RCRA ALERT

BEVERIDGE & DIAMOND PC

OCTOBER 30, 2008

Authors:

Donald J. Patterson, Jr.
1350 I Street, N.W.
Suite 700
Washington, DC 20005
(202) 789-6032
dpatterson@dblaw.com

Aaron H. Goldberg
1350 I Street, N.W.
Suite 700
Washington, DC 20005
(202) 789-6052
agoldberg@bdlaw.com

Elizabeth M. Richardson
1350 I Street, N.W.
Suite 700
Washington, DC 20005
(202) 789-6066
erichardson@bdlaw.com

For more information about our firm, please visit www.bdlaw.com

If you do not wish to receive future RCRA Alerts, please send an e-mail to: jmilitano@bdlaw.com

EPA'S FINAL REVISIONS TO THE DEFINITION OF SOLID WASTE: *RECYCLING THE RULES FOR RECYCLABLE MATERIALS*

On October 30, 2008, the United States Environmental Protection Agency ("EPA" or "the Agency") published its long-awaited final rule revising the Resource Conservation and Recovery Act ("RCRA") regulatory definition of solid waste ("2008 Final DSW Rule"), which will go into effect on December 29, 2008. *See* 73 Fed. Reg. 64668 (October 30, 2008). The 2008 Final DSW Rule revises EPA's regulatory definition of solid waste to exclude conditionally certain types of recycled materials and reclamation operations from the onerous RCRA hazardous waste requirements that otherwise would apply.

In its introduction to the 2008 Final DSW Rule, EPA asserts that this rule is consistent with the resource conservation goal of RCRA, and EPA's "longstanding policy" of encouraging recovery, recycling, and reuse as alternatives to disposal, while maintaining protection of human health and the environment. EPA also states that it had two primary purposes in adopting the rule. First, it was "responding to seven decisions" of the U.S. Court of Appeals for the District of Columbia ("D.C. Circuit"), including *Association of Battery Recyclers v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000), which struck down EPA's most recent attempt to expand the regulatory definition of solid waste rule under RCRA because EPA had unlawfully exerted jurisdiction over materials that were not "discarded." Second, EPA states that it was attempting to "clarify" the RCRA concept of "legitimate recycling," a central concept in EPA's regulatory definition of solid waste.

It is questionable whether EPA has achieved its stated goals and corrected the regulatory definition of solid waste so that it is consistent with the RCRA statute and the D.C. Circuit's multiple decisions that EPA's RCRA jurisdiction extends only to discarded materials. Legal challenges to the 2008 Final DSW Rule will likely be filed soon in the courts, addressing this issue. Such challenges will undoubtedly take months or years to be resolved.

In the meantime, the regulated community will need to grapple with a complex new set of rules, conditions, requirements, and procedures for recyclable materials. Federal judges in the past have referred to the RCRA definition of solid waste as a "mind-numbing journey." Now that EPA has recycled its rules for recyclable materials once again, the road has become even more difficult to follow. The discussion below provides a brief summary of the new rule and a preliminary analysis of several key issues that it raises for both generators and recyclers.

I. SUMMARY OF THE 2008 FINAL DSW RULE

The two main elements of the 2008 Final DSW Rule are new exclusions from the definition of solid waste and a new process for obtaining case-by-case determinations that specific materials are non-wastes. We discuss each of these elements separately below, as well as the legitimacy

criteria that EPA has established for assessing whether hazardous secondary materials are being legitimately recycled and therefore eligible for one of the new exclusions or a non-waste determination. We also address provisions under the final rule for enforcement and implementation in the states.

A. New Conditional Exclusions from the Regulatory Definition of Solid Waste

The 2008 Final DSW Rule creates two new conditional exclusions to the RCRA regulatory definition solid waste for certain "hazardous secondary materials" (*i.e.*, spent materials, listed sludges, and listed by-products) that are legitimately reclaimed. Each exclusion is discussed separately below.

1. *Generator-Control Exclusion*

EPA's 2008 Final DSW Rule conditionally excludes hazardous secondary materials from the definition of solid waste if they are reclaimed under the control of the generator within the United States. EPA's rationale for this exclusion is that hazardous secondary materials, when generated and reclaimed under the "control" of the same person, are more commodity-like than waste-like, assuming the enumerated conditions are met.

"Under control of the generator" is defined to mean circumstances in which the materials are: (1) generated and then reclaimed on-site at the same facility; (2) generated and reclaimed at a different facility, if the generator certifies that the hazardous secondary materials are sent either to a facility controlled by the generator or to a facility under common control with the generator, and that either the generator or the reclaimer assumes responsibility for the safe handling of the materials; or (3) generated and reclaimed under a written toll manufacturing agreement, if the tolling contractor certifies that it retains ownership of, and responsibility for, the hazardous secondary materials generated during the course of manufacture, including any releases of hazardous secondary materials that occur during the manufacturing process.

