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Reversing Course, EPA Tightens Its RCRA Hazardous Waste Recycling Rules

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After years of relative easing in its interpretation of the Resource Conservation and Recovery Act rules that govern industrial recycling, the Environmental Protection Agency is now taking a harder line. A recently issued regulation makes recycling almost as heavily regulated as other hazardous waste management activities under RCRA.

A long-term project by EPA to reform, reduce and relax the regulatory obstacles to the reclamation and recovery of valuable by-products generated by manufacturing and other industrial practices and operations appears to have come to an end. On December 10, 2014, the Administrator of EPA signed a final rule which again revises the agency's regulatory definition of "solid waste," which is the linchpin of EPA's authority to regulate the management of hazardous waste. This action, albeit long-delayed, blunts or reverses the modest regulatory actions taken by EPA in October 2008 to encourage the legitimate recycling of "hazardous secondary materials" that would otherwise be subject to EPA's very strict and complex RCRA Subtitle C hazardous waste rules. The agency states that it has revised the 2008 rules because it was concerned that the application of those rules would increase risk to human health and the environment from discarded hazardous secondary materials without additional safeguards. The many conditions that EPA placed on the new recycling exclusions in 2008 have been made more prescriptive, to the extent that the conditions attending a proposed recycling activity are similar in scope and complexity to the rules that apply to permitted RCRA treatment, storage and disposal facilities. This result also appears to conflict with the stated purpose of RCRA to "promote the protection of health and the environment and to conserve valuable material and energy resources."

To place these changes in context, it may be helpful to briefly review the history of these rules.

I. Background.

A. The Resource Conservation and Recovery Act ("RCRA").

The Resource Conservation and Recovery Act of 1976, 42 U.S. §§ 6901 *et seq*. ("RCRA"), as amended by the 1984 Hazardous and Solid Waste Amendments, sets forth criteria for the management of solid waste and hazardous waste and establishes strict requirements applicable to generators and transporters of

hazardous waste and rigid operating and permit requirements for those who treat, store, or dispose of hazardous waste. RCRA also provides a framework for the handling of recycled materials, the management of used oil, and the regulation of thousands of underground storage tanks containing petroleum products or other regulated materials. Most of the states have been delegated the authority to execute these programs, subject to EPA oversight.[1]

B. EPA's First Regulatory Steps.

RCRA's enactment in 1976 was accompanied by Congressional findings to the effect that the haphazard disposal of hazardous waste could present a danger to human health and the environment and that the passage of the Clean Air Act in 1970 and the Clean Water Act in 1972 had, in fact, created even more waste that needed to be handled carefully. According to a contemporary report of the House Committee on Interstate and Foreign Commerce, an estimated 30-35 million tons of hazardous waste were deposited on the ground every year, and those practices were largely unregulated. With these findings in mind, EPA was directed to promulgate, within 18 months of RCRA's enactment, rules which identified hazardous waste characteristics and listed particular hazardous wastes. This deadline was missed, and a citizen's suit was filed to force EPA to promulgate these rules. In *Illinois v. Costle*, 12 ERC 1597 (D.D.C. 1979), a federal district court established new deadlines for EPA. The court noted that "the issues are extremely complex, and the scope of the regulations is extensive."

On May 19, 1980, EPA promulgated the first major set of hazardous waste regulations, usually described as a "cradle to grave" management system.[2] These rules addressed the definition, identification and classification of solid and hazardous waste, established standards to govern the generation and transportation of hazardous waste, and provided "interim status standards" for existing (and grandfathered) facilities that treated, stored or disposed of hazardous waste. New RCRA regulated facilities were subjected to much more rigorous permitting and operational standards. The rules became effective on November 18, 1980. Over the years, the program has become ever more complex, but the 1980 rules remain the heart of the RCRA system.

