

RCRA Regulatory Developments

Karen A. Winters, Esq.

November 3, 2016

Second Annual Midwest Environmental
Compliance Conference
Chicago, Illinois



U.S. EPA's 2015 Revisions to the Definition of Solid Waste

- **Background**

- **RCRA Generally**

- The Resource Conservation and Recovery Act, 42 USC §§6901 *et seq* (“RCRA”) established “cradle to grave” requirements applicable to the management of hazardous waste in the US by generators, transporters and disposal facilities. By definition, a “hazardous waste” is “any “solid waste” that is either listed as a hazardous waste by US EPA in its regulations at 40 CFR Part 261 Subpart D or exhibits the hazardous waste characteristic of ignitability, corrosivity, reactivity or toxicity, as defined in 40 CFR Part 26, Subpart C. If a material is a hazardous waste, that material is subject to the full panoply of regulation under Subtitle C of RCRA and regulations promulgated pursuant thereto.
 - A threshold question is, however, whether the material in question is a “solid waste.” In other words, material cannot be a hazardous waste unless it is first a solid waste. RCRA defines the term “solid waste” as “any garbage, refuse, sludge... *and other discarded material.*” See 42 USC §6903(27) and 40 CFR §261.2. Since 1980, US EPA has interpreted the term “discarded” as encompassing both materials that are destined for disposal as well as materials that are destined for recycling. This interpretation is reflected in US EPA’s definition of solid waste at 40 CFR §261.2.

U.S. EPA's 2015 Revisions to the Definition of Solid Waste (Continued)

- **RCRA Recycling Exemptions Historically**

- Historically, US EPA's definition of solid waste separated hazardous secondary materials recycled by being reclaimed into two categories: those that were classified as solid waste when recycled by being reclaimed and therefore subject to regulation under Subtitle C and those that were not.
- Those hazardous secondary materials that were classified as solid waste when recycled by being reclaimed were "spent materials," "sludges" listed in 40 CFR §261.31 or §261.32, "byproducts" listed in 40 CFR 261.31 or 261.32 and "scrap metal."
- Those hazardous secondary materials that were not classified as solid waste when recycled by being reclaimed were "byproducts" or "sludges" that exhibit a characteristic of hazardous waste and "commercial chemical products" that are either listed in 40 CFR §261.53 or exhibit a characteristic of hazardous waste.

U.S. EPA's 2015 Revisions to the Definition of Solid Waste (Continued)

■ US EPA's 2008 Revisions to the Definition of Solid Waste

- After years of litigation as to the appropriate scope of regulation of recycled materials under RCRA, US EPA on several occasions proposed to reexamine the regulatory status of these hazardous secondary materials and revise the definition of solid waste. US EPA ultimately finalized revisions to the definition of solid waste in 2008, creating two specific exemptions for hazardous secondary materials recycled by being reclaimed at 40 CFR 261.2, those being:
 - An exemption under 40 CFR §261.2(a)(2)(ii) and 40 CFR §261.4(a)(23) for hazardous secondary materials generated and reclaimed under the control of the generator; and
 - An exemption under 40 CFR §261.4(A)(24) for hazardous secondary material generated and then transferred to another person for the purpose of reclamation. Both of these exemptions were largely self implementing and subject to a host of terms and conditions outlined in the rule, including a requirement that the recycling be “legitimate.” See *73 Fed. Reg. 64668 (October 30, 2008)*.

U.S. EPA's 2015 Revisions to the Definition of Solid Waste (Continued)

- In a settlement agreement with The Sierra Club entered in a challenge to the final rule, US EPA agreed to propose and finalize, by December 30, 2012, further revisions to the definition of solid waste. US EPA finalized revisions to the definition of solid waste at 40 CFR §261.2 in response to the settlement agreement with the Sierra Club which were published in the Federal Register in early 2015. See *80 Fed. Reg. 1694 (January 13, 2015)*.
- The 2015 revisions represent a significant retraction with respect to the exclusions for hazardous secondary materials recycled by being reclaimed from the 2008 exemptions.
 - US EPA maintained the existing exemption for hazardous secondary material generated and legitimately reclaimed within the US and its territories and under the control of the generator, provided the material complies with the revised requirements of 40 CFR §261.4(a)(23(i) and (iii).

