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Client Alert

Waste No More: New EPA Rule Boosts Gasification Recycling at Refineries

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On February 1, 2008, a new solid waste exclusion for petroleum refineries will take effect, adding "gasification" to the list of accepted petroleum refining processes. Consequently, oil-bearing hazardous secondary materials generated by a petroleum refinery that are recycled by being processed by a gasification unit at a refinery will no longer be considered to be solid wastes, if certain conditions are followed.

The Environmental Protection Agency published a final rule on January 2, 2008 (see 73 Fed. Reg. 57) that revises the existing list of exclusions from the regulatory definition of solid waste that applies to certain "oil-bearing hazardous secondary materials" that are generated at a petroleum refinery (materials which EPA describes as sludges, by-products or spent materials generated by the processing of crude oil that are hazardous because they are listed hazardous wastes or exhibit a hazardous characteristic). The current exclusions are located at 40 CFR Section 261.4(a)(12)(i) and exclude from EPA's hazardous waste regulation those oil-bearing hazardous secondary materials that are recycled by being re-inserted into the petroleum refining processes by means of distillation, catalytic cracking and fractionation, provided that these materials are not placed on the land or speculatively accumulated.

Background

The linchpin of EPA's hazardous waste program under the Resource Conservation and Recovery Act (RCRA) is the definition of "solid waste." Only those materials that are deemed to be a solid waste can also be determined to be a hazardous waste. EPA defines a solid waste as a discarded material which is any material that is abandoned, recycled or considered to be inherently waste-like. However, this definition is subject to a number of exclusions set forth at 40 CFR Section 261.4(a), as well as case-by-case variances under 40 CFR sections 260.30 and 260.31. The initial oil-bearing hazardous secondary material exclusions were promulgated by EPA in 1998 and enable refinery operators to recycle materials generated by the refining of

crude oil without triggering extensive RCRA hazardous waste regulation and oversight, if the conditions mentioned above are satisfied (See 63 Fed. Reg. 42110 (August 6, 1998)). The new conditional exclusion applies to those oil-bearing hazardous secondary materials that are processed and recycled by "gasification." EPA now defines gasification as "...a process, conducted in an enclosed device or system, designed and operated to process petroleum feedstock, including oil-bearing hazardous secondary material through a series of highly controlled steps utilizing thermal decomposition, limited oxidation, and gas cleaning to yield a synthesis gas composed primarily of hydrogen and carbon monoxide gas."

The New Rule

According to EPA, petroleum refineries can use gasification to convert these secondary oil-bearing hazardous materials into synthesis gas ("syngas"), which can itself be converted into usable products such as hydrogen, ammonia and other chemicals or even used to produce steam and electricity for the refinery. This latter use may become more significant as refineries are finding that their natural gas costs are rising. For this reason, EPA was persuaded that the use of a gasification unit was not merely another means of managing the refinery's waste disposal problems, but falls within the category of normal refining operations, even when applied to materials that have historically been managed as waste, and it is a legitimate petroleum refining process. A Fact Sheet issued by EPA states that, "By allowing certain secondary materials to be recycled for additional fuel production, EPA is helping petroleum refineries to reduce waste and capture more energy from each barrel of oil." EPA also decided against requiring that the synthesis gas produced by the gasification unit pursuant to this new rule be subject to the synthesis gas specifications that are part of the rules located at 40 CFR Section 261.38(b). EPA developed this rule a few years ago to apply to the synthesis gas generated by the gasification of hazardous waste.

EPA stated that the materials excluded from consideration as solid waste because of this rule would not be subject to any additional RCRA recordkeeping or reporting requirements. In particular, EPA noted that the hazardous waste notification and manifest requirements would not apply to these materials, provided that the conditions necessary to qualify for the exclusion are satisfied. However, EPA also cautioned that a current rule, 40 CFR Section 261.2(f), requires that respondents to an EPA enforcement action who claim in their defense that the recycled material was not a solid waste must provide documentation that the material is being processed in a manner that meets the conditions applicable to the exclusion.

With regard to the implementation of this new rule, EPA describes the new exclusion as being less stringent than the current federal requirement. **Consequently, states that have been authorized by EPA to administer their own hazardous waste programs in lieu of the federal program will not be required to modify their state programs, and EPA will implement the new exclusion in only those states that have not been authorized to operate the RCRA program.** Nevertheless, EPA encourages the states to amend their programs and to become "federally-authorized" to implement the rule.

Although the rule will become effective on February 1, 2008, it should be noted that almost every RCRA rule is eventually challenged in court, a possibility that should always be borne in mind.

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