

The Redefinition – Transfer-based Exclusion

- Materials transferred to another person for reclamation are not solid wastes if:
 - No speculative accumulation
 - Only handled by generator, transporter, intermediate facility, or reclaimer
 - Not subject to materials-specific management condition in 261.4(a)
 - Reclamation is legitimate
 - Proper notification is provided
 - Generator must:
 - Contain the material
 - Make reasonable efforts, and certify those efforts, to ensure reclaimer will legitimately reclaim the material
 - Reclaimer/intermediate facility must:
 - Send and maintain confirmations of receipt
 - Contain and manage materials like an analogous raw material
 - Have financial assurance

The Continuing Redefinition

- Proposed in July, 2011
- Purpose – To revise exclusions from the definition of solid waste to ensure that the regulations, as implemented, encourage reclamation in a way that does not result in increased risk to human health or the environment
- Elements
 - Reclamation by the Generator – Retained and revised
 - Legitimacy Criteria – Retained and broadened
 - Transfer-based Exclusion – Replaced with alternative
 - Non-waste Determinations – Retained and revised

The Continuing Redefinition – Reclamation by the Generator

- Revisions needed to ensure operation of exclusion as intended and improve implementation to ensure that it is correctly functioning
- Five proposed changes
 - Contained standard strengthened
 - Notification as a condition
 - Recordkeeping for speculative accumulation
 - Recordkeeping for tolling arrangements
 - Regulatory text edits

The Continuing Redefinition – Reclamation by the Generator

- Contained standard strengthened
 - Adding a regulatory definition in response to numerous inquiries about how to determine if a material is contained
 - Material is contained if managed in a unit meeting these criteria:
 - Unit in good condition, no leaks to environment, and is designed for the material it contains and to prevent releases to the environment
 - Unit is properly labeled, or has log to immediately identify materials in unit
 - Unit does not hold incompatible materials and addresses risk of fires and explosions
 - Material released to environment that is not immediately recovered is discarded
 - Materials managed in a unit with continuing or intermittent releases to environment is discarded
- Notification as a condition
 - Proposed making the submission of the notice a condition of obtaining the exclusion

The Continuing Redefinition – Legitimacy Criteria

- Proposal seeks to codify the legitimacy criteria for all hazardous secondary materials recycling
- Includes...
 - Materials excluded or exempted from Subtitle C because they are recycled (e.g., the 261.4(a) exclusions)
 - Materials regulated under Subtitle C prior to recycling or subject to reduced regulation
 - Materials handled under the alternative to the TBE
 - Materials subject to non-waste determinations
 - Units involved in recycling
- Materials in Part 266 (e.g., use constituting disposal, burned for energy recovery) need to comply with specific provisions of their exclusions and the legitimacy factors

The Continuing Redefinition – Transfer-based Exclusion

- Revisions needed because
 - EPA sought to avoid discard by setting conditions for TBE, but failed to take into account how the exclusion would work when implemented
 - TBE is broadly applicable and TBE materials do not undergo full evaluation as did other excluded materials
- 27 facilities operating under TBE
 - 23 generators and 4 off-site facilities
 - All four off-site facilities are permitted TSDs
 - No environmental problems reported
- No change or new study since 2008 Redefinition

The Continuing Redefinition – Transfer-based Exclusion

- Replace with an alternative regulatory scheme for hazardous recyclable materials (HRM) transferred to others
- HRM is ‘hazardous waste being reclaimed’
- Notification prior to operating under standard
- Generator may accumulate for a year if:
 - Complies with all generator requirements
 - Labels unit ‘HRM’
- Prepares and follows a reclamation plan
 - Written confirmation that facility is able to reclaim material
- Sent to permitted TSD or 261(c)(2) site

The Continuing Redefinition – Status

- ⦿ Comments due by October 20, 2011
- ⦿ Final rule by December 31, 2012

RCRA and the CAA

- Definition of solid waste determines applicability of CAA 129, relating to solid waste incineration units
- Rule identifies which non-hazardous secondary materials are 'solid waste' when used as fuels or ingredients
 - 76 Fed. Reg. 15456 (March 21, 2011)
- Secondary material – Not the primary product of a manufacturing or commercial process
- Non-hazardous secondary material – Secondary material that is not a hazardous waste under Part 261

RCRA and the CAA

- **NHSM that are combusted are solid wastes, except....**
 - NHSM used as a fuel in a combustion unit**
 - Remains in control of generator
 - Meets 'fuel' legitimacy criteria
 - NHSM (scrap tires, resinated wood) used in combustion unit**
 - In or out of control of generator
 - Meets 'fuel' legitimacy criteria
 - NHSM used as an ingredient**
 - Meets 'ingredient' legitimacy criteria
 - Fuel or ingredient products used in a combustion unit that are produced from processing of discarded NHSM**
 - Meets legitimacy criteria

RCRA and the CAA

- Traditional fuels

- Material designated as 'traditional fuels' are not solid wastes
- Materials that are produced as fuels and are unused products that have not been discarded
 - Fuels that have historically been managed as valuable fuels
 - Fossil fuels and their derivatives
 - Cellulosic biomass (virgin wood)
 - Alternative fuels developed from virgin materials
 - Used oils meeting 279.11 specifications
 - Currently mined coal refuse
 - Clean cellulosic biomass

Questions?

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