U.S. EPA's 2015 Revisions to the Definition of Solid Waste (Continued)

- US EPA essentially withdrew the exemption under 40 CFR §261.4(a)(24) for hazardous secondary materials generated and then transferred to another person for the purpose of reclamation and replaced it with a verified recycler exclusion. The verified recycler exclusion allows a generator of hazardous secondary materials to recycle hazardous secondary materials without having to treat the materials as a solid waste if the materials are sent to a verified recycler of hazardous secondary materials, either a RCRA permitted facility, or one who has obtained a verified recycler variance from US EPA or an authorized state.
- US EPA also added a general prohibition against sham recycling and, defining sham recycling as recycling that is not “legitimate” as defined in 40 CFR §260.43.

■ Recycling Exemptions

- **Revisions to the Exclusion under 40 CFR §261.4(a)(23) for Hazardous Secondary Materials Generated and Reclaimed Under the Control of the Generator**

US EPA's 2015 Revisions to the Definition of Solid Waste (Continued)

- US EPA retained the exclusion for hazardous secondary materials generated and legitimately reclaimed within the US or its territories and under the control of the generator, provided the material complies with the revised requirements of 40 CFR §261.4(a)(23)(i) and (iii).
- The exclusion is available in circumstances where the hazardous secondary material is generated and reclaimed at the generating facility, where the hazardous secondary material is generated and reclaimed at different facility, where the hazardous secondary material is generated and reclaimed at different facilities, if the reclaiming facility is controlled by the generator or if both the generating facility and the reclaiming facility are controlled by a “person” as defined in 40 CFR §260.10.

US EPA's 2015 Revisions to the Definition of Solid Waste (Continued)

- **Withdrawal of the Exclusion Under 40 CFR §261.4(a)(24) for Hazardous Secondary Material Generated and Then Transferred to Another Person for the Purpose of Reclamation with the “Verified Recycler” Exclusion**
 - US EPA withdrew the exemption under 40 CFR §261.4(a)(24) for hazardous secondary materials generated and then transferred to another person for the purpose of reclamation and replaced it with that US EPA refers to as the “verified recycler” exclusion. Hazardous secondary materials that are generated and then transferred to a verified reclamation facility for the purpose of reclamation are not solid wastes provided the requirements of 40 CFR §261.4(A)(24) are met. The material must not be handled by any person or facility other than the hazardous secondary material generator, transporter, intermediate facility or reclaimer and, while in transport, must not be stored for more than ten (10) days at a transfer facility, and packaged according to US DOT requirements. In addition to the conditions that must be met below, hazardous secondary materials generators, reclaimers and intermediate facilities must satisfy certain conditions regarding recordkeeping, management as an analogous raw material, residuals management and financial assurance. See 40 CFR §261.(a)(24)(v) and (vi).

US EPA's 2015 Revisions to the Definition of Solid Waste (Continued)

- **Conditions Common to Both Exemptions**
 - **Requirement that the Hazardous Secondary Material be “Contained”**
 - Both exemptions require that the hazardous secondary material be “contained” in accordance with the definition set forth in 40 CFR §260.10.
 - **Requirement that there Be No Speculative Accumulation**
 - Both exemptions require that the hazardous secondary material not be “accumulated speculatively.” US EPA revised the definition of “accumulated speculatively” at 40 CFR §261.61 to include the requirement that “materials must be placed in a storage unit with a label indicating the first date that the material began to accumulate. If placing a label on the storage unit is not practicable, the accumulation period must be documented through an inventory log or other appropriate method.”