A generator of hazardous secondary materials seeking to take advantage of this exclusion must submit a prior notification to EPA or to an authorized State, and must update the notification every two years thereafter. In addition, the material must be legitimately recycled and cannot be speculatively accumulated.

In the 2008 Final DSW Rule, EPA made several changes or clarifications to its 2007 proposal with regard to the generator-control exclusion:

- **Generator Control:** EPA attempts to clarify issues surrounding the definitions of "on-site," "same company," and "tolling arrangement."
- **Land-Based Units/Containment:** EPA explains that hazardous secondary materials must be "contained" when they are managed either in land-based units or non-land-based units (the 2007 proposal imposed this requirement only on land-based units), cautioning that such materials are "discarded" if they are released into the environment and not immediately recovered. EPA revises the definition of land-based unit to be "an area where hazardous secondary materials are placed in or on the land before recycling," and specifically states that "land-based unit" does not include production units.
- **Notification:** EPA added data elements to the notification requirement for generators taking advantage of the exclusion.

2. ***Transfer-Based Exclusion***

In the 2008 Final DSW Rule, EPA also adopted a "transfer-based exclusion" for spent materials, listed sludges, and listed by-products that are transferred from a generator to another person or company for reclamation. EPA's rationale for this exclusion is that hazardous secondary materials generated and reclaimed by different entities may also be commodity-like, but that additional conditions are needed to ensure the materials are not being discarded.

The conditions that must be met for this exclusion to apply include: (1) the generator and reclaimer must notify EPA or the relevant authorized State(s); (2) records of shipments and confirmations of their receipt must be maintained for 3 years; (3) the materials must be legitimately recycled; (4) residuals generated from the recycling process must be properly managed (including as hazardous wastes, if needed); and (5) the reclaimer must maintain financial assurance generally equivalent to RCRA Subtitle C financial assurance for closure and liability for sudden and non-sudden accidental occurrences.

Reclamation facilities must also ensure that hazardous secondary materials are contained, and that they are managed in a fashion at least as protective as that employed for analogous raw materials, where there are analogous raw materials. In addition, a generator seeking to take advantage of this exclusion must use "reasonable efforts," using all "credible evidence," to ensure that its materials will be safely and legitimately recycled. Finally, a secondary material that is "transferred" by being exported from the United States for reclamation in another country must comply with specified notice-and-consent procedures, including obtaining consent of the importing country.

EPA made a number of significant changes from the 2007 proposal, which are discussed below:

- **Reasonable Efforts:** The 2008 Final DSW Rule provides 5 specific questions that must be answered in the affirmative as part of the generator's "reasonable efforts" inquiry. EPA is requiring documentation of, and certification for, this inquiry.

- **Transfer and Intermediate Facilities:** EPA is allowing hazardous secondary materials to be stored at an intermediate facility for more than 10 days, provided the intermediate facility complies with the same conditions as the reclamation facility, the generator engages in the same reasonable efforts to approve the intermediate facility, and the intermediate facility sends the materials to the reclamation facility selected by the generator. In addition, EPA has clarified that a transporter that stores hazardous secondary materials 10 days or less is eligible for existing transfer station requirements and is not subject to the conditions on reclamation facilities.

- **Financial Assurance:** EPA adopted financial assurance requirements for reclaimers and intermediate facilities that are similar to the requirements for hazardous waste treatment, storage, or disposal ("TSD") facilities, covering the cost of managing as a hazardous waste any material that will remain at the facility when operations cease, as well as the costs for closure of the facility (but not for post-closure care). The same types of instruments available to RCRA TSD facilities are available to reclamation and intermediate facilities: trust funds, payment-surety bonds, letters of credit, insurance, or a financial test and corporate guarantee. In addition, reclamation and intermediate facilities must establish TSD-quality financial assurance to cover liability for sudden and non-sudden (for land-based units) accidental occurrences.

B. Legitimacy Criteria

In the 2007 proposal, EPA proposed establishing two mandatory criteria to determine whether legitimate recycling, as opposed to "sham" recycling, is occurring with regard to the reclamation of spent materials, listed sludges and listed by-products, as well as for all other recycling of hazardous secondary materials. In the final rule, EPA limits the application of the legitimacy criteria only to the hazardous secondary materials conditionally excluded in the 2008 Final DSW Rule (*i.e.*, spent materials, listed sludges and listed by-products destined for reclamation), as well as to any materials subjected to non-waste determinations under this rule (discussed below).

