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EPA Proposes Revised Rules to Regulate Hazardous Waste Recycling

BY KENNETH J. WARREN

Special to the Legal

On July 22, the U.S. Environmental Protection Agency published in the Federal Register a proposal to revise its Definition of Solid Waste rule. If adopted, the proposal would extend virtually all of the EPA's existing hazardous waste requirements to hazardous secondary materials that a generator sends to an unrelated party for reclamation. The proposed regulations would also tighten requirements on generators performing their own recycling activities.

Companies engaged in hazardous materials recycling should carefully review the proposed regulations and consider commenting on them. Written comments must be submitted to the EPA by Oct. 20.

The EPA's rule defining solid waste is one of the most controversial provisions in its solid waste regulations. In the Resource Conservation and Recovery Act (RCRA), Congress defined solid waste to include not only specific classes of materials, but also "other discarded material." Much of the controversy surrounding the definition of solid waste has centered on this phrase.

For example, when the EPA classified mining and petroleum materials destined for immediate use in ongoing manufacturing processes as "discarded material," affected companies challenged the rule. The U.S. Court of Appeals for the D.C. Circuit rejected the EPA's position in its 1987 opinion in *American Mining Congress v. EPA*. The court held that Congress intended "discarded" to have its ordinary meaning: abandoned or disposed. Materials that are immediately reused as part of an ongoing manufacturing process are neither abandoned nor disposed and may not be regulated under the RCRA. Because hazardous wastes are a subset of solid wastes, hazardous secondary materials are hazardous wastes subject to the EPA's authority only if they are discarded.

Notwithstanding its rejection of the EPA's regulation, the *AMC* court did not



KENNETH J. WARREN

is a shareholder in the environmental practice group at Hangley Aronchick Segal Pudlin & Schiller. He is a former section chair of the American Bar Association section of environment, energy and resources.

circumscribe the EPA's discretion to determine when hazardous secondary materials that are not used as part of an ongoing manufacturing process should be viewed as discarded materials. In cases subsequent to *AMC*, the D.C. Circuit recognized that factors such as whether the materials are managed to prevent loss, have market value and contain levels of contaminants identical to those made with virgin new materials are relevant to determining whether they have been discarded.

The EPA has struggled to establish a clear demarcation between recycled materials that have been discarded and those remaining in use as part of a manufacturing process. The EPA promulgated the most recent iteration of the Definition of Solid Waste rule in 2008. The 2008 rule is currently effective in six states, including Pennsylvania and New Jersey.

The 2008 rule contains several provisions streamlining regulatory requirements and encouraging recycling. In response, challenges were filed in the District of Columbia Circuit and in an administrative petition submitted to the EPA by the Sierra Club. The Sierra Club asserted that the 2008 rule did not adequately protect the environment and that the EPA had not fully examined the effects of the 2008 rule on minority and low income populations. This latter deficiency allegedly contravened environmental justice requirements established through executive order and regulation.

The 2011 proposal is designed to meet concerns raised by the Sierra Club and

others. One thrust of the proposed regulatory revisions is to limit opportunities for sham recycling. The EPA has long expressed concern that generators seeking to dispose of hazardous wastes may claim that their materials are being recycled and are therefore exempt from regulation. If these wastes have little commercial value, a company receiving the wastes for recycling may dispose of them improperly. To prevent the recycling rules from being used as a mechanism to avoid compliance with the EPA's hazardous waste regulations, the EPA developed criteria to distinguish "legitimate" recycling from sham recycling.

The 2008 regulations define legitimate recycling by enumerating four legitimacy factors: (1) the hazardous secondary material must provide a useful contribution to the recycling process or to a product or intermediate, (2) the recycling process must produce a valuable product or intermediate, (3) the hazardous secondary material must be managed as a valuable commodity, and (4) the recycling process must produce products containing concentrations of hazardous constituents not significantly greater than those in analogous products. In the 2008 regulations, the first two factors are mandatory while the second two factors must be considered when making a legitimacy determination.

The proposed rule would strengthen the legitimacy test by making all four legitimacy factors mandatory, subject to a petition process offering potential relief for recyclers unable to meet factors three or four. In addition, the proposed rule would revise factor three to allow the material to be managed either in the same manner as a valuable raw material or in an equally protective manner. Factor four would be clarified to require products from recycling to have levels of toxics comparable to or lower than those found in analogous products. Recyclers must document their legitimacy determinations. The legitimacy requirements would apply to all hazardous secondary materials and hazardous waste recycling.