US EPA's 2015 Revisions to the Definition of Solid Waste (Continued)

- **Notification of Intended Use of Exemption**
 - Both exemptions require notification of US EPA with respect to the intended and continued use of the variance. See *40 CFR §260.42*.
- **Emergency Preparedness and Response**
 - Both exclusions require compliance with the emergency preparedness and response requirements for management of excluded materials at 40 CFR Part 261, Subpart M.
- **Conditions Common to Both Exemptions**
 - **Legitimate Recycling**
 - Both exemptions require that the recycling be “legitimate.” US EPA strengthened its long-standing policy with the addition of a general prohibition against “sham” recycling at 40 CFR 260.43. US EPA also revised the legitimacy criteria in 40 CFR 260.43 so that legitimacy is defined as follows:

US EPA's 2015 Revisions to the Definition of Solid Waste (Continued)

- Legitimate recycling must involve a hazardous secondary material that provides a useful contribution to the recycling process or to a product or intermediate of the recycling process in accordance with 40 CFR §260.43(a)(1)
 - Contributes valuable ingredients to a product or intermediate
 - Replaces a catalyst or carrier in the recycling process
 - If the source of a valuable constituent recovered in the recycling process, is recovered or regenerated by the recycling process or is used as an effective substitute for a commercial product
- The recycling process must produce a valuable product or intermediate in accordance with the criteria set forth in 40 CFR §260.43(a)(2)
 - Sold to a third party
 - Used by the recycler as an effective substitute for a commercial product or as an ingredient or intermediate in an industrial process
- The generator and the recycler must manage the hazardous secondary materials as a valuable commodity when it is under their control in accordance with 40 CFR §260.43(a)(3)

US EPA's 2015 Revisions to the Definition of Solid Waste (Continued)

- Where there is an analogous raw material, the hazardous secondary material must be managed , at a minimum, in a manner consistent with the management of the raw material or in an equally protective manner
- Where there is no analogous raw material, the hazardous secondary material must be contained
- The product of the recycling process must be comparable to a legitimate product or intermediate in accordance with the criteria set forth in 40 CFR §260.43(a)(4)
 - Where there is an analogous raw material, the product is comparable if the product does not exhibit a hazardous characteristic that analogous products do not exhibit and the concentrations of hazardous constituents found in Appendix VII of part 261 in the product or intermediate are at levels that are comparable to or lower than those found in analogous products or at levels that meet widely recognized commodity standards and specifications
 - Where there is no analogous raw material, the product is comparable where the product is a commodity that meets widely recognized commodity standards and specifications or the hazardous secondary materials are returned to the original process from which they were regenerated

US EPA's 2015 Revisions to the Definition of Solid Waste (Continued)

Additions to and Revisions of the Variance Procedures in 40 CFR Part 260

■ Verified Recycler Variance

- 40 CFR §260.30(f) allows the Administrator to determine on a case by case basis that “hazardous secondary materials are not solid waste where they are transferred for reclamation and managed at a verified reclamation facility or intermediate facility where the management of the hazardous secondary material is not address under a RCRA Part B permit or interim status standards.” See *40 CFR §260.30(f)*. The criteria for issuance of the variance is outlined at *40 CFR 260.30(F)*:
 - The reclamation facility or intermediate facility must demonstrate that the reclamation process for the hazardous secondary materials is legitimate
 - The reclamation facility or intermediate facility must satisfy the financial assurance condition in 40 CFR §261.4(a)(24)(vi)(F)
 - The reclamation facility or intermediate facility must not be the subject of a formal enforcement action in the previous three years and not be classified as a significant non-complier under RCRA, Subtitle C or must provide credible evidence that the facility will manage the hazardous secondary material properly.

US EPA's 2015 Revisions to the Definition of Solid Waste (Continued)

- The intermediate or reclamation facility must have the equipment and trained personnel needed to safely manage the hazardous secondary material and must meet the emergency preparedness and response requirements under 40 CFR part 261 Subpart M.
- If residuals are generated from the reclamation process, the reclamation facility must have the permits required (if any) to manage the residuals, have a contract with an appropriately permitted facility to dispose of the residuals or present credible evidence that the residuals will be managed in a manner that is protective of human health and the environment.
- The intermediate or reclamation facility must address the potential for risk to proximate populations from unpermitted releases of the hazardous secondary materials to the environment.