EPA's 2008 Final DSW Rule codifies two legitimacy criteria (in keeping with the 2007 proposal). Hazardous secondary materials must (1) provide a useful contribution to the recycling process or to a product of the recycling process, and (2) the recycling process must produce a valuable product or intermediate. In addition, in determining whether legitimate recycling is occurring, a generator must also consider two other factors: (A) how the secondary material is managed, and (B) the presence of hazardous constituents in the product of the recycling (*i.e.*, whether "toxics are along for the ride"). EPA recognizes, however, that there will be some situations where a legitimate recycling process will not conform to one or even both of these latter considerations.

C. Non-Waste Determinations

EPA proposed establishing procedures for a voluntary administrative petition process for case-by-case non-waste determinations by EPA or an authorized State for hazardous secondary materials that are "clearly not discarded," including materials that are: (i) reclaimed in a continuous industrial process; (ii) indistinguishable in all relevant aspects from a product or intermediate; or (iii) reclaimed under the control of the generator, including under contractual arrangements similar to the tolling arrangements eligible for the generic exclusion. In the 2008 Final DSW Rule, EPA limits the eligible categories for non-waste determinations to the first two set forth above, and establishes criteria for these two types of non-waste determinations (including the legitimate recycling criteria and legitimacy considerations discussed above).

To the extent a non-waste determination is granted, the hazardous secondary material is not subject to the limitations and conditions automatically applied to materials under the generator-control or transfer-based exclusions, but could be subjected to material-specific conditions as part of the granting of the non-waste determination. EPA adds that generators or reclaimers operating under an existing exclusion, variance or other EPA, or authorized State, determination do not need to re-apply for a non-waste determination under this rule.

The process for obtaining a non-waste determination is identical to the process currently set forth in 40 C.F.R. § 260.30 for variances from the hazardous waste regulations (*e.g.*, variances from the definition of solid waste). Petitioners must apply to EPA or an authorized State, and EPA or the State will provide public notice and take comment on its tentative decision. If the request is denied, petitioners can still proceed under other exclusions, to the extent they apply, or utilize EPA or State variance procedures. EPA also provides that States may issue non-waste determinations (even if they have not "formally adopted" the new process) if the State determines that the relevant criteria are met and EPA formally approves the State-proposed determination.

D. Enforcement

Entities availing themselves of the generator-control exclusion are subject to enforcement for failure to comply with the conditions associated with the exclusion -- principally legitimate recycling, containment, and no speculative accumulation. Failure to meet these conditions means the hazardous secondary materials are not excluded, and thus are hazardous wastes subject to full Subtitle C regulation. EPA takes the position that it can take enforcement action against generators under RCRA § 3008(a) for violations of hazardous waste requirements occurring from the time the materials were generated through the time they are ultimately disposed of or recycled.

A generator's failure to meet the generator conditions associated with the transfer-based exclusion (including its "reasonable efforts" duties and certification requirements) will result in the same enforcement consequences for the generator. Failure by the reclaimer (or intermediate facility) to comply with the conditions of the transfer-based exclusion will mean that the reclaimer loses the exclusion, the materials become hazardous wastes, and the reclaimer is subject to enforcement under RCRA § 3008(a) from the point at which the reclaimer failed to meet the conditions. Failure by a reclaimer to meet its obligations, however, does not mean that a generator that shipped material to the reclaimer is subject to enforcement. If the generator met all of its obligations, including its "reasonable efforts" obligations, the generator is not subject to enforcement action.

E. State Authorization

The effective date of the 2008 Final DSW Rule is 60 days after publication in the Federal Register (*i.e.*, December 29, 2008). In unauthorized States and on Native American lands, the provisions of the rule will become law at that point.

As for authorized States, EPA announced that these new rules are less stringent than existing law, meaning that States are not required to adopt them as part of the RCRA authorization process. In the 2008 Final DSW Rule, EPA encourages States to adopt the provisions of the final rule, and asserts that if, prior to formal State adoption of these rules, States use State waiver or other authorities to begin to implement aspects of the 2008 Final DSW Rule, EPA will support such efforts as it reviews State authorizations.

II. KEY ISSUES

Because the 2008 Final DSW Rule alters the most fundamental concept in the RCRA hazardous waste regulatory program -- namely, what constitutes a solid waste -- it is likely to have broad ramifications for a wide variety of materials, processes, and facilities. It will undoubtedly take years for all of the issues raised by the final rule to become apparent. Nevertheless, we highlight here a number of issues that seem particularly important, including issues related to the scope of the final rule, the conditions of the new solid waste exclusions, the applicability of EPA's new legitimacy criteria, enforcement of the new exclusions, and implementation of the rule in the States.

