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)

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

  - Original promulgation of definition within Subtitle C
  - Tracks statutory definition, but also attempts to define ‘discard’

  - 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
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

- Administrative reconsideration filed with EPA
- Suit for judicial review filed against EPA
- EPA agreed to address concerns and propose new rule

- 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*
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 reclainer 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
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.
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
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
‘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 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
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
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
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
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
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.

- 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
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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