EPA's Supplemental Definition of Solid Waste Proposal:

Another Regulatory Go-Round

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I. INTRODUCTION

On March 26, 2007, the United States Environmental Protection Agency ("EPA" or "the Agency") issued a supplemental proposed rule to revise the Resource Conservation and Recovery Act ("RCRA") regulatory definition of solid waste. 72 Fed. Reg. 14,172 ("March 26, 2007 Supplemental Proposal"). EPA's goal in issuing the proposal is to make it easier to safely recycle "hazardous" secondary materials and to increase recycling. Comments are due on May 25, 2007; at least one significant stakeholder has indicated it will file a request for an extension.

EPA characterizes its supplemental proposal as reflecting the fundamental logic of the RCRA statute as interpreted by *Association of Battery Recyclers v. EPA,* 208 F.3d 1047 (D.C. Cir. 2000), and other leading cases, *i.e.*, that only secondary materials that are "discarded" under a plain language reading of that statutory term are subject to regulation as hazardous wastes. EPA's latest formulation would undoubtedly expand the scope of recycling operations and secondary materials excluded from regulation, when compared to EPA's 2003 definition of solid waste proposal. 68 Fed. Reg. 61,558 ("2003 Proposal"). However, the Agency has still failed to propose a rule that would accurately define the limits to EPA's jurisdiction under RCRA, one that properly reflects the D.C. Circuit's repeated admonitions that secondary materials cannot be regulated under RCRA unless they are "discarded." If finalized, EPA's proposed regime of new exclusions, additional conditions, numerous restrictions and legitimacy criteria and factors will make the confusing labyrinth that is the regulatory definition of solid waste even more bewildering and stupefying.

II. GENERAL PRINCIPLES

EPA's March 26, 2007 Supplemental Proposal departs significantly from the 2003 Proposal, by expanding the proposed exclusion to take into account a wider range of recycling operations, reflecting a more realistic view of how recycling is actually conducted in the United States. The 2003 Proposal excluded only "hazardous" secondary materials that were reclaimed in a "continuous process within the same industry." Accordingly, if secondary materials moved between industries (as defined by the 4-digit NAICS codes), or if they were recycled but not in a "continuous process," they were not eligible for the exclusion. EPA's rationale for the 2003 Proposal was based principally on its arbitrary selection of a single sentence from the D.C. Circuit's decision in *American Mining Congress v. EPA*, 824 F.2d 1177, 1190 (D.C. Cir. 2000) ("*AMC I*")

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as a guiding principle, which stated that materials were not discarded when they were "destined for beneficial reuse or recycling in a continuous process by the generating industry itself."

EPA now seems to recognize that its 2003 Proposal was unworkable, both from a legal perspective and from the practical standpoint of actually encouraging additional recycling. EPA claims to have gone back to the drawing board and examined "the principles behind the Court's [D.C. Circuit's] holdings, rather than to fit materials into specific fact patterns," in an effort to determine a "unifying principle" to the term "discard."

Unfortunately, however, EPA has failed to propose a regulatory program reflecting the statutorily mandated approach to RCRA jurisdiction, *i.e.*, that only materials that are thrown out, abandoned or disposed of are discarded and subject to RCRA Subtitle C regulation. Rather than simply and clearly excluding all secondary materials being reclaimed from its RCRA Subtitle C jurisdiction, EPA has attempted to define discard in terms of who is engaging in the reclamation, where it is occurring, and how materials are managed prior to, or even after, reclamation. While EPA's new, separate regulatory system for spent materials, listed sludges and listed byproducts opens the door for more materials to potentially be excluded than did the 2003 Proposal, the March 26, 2007 Supplemental Proposal at the same time imposes so many conditions and restrictions on the proposed exclusions, and seeks comment on a staggering amount of potential additional limitations, that the proposed 2007 exclusions could ultimately turn out to be of minimal practical value.

III. March 26, 2007 Supplemental Proposal

The March 26, 2007 Supplemental Proposal fundamentally departs from its 2003 predecessor's approach, under which only "continuing processes" in the generating industry would have been excluded from EPA jurisdiction. The Supplemental Proposal focuses first on who is performing reclamation to develop two categories of exclusions: (1) exclusions that apply when the reclamation is "under the control" of the generator, and (2) a more restrictive exclusion that applies when the materials are transferred to a separate entity for reclamation.

In addition, EPA adopts two mandatory legitimacy criteria (which apply not only to the materials and operations otherwise subject to this proposal but to all RCRA excluded recycling operations), and two other factors that must be considered in weighing whether legitimate recycling has occurred.

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EPA proposes a case by case petition process for "non-waste" determinations. Finally, EPA seeks comment on a number of studies that underlie its March 26, 2007 Supplemental Proposal.