A. Scope of the Final Rule

1. *Types of Recycling That Are Not Covered by the New Solid Waste Exclusions*

The 2008 Final DSW Rule applies only to certain hazardous secondary materials that are "reclaimed," *i.e.*, if they are processed to recover a usable product, or if they are regenerated. The final rule does not modify the definition of reclamation, and therefore presumably does

not affect any prior EPA/State decisions regarding the scope of the definition of "reclamation." Other types of recycling operations are also not affected by this rule. For example, it does not affect, and does not establish any exclusions relevant to, recycling operations involving (1) the use of hazardous secondary materials in a manner constituting disposal or to produce products that are applied to the land, (2) uses for energy recovery or to produce a fuel, or (3) uses that involve "inherently waste-like" materials.

2. ***Types of Materials That Are Not Covered by the New Solid Waste Exclusions***

The 2008 Final DSW Rule applies only to spent materials, listed sludges and listed by-products as defined under the RCRA program. It does not apply to characteristic sludges, characteristic by-products, or "commercial chemical products." Historically, some of the thorniest issues of interpretation under RCRA have involved questions about whether particular secondary materials that are hazardous only by characteristic are properly classified as spent materials (and therefore are wastes when reclaimed) or are instead characteristic sludges, by-products, or commercial chemical products (and thus not subject to RCRA regulation if reclaimed). The final rule does not alter the regulatory landscape with regard to the proper classification of secondary materials.

Under the 2008 Final DSW Rule, if a hazardous secondary material is subject to material-specific management conditions under existing solid waste exclusions in 40 C.F.R. § 261.4(a) when reclaimed, such material is not eligible for the generator-control or transfer-based exclusions, and must continue to meet the existing conditions or requirements to be excluded from the definition of solid waste. These "ineligible" materials include:

- spent wood preserving solutions (if recycled on-site);
- shredded circuit boards;
- mineral processing spent materials;
- spent caustic solutions from petroleum refining liquid treating processes; and
- cathode ray tubes.

In addition, spent lead acid battery recycling will continue to be regulated under 40 C.F.R. § 266.80 or 40 C.F.R. Part 273.

With regard to the exclusions for precious metals recycling under 40 C.F.R. § 266.70 and the conditional exclusion for smelting, melting and refining furnaces and precious metals recovery furnaces at 40 C.F.R. §§ 266.10(d) and (g), EPA offers facilities the choice as to whether they manage their materials under these existing exclusions or instead under the new solid waste exclusions established by the 2008 Final DSW Rule. With regard to smelting, mining and refining furnaces, EPA retains as part of the new requirements for these units the minimum metals and maximum toxic organic constituent limits (to ensure that these operations are engaged solely in metals recovery). However, facilities with these units would be exempted under the new exclusions from the hazardous waste storage and manifest requirements that they are potentially subject to under the current hazardous waste exclusion.

Otherwise, if a hazardous secondary material has been excluded from hazardous waste regulation -- for example, under the so-called "Bevill exclusion" in 40 C.F.R. § 261.4(b)(7) for certain mineral processing materials -- the regulatory status of such material is not affected by the 2008 Final DSW Rule.

3. *Effect of the Final Rule on Prior Solid Waste Determinations*

At various points in the preamble to the final rule, EPA appears to clarify that the 2008 Final DSW Rule should not affect prior federal or State determinations as to whether particular materials qualify as solid wastes. In its "Effect on Other Exclusions" section, EPA states that "[t]he final rule will not supersede any of the current exclusions or other prior solid waste determinations or variances, including determinations made in letters of interpretation and inspection reports." EPA recognizes in its reference to "letters of interpretation" and "inspection reports" that not only formal determinations adopted pursuant to notice-and-comment rulemaking, but also "informal" prior determinations, should not be affected by the final rule.

EPA reiterates its position that prior determinations are not affected at two other points in the preamble, both in discussion of the legitimacy criteria. For example, in its "Response to Comments" section, EPA states that:

> [I]n developing the codified legitimacy language, we did not intend to raise questions about the status of legitimacy determinations that underlie existing exclusions from the definition of solid waste, or about case-specific determinations that have been made by EPA or the states. Current exclusions and other prior solid waste determinations or variances, including determinations made in letters of interpretations and inspection reports, remain in effect.

Here, EPA is explicit that State as well as federal determinations remain in effect. Although this issue is raised in context of legitimacy criteria, there is no reason to believe other State determinations (*e.g.*, non-waste determinations) should be affected.

Note that EPA asserts that EPA and the States reserve the right to revisit these prior determinations, and that the 2008 Final DSW Rule does not in any sense endorse or "federalize" any such determinations -- "[i]f a hazardous secondary material has been determined not to be a solid waste, for whatever reason, such a determination will remain in effect, unless the regulatory agency decides to revisit the regulatory determination under their [sic] current authority."