C. EPA's Struggle to Define "Solid Waste".

The keystone of EPA's regulatory program is the agency's definition of "solid waste." A material cannot be a hazardous waste unless, first of all, it is a solid waste. A solid waste that exhibits one of the characteristics of a hazardous waste, or has been listed or otherwise defined as a hazardous waste, and is not otherwise excluded from the definition of a hazardous waste, is a hazardous waste and is subject to EPA's hazardous waste management system. See 42 U.S.C. § 6903 (5) and 40 C.F.R. § 261.3(a).

The statute itself defines "solid waste" as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility and other discarded material…" "Hazardous waste" is defined as "a solid waste, or a combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may – (A) cause or significantly contribute to an increase in mortality or an increase in serious, irreversible, or incapacitating reversible illnesses; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of or otherwise managed."[3]

[1] These state delegations are listed at 40 CFR Part 272.

[2] See 45 FR 33084.

[3] See 42 USC § § 6903(27) and (5).

The regulatory definition of "solid waste" is pretty straightforward and limited to materials that are discarded or thrown away. However, EPA historically has also been concerned with the scope of its authority to regulate "other discarded materials." The agency's initial 1980 definition of "solid waste" addressed this provision by including in the regulatory definition materials that were manufacturing and mining by-products and materials that "are sometimes discarded." This definition proved to be unworkable, yet EPA was also clearly worried about "sham" recycling operations that, in fact, created large hazardous waste disposal sites and other environmental problems.[4]

Accordingly, in 1985, EPA overhauled its definition of "solid waste" to include certain recycling activities – many of them arguably being routinely accepted operational procedures. Under the 1985 rule, materials are considered to be "solid waste" if they are discarded, abandoned, inherently waste-like, or recycled as described in the rule. Five categories of hazardous secondary materials, if they were recycled in a manner described in the rule, constituted a solid waste and also a hazardous waste. The 1985 rule also contained a few recycling exclusions: materials that were recycled by being reused as an ingredient or as an effective substitute for a commercial product, or returned to the original manufacturing process as a substitute for a raw material feedstock.

D. Litigating the Definition of "Solid Waste".

The 1985 redefinition of solid waste was challenged in the Court of Appeals, resulting in the decision known as *American Mining Congress v. EPA*, 824 F.2d 1177 (D.C. Cir. 1987), or "*AMC I*" because it was the first of a series of cases to grapple with this definition. In *AMC I*, the mining and petroleum industries sought a broad review of EPA's 1985 rules because they encompassed, and subjected to stringent RCRA rules, many ordinary recycling activities. The petitioners argued that these special recycling rules were being applied to materials that had never been thrown away. The *AMC I* court agreed, holding that the term "discarded" was to be interpreted in its ordinary sense, and that EPA's solid waste authority did not extend to the use of in-plant, closed loop recycling. According to the court, spent materials that are recycled and reused in an ongoing manufacturing and industrial process "have not yet become part of the waste disposal problem."[5]

In response, EPA issued a Notice of Proposal Rulemaking (NPRM) in January 1988 which proposed a modest revision of these rules and restated EPA's narrow reading of the *AMC I* ruling. See 53 *Fed. Reg*. 519 (1988). After considerable prodding over the life of two Presidential administrations, EPA finally completed its work on this 1988 proposal in the summer of 1994 by promulgating new exclusions to its definition of solid waste. See 59 *Fed. Reg*. 38536 (July 28, 1994). This regulatory response to *AMC I* provides that oil recovered from petroleum refinery operations, petroleum exploration and production activities, and incidental transportation activities is excluded from the regulatory definition of solid waste if it is subsequently inserted into the petroleum refining process prior to crude distillation and catalytic cracking. In effect, EPA recognized a "closed loop" recycling exception to its definition of discarded materials.