US EPA's 2015 Revisions to the Definition of Solid Waste (Continued)

■ Partial Reclamation Variance

- The “partial reclamation” variance allows US EPA to grant a request for a variance from classifying as a solid waste those materials that have been reclaimed but must be reclaimed further before reclamation is completed, if, after initial reclamation, the resulting material is commodity-like (even though it is not yet a commercial product and has to be reclaimed further) based upon the considerations outline in the rule.
- To address the disparity in application of the criteria for issuance of the variance by authorized states, US EPA increased the stringency of the variance to assure that the partially reclaimed material is the subject of the inquiry as to whether the material is commodity like, rather than the end product of the reclamation process, and to eliminate the discretion afforded states by allowing consideration of “other factors.”
- 40 CFR §260.31(c) now authorizes US EPA to grant a variance from classification as a solid waste those hazardous secondary materials that have been partially reclaimed but must be reclaimed further before recovery is completed, if the partial reclamation has produced a commodity-like material. The determination is based on whether the hazardous secondary material is legitimately recycled and the following criteria:

US EPA's 2015 Revisions to the Definition of Solid Waste (Continued)

- Whether the degree of partial reclamation the material has undergone is substantial as demonstrated by using a partial reclamation process other than the process that generated the hazardous waste.
 - Whether the partially-reclaimed material has sufficient economic value that it will be purchased for further reclamation.
 - Whether the partially reclaimed material is a viable substitute for a product or intermediate produced from virgin or raw materials which is used in subsequent production steps.
 - Whether there is a market for the partially-reclaimed material as demonstrate by known customers who are further reclaiming the material.
 - Whether the partially-reclaimed material is handled to minimize loss.
- **Effective Date**
 - US EPA's 2015 revisions to the definition of solid waste were effective on July 13, 2015. *See 80 Fed. Reg. at 1703.*

US EPA's 2015 Revisions to the Definition of Solid Waste (Continued)

- **US EPA Guidance Issued to Date**

- <https://www.epa.gov/hwgenerators/final-rule-2015-definition-solid-waste-dsw>

- **Challenge to the Final Rule**

- Currently Pending Before the United States Court of Appeals for the DC Circuit
- Oral Argument Schedule for November 3, 2016

- **State Program Implementation**

- Because the exclusions to the definition of solid waste for hazardous secondary materials recycled by being reclaimed are less stringent than existing federal programs, authorized states are not required to adopt the exclusions.
- However, the prohibition against sham recycling and associated revisions to the definition of legitimacy, the additional record keeping requirements in the speculative accumulation provision in 40 CFR §261.1(c)(8), the revisions to the standards and criteria for variances from classification as a solid waste are more stringent than the current federal hazardous waste program requirements. In these cases, authorized states will be required to modify their programs and adopt equivalent, consistent and no less stringent requirements.

US EPA's 2016 Hazardous Waste Generator Improvements Rule

- **Proposed Rule**

- The proposed rule published in the Federal Register September 25, 2015. See *80 Fed. Reg. 57918 (September 28, 2015)*.
- Comments were accepted by US EPA through December 24, 2015.

- **Final Rule**

- The final rule signed by the Administrator on October 28, 2016, but has not yet been published in the Federal Register, although a pre-publication version of the final rule is available at <https://www.epa.gov/hwgenerators/final-rule-hazardous-waste-generator-improvements>.
- The final rule reflects a comprehensive update to the RCRA hazardous waste generator requirements. Over sixty (60) revisions or additions to the generator regulatory program intended to foster improved compliance in the identification and management of hazardous waste they generate.