B. Major Conditions of the New Solid Waste Exclusions

1. *Notification of Intent to Handle Materials under the Exclusions*

Persons managing hazardous secondary materials pursuant to either the generator-control or transfer-based exclusion must notify EPA of their activities, including the specific materials handled (identified by the hazardous waste code that would apply if the materials were being disposed) and the date on which the claim of exclusion is intended to become effective. For persons who are currently handling hazardous secondary materials as hazardous wastes, and therefore have been filing biennial or other reports on the materials in the past, this requirement may not be especially onerous. However, the notification requirement may be more problematic for persons who have previously been taking the position that the materials are not wastes for other reasons.

If these people now claim one of the new exclusions, questions may be raised about whether the materials were previously generated, and, if so, how they were managed. Notification under a new exclusion could be viewed as an admission that the materials are hazardous, are spent materials and/or listed materials (*i.e.*, listed sludges or by-products), are being reclaimed, and thus are solid and hazardous wastes under the current regulations. Regulators could

then potentially bring enforcement actions against people who did not previously handle the materials as hazardous wastes.

Notification could also present other difficulties. Under existing exclusions from the definition of solid waste, there is no reason to notify EPA of activities involving covered materials, and thus no reason to declare the materials as "hazardous" (or, for that matter, to even make a determination as to whether they are hazardous). Declaring materials as hazardous under the new exclusions may raise concerns in the minds of communities adjacent to the facilities where the materials are managed or persons who use the materials before they become secondary (*e.g.*, spent) materials. In addition, because the notifications will include the quantities of hazardous secondary materials generated, pressure may be placed on generators of such materials to minimize such generation (much as generators must now have plans for minimizing their generation of hazardous wastes).

2. ***Containment of Materials in Land-Based or Non-Land-Based Units***

In the Final 2008 DSW Rule, EPA has modified the definition of land-based units and defined them as areas where hazardous secondary materials "are placed in or on the land before recycling." In response to comments from the mineral processing industry, EPA has added regulatory text stating that "[t]his definition does not include land-based production units."

In the 2007 proposal, EPA provided as a condition of the exclusions that hazardous secondary materials stored in land-based units be "contained." In the final rule, EPA has extended that condition to non-land-based units as well. EPA decided, however, not to require specific performance standards or design or other requirements to ensure that materials are contained. EPA states that whether a material is contained should be based on "all site-specific circumstances." In particular, EPA states that local conditions should be evaluated, and that measures such as liners, leak detection measures, inventory control and tracking, control of releases or monitoring, and inspections could be considered. EPA declined to specify that units complying with State regulatory programs addressing releases should be considered contained, but added that "regulatory authorities may consider compliance with such requirements as one of the factors in determining whether the hazardous secondary materials are contained in the units."

EPA also, to a small degree at least, addresses the question of what types of releases from a unit would cause the materials to fail the "contained" condition. According to the Agency, if a "significant release" of hazardous secondary materials to the environment occurs from either a land-based or non-land-based unit, not only are the "released" materials hazardous wastes, but the materials in the unit become hazardous waste and the unit is subject to all applicable hazardous waste requirements. EPA does not define "significant" in this context, but states that a significant release does not necessarily have to be large in volume, and that a small leak that if unaddressed over time could cause "significant" damage could be a "significant" release. Conversely, EPA states that "small releases resulting from normal operations of the facility" are not "significant" releases. EPA adds that "[s]ometimes a material may escape from primary containment and may be captured by secondary containment or some other mechanism that would prevent the material from being released to the environment or would allow immediate recovery of the material." In these cases, EPA states that while the released material if not immediately recovered would be discarded and a hazardous waste, the unit and the material in it would retain their exclusions from full hazardous waste regulation. Substantial uncertainty under the 2008 Final DSW Rule remains as to how to determine what constitutes a "significant" versus a "non-significant" release.

3. *Maintenance of Generator Control over Hazardous Secondary Materials under the Generator-Control Exclusion*

As discussed above, the new generator-control exclusion potentially applies in only four situations: (1) where hazardous secondary materials are reclaimed at the generating facility, (2) where such materials are reclaimed at another facility controlled by the generator, (3) where the materials are reclaimed at a facility under common control with the generating facility, and (4) where the materials are generated and reclaimed pursuant to a toll manufacturing agreement. In many instances, it may be easy to determine whether a particular material is being recycled under one of these scenarios. In others, however, complicated issues of interpretation may arise.