E. Later Cases Construing the Decision in *AMC I*.

However, in 1990, the Court of Appeals appeared to limit the central holding of *AMC I* in two important cases. In *American Petroleum Industry v. EPA*, 906 F.2d 729 (D.C. Cir. 1990), several environmental petitioners argued that certain EPA Land Ban Rules, insofar as they exempted K061 "slag residues" from the rules because of EPA's interpretation of *AMC I*, constituted an erroneous interpretation of RCRA. The

[4] Appendix A to the 1985 rulemaking defining solid waste is a list of "Damage Incidents Resulting from Recycling of Hazardous Wastes." See 50 FR 614 at 658-659 (1985).

[5] Today, this exclusion can be found at 40 CFR § 261.4(a)(12).

court agreed, holding that these slag residues had become part of a waste disposal problem and could be regulated as solid and hazardous wastes. *AMC I* was distinguished; its "proper focus" was defined as being limited to the issue of regulating in-process secondary materials reused in ongoing operations.

A few months later, in *American Mining Congress v. EPA*, 907 F.2d 1179 (D.C. Cir. 1990) (aka "*AMC II*"), the mining industry argued that EPA's attempt to relist six metal smelting wastes foundered on the fact that they had not been discarded, and under *AMC I*, they were not "solid wastes." The court disagreed, noting that these smelting wastes were produced when large volumes of process wastewater were handled in surface impoundments. *AMC I* was again interpreted as excluding from EPA's jurisdiction only those spent materials that were destined for immediate reuse in an ongoing production process. In both cases, the court considered the recycling activities under review to be part of the waste management process, which triggered their regulation as RCRA solid wastes.

A few years later, the DC Circuit restated the central holding of *AMC I*. In *Association of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000), the court ruled that EPA's definition of "solid waste" contained in the new "Land Disposal Restrictions Phase IV Rule" was inconsistent with *AMC I*. This "land ban" rule addressed residual or secondary materials generated in mining and mineral processing operations, and EPA had taken the position that materials that are removed from a production process for storage and are not immediately reused were therefore discarded and could be regulated as solid waste. The *Battery Recyclers* court disagreed, holding that EPA had misread *AMC I*, and that the intervening *AMC II* and API I decisions had not eviscerated the core holding of *AMC I* that "discard" was to be given its normal, non-technical meaning.

This decision was followed by *Safe Food and Fertilizer, et al. v. EPA* 350 F.3d 1263 (D.C. Cir. 2003). EPA had issued a rule which determined that RCRA would not apply to recycled materials used to make zinc fertilizers, or to the resulting fertilizers themselves, provided certain handling, storage and reporting conditions were observed, and concentration levels for certain constituents fell below specified thresholds. If these conditions were followed, the recycled materials would not be viewed as being "discarded" and hence, not solid waste. The petitioners objected to these conditions, arguing that circuit precedent held that materials that are transferred from one firm to another must always be viewed as discarded material. The court disagreed, stating that the petitioners had "misread our cases". The *Safe Food and Fertilizer* court summarized the *AMC I* precedents as follows: "We have held that the term 'discarded' cannot encompass materials that are destined for beneficial reuse or recycling in a continuous process by the generating industry itself. We have also held that materials destined for future recycling by another industry may be considered "discarded;" the statutory definition does not preclude application of RCRA to such materials if they can reasonably be considered part of the waste disposal problem. But we have never said that RCRA compels the conclusion that material destined for recycling in another industry is necessarily 'discarded.' Although ordinary language seems inconsistent with treating immediate reuse within an industry's ongoing industrial process as a discard . . . the converse is not true."

F. EPA's Latest Response to the AMC I Line of Cases.

In response to these decisions, in 2003, EPA proposed new revisions to the definition of solid waste. See 68 *Fed. Reg*. 61558. EPA stated that the proposed revisions would be consistent with these rulings, and that EPA would "clarify in a regulatory context the concept of legitimate recycling." As EPA explained at the time, "Under RCRA, to be a hazardous waste a material must also be a solid waste. EPA's framework for determining whether a material is a solid waste is based on what the material is and how it is managed . . . For materials recycled, RCRA jurisdiction is complex and the history of legal decisions related to these definitions is extensive."