A. Generator Control Exclusion

1. Conditions

When hazardous secondary materials remain under the control of the generator, EPA proposes an exclusion with relatively fewer conditions, because EPA believes the secondary materials are less likely to be discarded, since the generator will presumably maintain control over, and liability for, the reclamation process. In this exclusion, "under control of the generator" includes circumstances in which the materials are (1) generated and then reclaimed at the same facility, (2) generated and reclaimed by the same company at a different facility, if the generator certifies that the reclaimer is under the same ownership and the owner acknowledges responsibility for the safe handling of the materials, or (3) generated and reclaimed under tolling or batch manufacturing agreements.

EPA deliberately has not included all "on-site" recycling within the scope of this exclusion. EPA explicitly seeks comment on scenarios in which the secondary materials might still be under "sufficient" control of the generator, including all instances where materials are recycled on-site, albeit at a facility not owned by the generator.

EPA's second prong of this "control" exclusion requires that if a secondary material is transferred from the generating facility to another facility, the generator must demonstrate that the secondary material remains in its control by certifying that "the two companies are under the same ownership, and that the owner corporation [insert company name] has acknowledged full responsibility for the safe management of the hazardous recyclable material." EPA has adopted this formulation "[b]ecause of existing complexities in corporate ownership and liability," but the proposed rule is confusing and unclear in this regard.

For example, if Generator Company Alpha ships secondary material from one plant to another Company Alpha plant, this exclusion would presumably be available, although the generator would probably as a practical matter certify that the two plants are both owned by the same company, not that the two "companies are under the same ownership," as set forth in the proposed regulatory language. What if Generator Company

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Alpha, however, shipped the material to Company Beta, in which it owned a 75% interest, and for all practical purposes the secondary material remained under the control of Generator Company Alpha? Under the proposed regulatory language, this arrangement would not appear to be eligible for the "control" exclusion, because the generator could not certify that both companies were owned by the same company--Alpha would be owned by Alpha Parent and Beta owned partially by Alpha. Finally, even if Alpha sent the secondary material to Beta, which was 100% owned by the same parent, that parent, as the owner of two companies in question, would not, as required by the proposed certification language, be willing to, and should not be required to, take responsibility for materials generated and managed by separate subsidiaries--given the implications under CERCLA and similar state laws and for the corporate veil under state or federal common law.

The final method by which sufficient control can be established under the March 26, 2007 Supplemental Proposed is under certain types of written tolling arrangements (this portion of the exclusion appears to be designed primarily to provide relief to the specialty chemical manufacturing industry). Here, the tolling contractor (the entity arranging for the batch manufacturing) must retain ownership of, and responsibility for, the recyclable material that is generated during the course of the production of the product.

2. One Time Notification

To be eligible for the "generator control" exclusion, a generator of such materials previously subject to regulation shall be required to submit a one-time "basic" notification to EPA or the authorized State (EPA seeks comment on far more extensive notification requirements). With this one time notification requirement, EPA exerts jurisdiction over materials that it admits are not discarded under its March 26, 2007 Supplemental Proposal. EPA justifies this unlawful reach based on it being "inherent in our authority to determine whether a material is discarded," and under sections 3007 and 2002 of RCRA.

3. Land Based Storage

The generator control exclusion makes a distinction between hazardous secondary materials managed in non-land based units (i.e., tanks, containers, containment buildings) and in land-based units (i.e., surface

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impoundments, waste piles, injection wells, landfills). If the materials are managed in land-based units, they must be "contained" so as to prevent releases into the environment. Essentially, with this condition EPA is making a determination as to whether a secondary material is hazardous based on its method of storage, an approach previously struck down by the D.C. Circuit in *ABR* with regard to the mining and mineral processing industry. In addition, while EPA is not proposing any particular design or management requirements related to storage, EPA solicits comment on whether performance based standards should be required for land based storage of the kind that were specifically thrown out by the *ABR* Court.

EPA states that the decision as to whether a secondary material is "contained" will under its proposal "necessarily be determined on a case-by-case basis." EPA continues to state, however, that generally "recyclable" material is "contained" if it is placed in a unit that controls the movement of the secondary material out of the unit." EPA then adds, in a confusing statement that seems to rely on the difference between a "release" and a "significant release" without providing any guidepost to differentiate between them, that a material still can be contained, and eligible for the exclusion, if releases occur during storage, unless the secondary material is not managed as a valuable product and as a result, a significant release occurs. EPA states that "local geological and meteorological conditions, along with specific measures that a facility employs, such as liners, leak detection measures, inventory control and tracking, control of releases or monitoring and inspection during construction and operation of the unit" may be used to determine if a secondary material is being contained.

B. Transfer Based Exclusion

1. Basic Conditions

The March 26, 2007 Supplemental Proposal also establishes an exclusion for secondary materials that are shipped from the generator to an unrelated entity, including entities not part of the "generating industry" (and not eligible for an exclusion under the 2003 Proposal). When compared to the 2003 Proposal, this element of the March 26, 2007 Supplemental Proposal would significantly expand the universe of operations that could potentially take advantage of an exclusion.