Consider, for example, Scenario 2, which requires that the reclamation facility be "controlled" by the hazardous secondary material "generator." For these purposes, a hazardous secondary material generator is defined as "any person whose act or process produces hazardous secondary materials." Control is defined as "the power to direct the policies of the facility, whether by the ownership of stock, voting rights, or otherwise, except that contractors who operate facilities on behalf of a different person . . . shall not be deemed to 'control' such facilities."

Even though the definition of a hazardous secondary material generator is similar to the existing definition of a hazardous waste generator, and EPA has long stated that a single hazardous waste may have multiple "co-generators," the Agency does not address the potential existence of co-generators of a hazardous secondary material. It seems possible that the owner of a reclamation facility could participate in the generation of a hazardous secondary material at a site owned and operated by a customer, in which case the reclamation facility arguably would be under the control of one of the (co-)generators of the material, as required under Scenario 2. EPA does state that "a facility that collects hazardous secondary materials from other persons is not the hazardous secondary material generator." However, if the reclaimer is engaged in the generation process, it is not simply "collect[ing]" an already-generated material. Instead, it may be a (co-)generator eligible for the exclusion.

To complicate matters even further, the certification required under Scenario 2 states that the reclamation facility is controlled by the "generating facility." For these purposes, a generating facility is defined as "all contiguous property owned, leased, or otherwise controlled by the . . . generator." It is a mystery how such "property" could be deemed to "control" (*i.e.*, "direct the policies of") anything, much less a separate facility, thus raising potential questions with regard to the required certification. Clearly, these issues, and other issues under all four scenarios, will need to be addressed over time, and regulatory amendments may well be necessary.

4. *Reasonable Efforts Inquiry under the Transfer-Based Exclusion*

EPA codified five questions that a generator must affirmatively answer about each reclamation and intermediate facility in order to qualify for the transfer-based exclusion. These "reasonable efforts" amount to a due diligence inquiry that a generator must repeat every three years. The generator must document its inquiry and, prior to sending materials to a reclamation or intermediate facility, certify that reasonable efforts were made to ensure that hazardous secondary materials will be legitimately recycled and managed in a manner that is protective of the environment and human health.

This inquiry is not required if a generator sends hazardous secondary materials to a facility where reclamation of the hazardous secondary materials is covered by a RCRA Part B permit or interim status because presumably such facilities are required to meet more protective standards by law. However, if the reclamation facility's permit status changes, and the units reclaiming the excluded hazardous secondary materials become subject to the transfer-based

exclusion instead of RCRA permit or interim status requirements, the generator must engage in the reasonable efforts inquiry.

For purposes of the reasonable efforts inquiry, a generator must ensure that (1) the reclamation process is legitimate in accordance with the newly codified legitimacy criteria; (2) the reclaimer has met its notification and financial assurance obligations under the exclusion; (3) the reclaimer's RCRA enforcement history for the last 3 years is clean, or, if not, the generator has obtained credible evidence the reclaimer can meet its obligations and recycle the materials in an environmentally sound manner; (4) the reclaimer has the appropriate equipment and trained personnel to safely recycle the materials; and (5) the reclaimer has demonstrated the ability to appropriately manage residuals of the recycling process. While EPA asserts it does not expect generators to have specialized technical knowledge or expertise about the recycling of their materials, generators will clearly need to develop or obtain a significant amount of information about the hazardous secondary materials, the processes that will be used to recycle the materials, the recycler, etc. Although generators may obtain such information from others (*e.g.*, trade associations or independent evaluators), they will remain responsible for ensuring that the inquiry was reasonable.

Because of the central importance of the reasonable efforts inquiry to the transfer-based exclusion, EPA is requiring generators to keep records of their inquiries. Such records may also help generators limit their potential liabilities. Although EPA states that generators who fulfill their obligations under the exclusion, including the reasonable efforts inquiry, will not be liable under the hazardous waste regulations if the reclaimer subsequently fails to meet the conditions of the exclusion, any such failure could lead to increased scrutiny of the generator. In such an event, it would be in the generator's interest to have the type of documentation EPA requires, indicating that he or she relied on credible evidence to form an objectively reasonable belief that the materials would be legitimately recycled and managed in a manner protective of the environment and human health.

5. ***Financial Assurance for Reclaimers and Intermediate Facilities under the Transfer-Based Exclusion***

In one of the more significant elements of the 2008 Final DSW Rule, EPA requires substantial financial assurances from reclaimers and intermediate facilities under the transfer-based exclusion. These entities must post financial assurance for (1) the cost of disposing of any hazardous secondary material that would remain on the facility when operations cease as listed or characteristic hazardous wastes, and (2) the potential cost of closing the facility as a TSD facility. EPA does not require that reclamation or intermediate facilities provide financial assurance for post-closure care, on the theory that no materials should remain in place at such facilities when operations are closed, so that post-closure care will not be needed.