II. The October 2008 Rules.

Five years later, EPA promulgated the rules it had proposed in 2003.[6] These rules added two new, more general exclusions to the definition of solid waste to encourage increased recycling of valuable secondary materials, and made other changes as well.

More specifically, the October 2008 revisions to the regulatory definition of solid waste added two general recycling exclusions to 40 CFR Section 261.4(a): Hazardous secondary materials that are generated and legitimately reclaimed by and under the control of the generator whose processes created these hazardous secondary materials, and hazardous secondary materials that are transferred to another company for legitimate off-site reclamation, provided that the comprehensive attendant conditions are observed and followed. These two exclusions, popularly known as the "generator-controlled exclusion" and the "transfer-based exclusion" became the 23rd and 24th exclusions to EPA's definition of "solid waste."[7] In addition, EPA promulgated new rules which established exacting standards and criteria for a new administrative procedure by which a generator could seek a "non-waste" determination, on a case-by-case basis, for hazardous secondary materials that were not already specifically excluded by rule. Also, new notification requirements were placed in the rules, and EPA codified in the rules what it meant by the term and concept of "legitimate recycling," a term that had hitherto been given meaning and substance by EPA memoranda and policy. Lastly, owners and operators of reclamation and intermediate facilities handling excluded hazardous secondary materials were obliged to comply with new financial responsibility requirements that would enable them to demonstrate their ability to dispose of any hazardous waste resulting from their recycling operations, as well as the costs of closing the facility. These rules were largely based on the existing financial responsibility rules that apply to the owners of RCRA-permitted or interim status facilities governed by 40 CFR Parts 264 and 265.

Significantly, EPA made a finding in the 2008 rule, which it characterized as a "major rule" for purposes of the Congressional Review Act, that while the intent of the final rule was to streamline requirements for hazardous secondary materials being recycled, the agency did not find that any environmental justice concerns were triggered by these new rules.[8] EPA had analyzed the potential risks to minority neighborhoods and concluded that there would be no disproportionate impacts to such neighborhoods.[9]

III. The January 2015 Rules.

The October 2008 rules generated considerable controversy in the environmental community, and EPA hastened to revisit their provisions. In January 2009, the Sierra Club filed an administrative petition with EPA requesting that the 2008 rules be repealed and that the implementation of the rule (whose effective date was December 29, 2008) be stayed. Among the issues raised by the Sierra Club were its objections to EPA's finding that the rule would have no adverse impacts on environmental justice communities or children's health. While EPA decided against repealing or staying the 2008 rule, it entered into a settlement agreement with the Sierra Club in which the Sierra Club agreed to withdraw its administrative petition if the agency addressed four issues in the petition, namely promulgating a regulatory definition of "contained", requiring notification before operating under an exclusion, define "legitimacy", and review the new "transfer-based exclusion." A proposed rule to revise the October 2008 rules was publicized on

[6] See 73 FR 64668 (October 30, 2008).

[7] There are now 27 exclusions to the definition of "solid waste" located at 40 CFR 261.4(a). A list of 32 regulatory actions that ameliorate the impact of the definition of solid waste was published by EPA in 2011 at 76 FR 44094 at 44139 (July 22, 2011).

[8] It should be noted that the 2015 proceeding is not described as a "major rule." See 80 FR 1694 at 1771.

[9] See 73 FR 64668 at 64757. The Congressional Review Act is codified at 5 USC § 801.

July 22, 2011 at 76 FR 44094. The new proposed rules were prompted by the "concerns raised by stakeholders about potential increases in risks to human health and the environment."