US EPA's 2016 Hazardous Waste Generator Improvements Rule (Continued)

- Key provisions of the rule include:
 - Revisions to 40 CFR Part 260:
 - Outlines three categories of hazardous waste generators (very small quantity generators or “VSQGs”, small quantity generators or “SQGs” and large quantity generators or “LQGs”) and to define “acute hazardous waste” and “non-acute hazardous waste” for purposes of use in the definitions.
 - Adds definitions of the generator categories that expressly state which generator category would apply to hazardous waste generators that generate a combination of non-acute hazardous waste, acute hazardous waste, and/or residues from the cleanup of spills of acute hazardous waste in a calendar month.
 - Defines “central accumulation area” to mean any on-site hazardous waste accumulation area with hazardous waste accumulating in units subject to either 262.16 (for small quantity generators) or 262.17 (for large quantity generators).
 - Revisions to 40 CFR Part 261:
 - Add biennial reporting requirements for owners or operators of facilities that recycle hazardous waste without storing it.

US EPA's 2016 Hazardous Waste Generator Improvements Rule (Continued)

- Revisions to 40 CFR Part 262 to:
 - Clarify the waste determination requirements of 40 CFR §262.11
 - Require generators to determine their generator categories at 40 CFR §262.13
 - Define VSQG conditions for exemption at 40 CFR §262.14
 - Marking and labeling requirements for hazardous waste accumulated on site in containers and tanks as well as hazardous waste transporters that store containers of hazardous waste at transfer facilities and TSDFs that store containers of hazardous waste under the storage prohibition of the land disposal restrictions
 - Revisions to the requirements for satellite accumulation areas
 - Special requirements for ignitable and reactive wastes for LQGs
 - LQG closure requirements at 40 CFR §262.17(a)(8)
 - Documentation of inspections of waste accumulation units
 - Allowing VSQGs to send hazardous waste to LQGs under the control of the same person

US EPA's 2016 Hazardous Waste Generator Improvements Rule (Continued)

- US EPA identification numbers and re-notification requirements for small and large quantity generators
- Provision prohibiting generators from disposing of liquids in landfills
- Clarification of biennial reporting requirements
- Extending the time limit for accumulation under alternative requirements for laboratories owned by eligible academic entities at 40 CFR Part 262, Subpart K
- Deletion of Performance Track and Project XL regulations
- Addition to 40 CFR Part 262 for generators that temporarily change generator category as a result of an episodic event
- Preparedness, prevention and emergency procedures for SQGs and LQG
- Technical corrections and conforming changes
- Electronic tools to streamline hazardous waste reporting and recordkeeping requirements

US EPA's 2016 Hazardous Waste Generator Improvements Rule (Continued)

▪ **Effective Date**

- The final rule will be effective at the federal level six months after publication in the Federal Register. Regarding state implementation:
 - Authorized states will be required to adopt those revisions that are more stringent than existing program requirements. These provisions of the final rule will not become effective in states authorized for the RCRA program until states have adopted the rule and become authorized for the new provisions.
 - Authorized states will not be required to adopt those provisions that are less stringent or no more or less stringent than existing program requirements.

▪ **US EPA Guidance**

- US EPA sponsored webinars scheduled for November 30, 2016 and December 5, 2016 at <https://clu-in.org/conf/tio/hwgenerators/>.

US EPA's 2016 Hazardous Waste Export-Import Revisions Final Rule

- **Proposed Rule**

- Proposed rule published in the Federal Register on October 29, 2015. See *80 Fed. Reg. 63284 (October 29, 2015)*
- Comments received through December 15, 2015

- **Final Rule**

- Final rule signed by the Administrator on October 28, 2016, but not yet published in the Federal Register, although a pre-publication version of the final rule is available at <https://www.epa.gov/hwgenerators/final-rule-hazardous-waste-export-import-revisions>
- Key provisions of the final rule:

US EPA's 2016 Hazardous Waste Export-Import Revisions Final Rule (Continued)

- Making existing import and export related requirements more consistent with the current import-export requirements for shipments between members of the Organization of Economic Cooperation and Development (“OECD”);
 - Enables electronic submittal to US EPA of all import and export related documents; and
 - Enables electronic validation of consent in the Automated Export System (AES) for export shipments subject to RCRA export consent requirements prior to exit.
- **Effective Date**
- The final rule is effective in all states on December 31, 2016, although implementation will be phased in.

Karen A. Winters, Esq.
Squire Patton Boggs (US) LLP
karen.winters@squirepb.com