As stated above, EPA also requires that reclaimers and intermediate facilities post financial assurance for sudden accidental occurrences and, for land-based units, non-sudden accidental occurrences. The financial instruments available to reclaimers to demonstrate financial assurance are substantially the same as those available to TSD facilities.

6. ***Additional Conditions for Exports and Imports of Materials under the Transfer-Based Exclusion***

The new transfer-based exclusion for hazardous secondary materials follows the trend of more recent exclusions from the definition of solid waste, such as the cathode ray tube ("CRT") exclusion, by placing conditions on exports of otherwise excluded materials. A generator planning to export hazardous secondary materials to a reclamation facility in a foreign country must satisfy the generator requirements for the transfer-based exclusion and notify

EPA 60 days prior to the initial shipment off-site from the generator facility for export. The shipment cannot proceed without the consent of the country in which the reclamation facility is located. In the case of exports to countries that are members of the Organization for Economic Cooperation and Development ("OECD"), the consent can be tacit, rather than explicit (*i.e.*, if the receiving country has not objected to the shipment within 30 days of receiving notice from EPA). The generator must also submit an annual report to EPA on its exports of hazardous secondary materials under the new exclusion, similar to the report EPA currently requires for exporters of hazardous wastes.

EPA asserts that these conditions are necessary because it cannot exercise the same control over a reclamation facility in a foreign country that it would otherwise exert over a domestic reclamation facility under the transfer-based exclusion. According to the Agency, the conditions ensure that the receiving country is aware of the shipment, consents to the shipment, and has an opportunity to ensure that the materials will not be discarded.

One additional difference between the conditions for generators sending hazardous secondary materials to domestic and foreign reclamation facilities is that exporters do not have to certify, under the reasonable efforts requirement, that the reclaimer notified EPA of its hazardous secondary materials activities and demonstrated financial assurance for those activities. Imports of hazardous secondary materials are eligible for the transfer-based exclusion, provided the importer meets all the generator requirements under the exclusion (*e.g.*, reasonable efforts, legitimate recycling). EPA also leaves open the possibility, under the new process for non-waste determinations, that conditions on export similar to those under the transfer-based exclusion could be stipulated on a case-by-case basis.

C. Applicability of the Legitimacy Criteria

As stated above, the 2008 Final DSW Rule establishes criteria and factors for use in determining whether recycling is legitimate for purposes of the new conditional exclusions and non-waste determination process. In the 2007 proposal, EPA proposed to apply the legitimacy criteria not only to the exclusions and non-waste determinations, but also to all recycling operations exempt from regulation under other provisions of the EPA regulatory definition of solid waste. Although EPA has scaled back the applicability of the legitimacy criteria in the final rule, it asserts that all other recycling operations will remain subject to the pre-existing "legitimacy policy," which the Agency claims is "well understood" and substantively the same as the newly adopted legitimacy criteria.

Significantly, however, the preamble discussion identifies and discusses some differences between the "legitimacy policy" and the legitimacy criteria and factors in the final rule. For example, the newly codified legitimacy criteria and factors are different from the "legitimacy policy" inasmuch as they do not identify storage on the land as an indicator of sham recycling. Moreover, EPA notes that individual States may decide to adopt the approach of the 2007 proposal and apply the new criteria and factors to "all recycling." To the extent that the new criteria and factors are different from existing policy and are applied broadly by the States, they may have significant implications for the recycling of all hazardous secondary materials.

D. Enforcement of the New Exclusions

EPA's final rule contains a strange enforcement twist. If at any time during the period of management of a hazardous secondary material, the generator fails to meet the conditions of the generator-control exclusion, the generator is subject to EPA enforcement action for the entire time period from when the material was originally generated -- a draconian result. Thus, if after a year a generator runs afoul of the speculative accumulation requirement, it is

subject to enforcement action for that entire first year when presumably it was otherwise in compliance.

Reclaimers, however, are subject to a different standard. If a reclaimer fails to meet a condition or restriction of the transfer-based exclusion, the reclaimer is subject to enforcement action from the point at which the reclaimer failed to meet the condition or restriction. Therefore, if the reclaimer fails to meet the speculative accumulation requirements applicable to its operations, it is only subject to enforcement action for the period beginning on the date the violation first occurred.

EPA also notes that while a generator or a reclaimer's failure to submit the mandated notification to the authorized State agency or EPA would be a violation of a requirement of the exclusions, it would not be a violation of a condition of the exclusions. Thus, although the generator or reclaimer could be subject to an enforcement action for failure to comply, the generator or reclaimer would not automatically lose the exclusion and therefore be subject to enforcement action for violations of the various rules for hazardous wastes.

