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2015 Definition of Solid Waste Final Rule January 13, 2015 (80 FR 1694) Summary

Prepared by the
Compliance Monitoring and Enforcement Task Force
ASTSWMO Hazardous Waste Subcommittee
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On January 13, 2015, U.S. EPA issued a rule that amends its definition of solid waste (DSW) to promote recycling. This rule revises EPA's previous 2008 DSW rule to provide additional oversight and minimize potential risk of releases to surrounding communities.

The following is a summary of the 2015 DSW rule. For more information, go to EPA's webpage dedicated to the rule: www.epa.gov/hwgenerators/final-rule-2015-definition-solid-waste-dsw

Revised Generator-Controlled Exclusion

The 2015 DSW rule retains the Generator-Controlled Exclusion. This exclusion applies to hazardous secondary materials reclaimed by the generator on-site, within the same company, and within certain tolling manufacturing agreements. The rule also includes new recordkeeping requirements to ensure the hazardous secondary materials are legitimately recycled and not speculatively accumulated. Also included are requirements to notify, reclaim the materials within the United States, maintain records of shipments, and have emergency preparedness and response procedures. The exclusion also codified a new definition of "contained."

The revised generator-controlled exclusion does not apply to materials already subject to an exclusion in 40 CFR Part 261.4(a) and spent lead-acid batteries managed under 40 CFR Part 266 or as universal waste under Part 273. The revised rule also makes spent petroleum refining catalysts (K171 and K172) eligible for the exclusion.

"Transfer-Based" Exclusion Replaced with "Verified Recycler" Exclusion

EPA is replacing the exclusion for hazardous secondary materials that are transferred from the generator to other persons for the purpose of reclamation with an exclusion for hazardous secondary materials sent for reclamation to a verified recycler. Under this new exclusion, generators who want to recycle their hazardous secondary materials must send these materials to either a RCRA-permitted reclamation facility or to a "verified recycler" who has obtained a solid waste variance from EPA or an authorized State. This upfront requirement to be "verified" allows EPA and the States to verify that a facility has established measures to manage the material. Under

the variance process, EPA and the States will be able to review and approve the facilities' financial assurance before operations begin. Another change is that exports are no longer allowed under the verified recycler exclusion.

New Remanufacturing Exclusion for Spent Solvents

The 2015 DSW rule added a new exclusion that allows the transfer of certain spent solvents from one manufacturer to another for "remanufacturing." This exclusion is similar to the Generator-Controlled exclusion; however, there is no requirement in the "remanufacturing" exclusion that the generator and the remanufacturer be controlled by the same "person." The "remanufacturing exclusion" encourages the recycling of 18 higher-value hazardous spent solvents used for reacting, extracting, blending, or purifying chemicals in the pharmaceutical, organic chemical, plastics and resins, and the paint and coatings sectors. The remanufactured solvents can be used as ingredients to make products, but they cannot be used for cleaning or degreasing.

Legitimacy Criteria

The 2015 DSW rule requires that all four legitimacy factors must be met, but added flexibilities into the third and fourth factors to ensure current good recycling practices continue unimpeded. The four factors are:

- Factor 1: Materials must provide a useful contribution to the recycling process or to a product or intermediate;
- Factor 2: Recycling must produce a valuable product or intermediate;
- Factor 3: Materials must be managed as valuable commodities; and
- Factor 4: Products of recycling must be comparable to legitimate products or intermediates.

The 2015 DSW rule also explicitly prohibits "sham recycling" which will make the legitimate recycling regulations more transparent and enforceable. Documentation of legitimacy is not necessary or required for the existing recycling exclusions and exemptions.

New Tracking Requirement for Speculative Accumulation Prohibition

The definition of speculative accumulation has been revised by the 2015 DSW rule. Accumulation start dates must be formally tracked on the storage unit or documented through an inventory log or other appropriate method. This will allow regulatory authorities to quickly ascertain how long a facility has been storing an excluded hazardous secondary material.

DSW Variances and Non-Waste Determinations

If facilities are not able to meet the conditions of the new or pre-existing recycling exclusions, they can petition EPA or the authorized State for a non-waste determination or a variance from the classification as a solid waste. The 2015 DSW rule included the following revisions:

- Requires facilities to send a notice to EPA or the authorized State and potentially re-apply for a variance in the event of a change in circumstances that affects how a hazardous secondary material meets the criteria upon which a solid waste variance has been based;
- Establishes a fixed term not to exceed ten years for variance and non-waste determinations. At the end of the ten years, facilities must re-apply for a variance or non-waste determination;
- Requires facilities to re-notify every two years with updated information;
- Revises the criteria for the partial reclamation variance in 40 CFR part 260.31(c) to clarify when the variance applies and to require that all the criteria for this variance must be met; and
- For the non-waste determinations in 40 CFR Part 260.34, requires petitioners to demonstrate why the existing solid waste exclusions would not apply to their hazardous secondary materials.

Existing DSW variances granted under 40 CFR Part 260.30 – 260.34 are grandfathered.

State Authorization

The 2015 DSW rule is more stringent than the 2008 rule, so States that adopted that rule will be required to modify their programs to be consistent with the 2015 revisions. Other States are not required to adopt the 2015 DSW rule except for the following provisions:

- The prohibition of sham recycling and the definition of legitimate recycling, including the “contained” definition;
- Accumulation date tracking requirement for speculative accumulation provisions; and
- Changes to the standards and criteria for the solid waste variance and non-waste determinations.

The following is a link to EPA’s “RCRA State Authorization” home page which provides information on the State authorization process generally, but also useful information for State programs that are in the process of evaluating new federal RCRA rules for State adoption:

<https://www.epa.gov/rcra/state-authorization-under-resource-conservation-and-recovery-act-rcra>

Additionally, information about State adoption of 2015 DSW rule is available at the following link to State Program Advisory (SPA) 35; in particular, refer to the “Revision Checklist 233 Summary” document and the various “RCRA Revision Checklist 233” documents (i.e., Checklists A, B, C, D1, D2 and E): <https://www.epa.gov/rcra/state-authorization-rule-checklists-233-through-235-hazardous-waste-rulemakings-published>

The Revision Checklist 233 Summary document provides a general summary of the 2015 DSW rule as well as a detailed summary of which parts of that rule must be adopted by State programs and which parts are optional (depending on whether or not the State already adopted the 2008 version of the DSW rule). The Summary document also provides an overview of the parts of the 2015 DSW rule covered by each Revision Checklist. The Revision Checklist 233 Summary document may be viewed at the following link: <https://www.epa.gov/rcra/state-authorization-rule-checklists-233-through-235-hazardous-waste-rulemakings-published>