The list of legitimacy factors likely falls within the scope of the EPA's RCRA rule-making authority. A material can reasonably be considered discarded if the purpose of recycling is to dispose of the material, not to recover and reuse a valuable product. Examining factors such as whether the hazardous secondary material is managed as a valuable commodity and whether it is used to produce a product no more toxic than analogous products may reveal whether it has been discarded.

The proposed rule also revises the requirements that must be followed by generators and recyclers who have satisfied the legitimacy test. Under the proposed rule, hazardous recyclable materials sent off site to a third party for reclamation must be managed as hazardous wastes under RCRA Subtitle C. Subtitle C requires generators to, among other things, prepare hazardous waste manifests for shipments and obtain hazardous waste permits for storage. The sole proposed "streamlining" of the hazardous waste regulations is the provision allowing the generator to accumulate hazardous materials for up to one year without a RCRA permit. However, to avail itself of the one-year accumulation period, the generator must first arrange for reclamation, document those arrangements in a reclamation plan and label the stored materials.

Where a generator reclaims hazardous secondary materials on-site, within the same company, or using certain tolling agreements, the "generator-controlled exclusion" applies. Consistent with the 2008 rule, the 2011 proposal does not require a generator to comply with the entire RCRA Subtitle C regime. Nevertheless, the proposed rule imposes four new requirements on generators who perform their own recycling. First, the materials must be "contained." The "contained" standard requires the unit holding the hazardous secondary materials to be in good condition with no leaks or releases, to be designed to prevent releases, to be properly labeled and to contain only compatible materials with mechanisms to control fire and explosive risks.

Second, the proposed rule makes notification a condition of the generator-controlled exclusion. In other words, failure to notify is not merely a regulatory violation; it may also preclude the generator from invoking the exclusion. Third, tolling contractors and manufacturers must keep records for three years. Finally, generators must document the first date on which the hazardous secondary material is accumulated.

Portions of the EPA's proposed criteria applicable to generator-controlled activities or to third-party reclamation do not appear essential to determining whether a hazardous material has been discarded. If a container has not been properly labeled under the proposed rule, or if notification has not been properly made, the material may nonetheless not be discarded. To be sure, except for hazardous secondary materials immediately reused as part of an ongoing manufacturing process, the EPA has discretion to regulate these materials. But this discretion is not unlimited. If the EPA adopts the proposed rule, courts will likely be asked to resolve whether the proposed rule's conditions reasonably relate to defining "discarded material."

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The proposed rule creates a new more flexible exclusion for re-manufacturing high-value solvents in the pharmaceutical, organic chemical, plastics and resins, and paint and coatings sectors. The EPA determined that these solvents are highly energy intensive and carbon intensive. By maximizing recycling, less energy use and greenhouse gas emissions will occur.

For the re-manufacturing exclusion to apply, the hazardous secondary materials must be among those identified by the EPA. In addition, the generator and re-manufacturer must notify the regulatory authority prior to using the exclusion and thereafter submit notifications biennially, develop a re-manufacturing plan, maintain records of shipments, store solvents in tanks and containers satisfying RCRA hazardous waste requirements, comply with Clean Air Act and RCRA air emission standards and meet speculative accumulation storage limits. This exclusion strikes a balance between imposing traditional solid waste

protections and encouraging generators to recycle solvents that they may otherwise dispose as wastes.

In conjunction with its rulemaking, the EPA undertook a detailed environmental justice analysis. It concluded that many aspects of the 2008 rule that streamlined RCRA requirements had the potential for increasing risk to minority and low-income populations. Likewise, placing recycling outside the RCRA permitting process limited the public's opportunity to participate in decision making. Avoiding disparate impacts on minority and low-income populations and providing opportunities for vulnerable populations to participate in decision making were factors supporting the imposition of RCRA Subtitle C requirements on off-site recycling. The EPA also requested comment on whether a public participation requirement should be built into the generator-controlled exclusion.

The proposed amendments to the Definition of Solid Waste rule constitute the latest swinging of the pendulum on regulation of recycling. After the enactment of RCRA, some thought that all recycling activities were exempt because recycled material was not "discarded." When the EPA sought to extend its authority to virtually all hazardous secondary materials, courts intervened. The EPA's 2008 Definition of Solid Waste rule provided companies greater flexibility to manage hazardous secondary material. The proposed rule, which removes some of that flexibility, will likely be challenged on the ground that it restricts legitimate recycling of materials that are not discarded. Manufacturers and others engaging in recycling activities would be well advised to submit comments on how the rule may impose undesirable restrictions on their recycling activities. •