E. Implementation of the New Exclusions

1. *State Implementation and Interstate Movements of Materials*

Because most States have previously been authorized by EPA to implement their own definitions of solid waste in lieu of the federal definition, the 2008 Final DSW Rule will not take effect in most States unless and until the States act to adopt the rule. Some States, such as California and Maine, already have substantially different solid waste definitions, and therefore seem unlikely to adopt the 2008 Final DSW Rule. Other States have opposed EPA's promulgation of the rule, and thus may also not follow the Agency's lead.

The probable result is a patchwork of definitions, which may pose particular problems for hazardous secondary materials that move between States. For example:

- A reclaimer in a State with the transfer-based exclusion might not be allowed to accept materials from a generator in a State without the exclusion. In such a case, the material might need to be shipped by the generator with a hazardous waste manifest, and EPA states that "[it] is not allowing reclaimers to manage manifested . . . hazardous waste under the exclusion."

- If a material is sent from one State with the transfer-based exclusion to another, but travels through a State without the exclusion, EPA has indicated that the material might need to be manifested as a hazardous waste within the transit State (and, as a practical matter, throughout its journey) and this might prevent the reclaimer from accepting the material under the exclusion.

These issues and others like them may substantially reduce the regulatory relief that might otherwise be provided by the 2008 Final DSW Rule.

2. *Modification or Termination of Existing Hazardous Waste Permits*

Excluding hazardous secondary materials from the definition of solid waste, and therefore from hazardous waste regulatory requirements, means that some facilities may no longer need a RCRA Part B permit to manage these materials. Recognizing this, EPA has revised its permit regulations to allow two new types of Class 1 permit modifications (requiring Agency approval): one to remove permit conditions applicable to excluded materials, and another to terminate a permit where all units covered by the permit manage excluded materials. Permit

conditions for these units will remain in effect until the Agency approves the modifications, and modifications will be approved only if the units are used solely to manage excluded materials and the owner/operator has demonstrated that the conditions of the exclusion have been satisfied (*e.g.*, that the relevant units are engaged in reclamation, rather than treatment, burning for energy recovery, or use constituting disposal).

EPA makes clear the new rule does not alter a permitted facility's obligation to address facility-wide corrective action. In order to be released from the permit, the owner/operator should be prepared to demonstrate either that all corrective action at the facility has been addressed or that the permit is not necessary to address corrective action. This could mean delay in terminating a permit until a facility investigation can be conducted, and if regulators conclude corrective measures are required, the owner/operator might not be released from the permit. Even if the owner/operator can convince regulators that the permit is not necessary to address corrective action, EPA admonishes regulators not to terminate the permit unless they ensure that corrective action is enforceable by an alternative federal or State cleanup authority. Once relieved of the permit, the owner/operator still faces a variety of EPA enforcement mechanisms for cleanup in the event of a release.

It will not necessarily be in the interests of currently permitted facilities to remove units from their permits or to terminate their permits altogether. Of course, the elimination of permit requirements may provide such facilities with substantial cost savings, given that they will not have to comply with RCRA design and operating standards, maintain financial assurances (under the generator-control exclusion), and the like. However, by maintaining permit requirements, these facilities will retain the ability to receive manifested hazardous wastes from customers who are unable to take advantage of the exclusions (*e.g.*, because they are in States that have not adopted the exclusions). In addition, maintaining a permit may make it easier for the facility to modify its operations to handle non-excluded materials in the future.

III. CONCLUSION

The 2008 Final DSW Final Rule may provide some degree of regulatory relief to persons who generate, recycle, or otherwise manage certain hazardous secondary materials destined for reclamation. However, the potential benefits of the rule are, at best, uncertain, given the issues that remain under the final rule. Whether the rule will encourage recycling broadly -- especially given the numerous conditions placed on the new solid waste exclusions and the new process for non-waste determinations, as well as the issues associated with State adoption or non-adoption of the final rule -- remains an open question. Moreover, litigation will likely be required to resolve the issue of whether the 2008 Final DSW Rule is consistent with prior rulings of the D.C. Circuit, which limit EPA's authority to materials that are truly "discarded." Nevertheless, each member of the regulated community should consider whether the new rule offers opportunities to engage in environmentally beneficial recycling without triggering the onerous requirements for hazardous wastes that otherwise would apply under RCRA.

Office Locations:

Washington, DC

Maryland

New York

New Jersey

Massachusetts

Texas

California

Copyright 2008
Beveridge & Diamond, P.C.
All rights reserved

The content of this RCRA Alert is not intended as, nor is it a substitute for, legal advice. You should consult with legal counsel for advice specific to your circumstances. This communication may be considered advertising under applicable laws regarding electronic communications.