Under the 2015 rules, EPA took the following actions: (1) amended the "generator-controlled exclusion;" (2) replaced the "transfer-based exclusion" with a new "verified recycler exclusion;" (3) established a new "remanufacturing exclusion" to permit the controlled reclamation of specifically listed solvents; (4) codified the agency's long-standing policy that hazardous secondary materials determined to have been "sham recycled" are automatically considered to be discarded and solid waste; (5) changed the 2008 definition of "legitimate recycling;" and (6) substantially revised the procedures by which a solid waste variance or non-waste determination will be made. These revisions to the rules satisfied EPA's obligations under the settlement agreement. More specifically, EPA has taken these actions:

- As noted above, the new rule considerably tightens the 2008 recycling exclusions. For example, the "generator-controlled" exclusion has been revised by providing that the reclamation process must meet the revised definition of "legitimate recycling" and EPA substantially revised the "speculative accumulation" rule.[10] In addition, this exclusion mandates adherence to new recordkeeping requirements, expanded notification requirements, new emergency response and preparedness conditions, and the affected hazardous secondary materials must be managed in units that satisfy the new "contained" definition. Much of the "transfer-based exclusion" has been jettisoned, and generators who wish to take advantage of this exclusion will be obliged to use the services of a third party "verified recycler" that enjoys either a federal or state authorization and has proof of financial responsibility.[11]

- The new "remanufacturing exclusion" will permit the reclamation of specific hazardous secondary materials that are listed high-value solvents--these materials will not be considered to be solid wastes if they are processed in accordance with this rule. New notification requirements also apply to this new exclusion, and the remanufacturing facility must prepare and follow a satisfactory "remanufacturing plan," whose criteria are spelled out in the rule. In addition, these solvent reclamation facilities must adhere to complex and extraordinarily-detailed Clean Air Act emission control requirements that are modeled on the existing requirements applicable to certain RCRA-permitted or authorized units.[12]

- EPA has added a provision that explicitly prohibits "sham recycling", which the agency defines as "recycling that is not legitimate as defined in the rule."[13]

- The Administrator's decision whether to grant a petition seeking a variance from a material's classification as a "solid waste" that is being reclaimed by a verified recycler will depend on whether the reclamation or intermediate facility's petition addresses the "potential for risk to proximate populations from unpermitted releases…and must include consideration of potential cumulative risks from nearby stressors." This new provision appears to address some of the environmental justice concerns the agency has grappled with over the years.[14]

- Any variance or non-waste determination will be effective for no more than 10 years--which is consistent with the length of a RCRA permit.[15]

[10] See revised 40 CFR 261.1(c)(8).
[11] See revised 40 CFR §§ 261.4(a)(23) and (24).
[12] See new 40 CFR 261.4(a)(27).
[13] See new 40 CFR § 261.2(b)(4) and (g).
[14] See new 40 CFR 260.31(d)(6).
[15] See new 40 CFR 260.33(d).

- The new definition of "contained" provides that a compliant unit must address "any potential risks of fires or explosions," which EPA states will make spent petroleum catalysts eligible for inclusion in the generator-controlled exclusion.[16]

- EPA has deferred, for the time being, a review of all pre-2008 recycling exclusions.

IV. Conclusions.

EPA's decision to reduce the scope of the new recycling exclusions by adding so many new and complex conditions to their use appears to be inconsistent with the Agency's frequently expressed goal to encourage the safe and expeditious recovery, recycling and reuse of valuable resources as an alternative to their disposal. Compliance with these rules, when they are effective, will require an exacting attention to detail mandated by the myriad new regulatory requirements imposed by EPA. While these new rules are certain to be challenged in court, their overturn is by no means a foregone conclusion. A few months ago the Court of Appeals issued two stunning decisions holding that: (a) the "gasification exclusion" rules promulgated in 2008 and set forth in 261.4(a)(12) violated a specific RCRA provision regulating "Hazardous Waste used as fuel," as did (b) the "comparable fuels" exclusions of 40 CFR 261.4(a)(16) and 40 CFR 261.38. These exclusions to the definition of solid waste were vacated.[17]

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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[16] The new definition of "contained" is located at 40 CFR 260.10

[17] See *Sierra Club v. EPA*, 755 F.3d 968 (CADC 2014) and *Natural Resources Defense Council v. EPA*, 755 F.3d 1010 (CADC 2014).