EPA's "transfer based" exclusion applies to spent materials, listed sludges, and listed by-products that are transferred directly from the generator to another person or company for reclamation (*i.e,* shipments to brokers are

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not eligible). Similar to the generator control exclusion, a one-time notification must be made by generators and reclaimers previously subject to regulation to EPA or an authorized State. In addition, however, in EPA's view, the transfer-based exclusion warrants additional conditions because the generator has relinquished control and the reclaimer may not have the same incentives to manage the hazardous secondary materials as a useful product.

EPA requires as a condition that any residuals generated from the recycling process must be managed by the reclaimer in a manner that is "protective of human heath and the environment." In addition, EPA requires that the reclaimer provide the same financial assurance that is required for RCRA treatment, storage, and disposal facilities. EPA seeks comment on whether these financial assurance requirements need to be modified in some way for reclamation facilities, particularly with regard to how much financial assurance should be required.

2. Reasonable Efforts

Moreover, a generator seeking to take advantage of this exclusion must use "reasonable efforts," using any "credible evidence," to ensure that its materials will be safely and legitimately recycled. In EPA's mind, requiring the generator to undertake "reasonable efforts" in selecting a reclaimer facility forces a generator to ensure that the recycling activities will be conducted in an environmentally safe manner and not result in discard of hazardous wastes. EPA argues that the "reasonable efforts" requirement will not be particularly burdensome since most generators already undertake some form of due diligence when sending secondary materials to another facility for recycling.

However, the questions EPA proposes to guide a generator's "reasonable efforts" would essentially require a generator to conduct an audit, or hire a third party to conduct an audit, of the reclaimer. The "reasonable efforts" questions range from determinations of whether the reclaimer has made the one-time notification to EPA or the authorized State and obtained appropriate financial assurance, to criteria requiring more substantial efforts, such as research into the compliance history of the reclaimer, obtaining "credible evidence" that the reclaimer will handle the materials in an environmentally safe manner, and ensuring that the reclaimer will properly manage residuals from the recycling process. Additional "reasonable efforts" questions overlap with EPA's criteria for legitimate

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recycling, which are discussed below. EPA also seeks comment on whether a generator must make a certification as to its reasonable efforts.

3. Land Based Storage

Storage of hazardous secondary materials at the reclaiming facility would also be regulated under the transfer based exclusion. The March 26, 2007 Supplemental Proposal requires the reclaimer to store hazardous secondary materials in at least as protective a manner as employed for analogous raw materials. If there are no analogous raw materials, or the materials are stored in a land-based unit, the hazardous secondary materials must be contained (for land based units, the same requirement as for the control exclusion). Again, these restrictions on storage are not limited to secondary materials that are discarded, and, thus, the legal basis for their application is problematic at best.

4. Export

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 consent of the importing country. This approach is inconsistent with existing conditional exclusions that typically place no restrictions on exports, raising the question of why this limitation is now required. Additionally, the March 26, 2007 Supplemental Proposal would require consent of the importing country even if the importing country considered the secondary material a commodity or a non-hazardous waste. Requiring such consent is inconsistent with current rules, such as EPA's rules implementing the decision of the Organization for Economic Cooperation and Development (OECD) for transfrontier movements of hazardous waste for recovery among OECD member countries. These rules provide that affirmative consent of the importing country is not required where the importing country gives tacit consent by not objecting to the shipment. Moreover, importing countries that consider the material a commodity or a non-hazardous waste may be confused by the affirmative consent requirement.

C. Other Provisions in the 2007 Proposal

1. Legitimate Recycling

EPA proposes to codify the legitimate recycling criteria that it states the

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Agency has used for many years to evaluate whether recycling is actually legitimate. These legitimacy criteria would apply not only the reclamation operations otherwise subject to this proposal, but would apply to all recycling operations exempt from regulation under other provisions of the EPA regulatory definition of solid waste. EPA adds that it is simply "reorganizing, streamlining, and clarifying the existing legitimacy principles," and that "we generally do not see the need for the regulated community or overseeing agencies to revisit previous determinations and expect any written determinations from these agencies to, in effect, be grandfathered."

EPA's proposed rule would establish two mandatory legitimacy criteria: (1) that the secondary material provide a useful contribution to the recycling process or to a product of the recycling process, and (2) that the recycling process produces a valuable product or intermediate. In addition, in determining whether legitimate recycling is occurring, the generator must consider two other factors (note that in the 2003 Proposal EPA took comment on whether it should codify all four legitimacy factors as criteria): (1) how the secondary material is managed (as compared to analogous raw materials, to the extent they exist), and (2) the presence of hazardous constituents in the product of the recycling (whether "toxics are along for the ride"). EPA explicitly recognizes that there may be some situations in which a legitimate recycling process "does not conform to one of these" latter two factors. EPA recognizes that codifying these criteria could potentially limit flexibility in making determinations of whether recycling is legitimate, and solicits comment on this issue. EPA also solicits comment on how the economics of recycling activities should be considered in making overall legitimacy determinations.

2. Proposed Process for Non-Waste Determinations

The March 26, 2007 Supplemental Proposal would also establish procedures for a petition process for case by case "non-waste determinations" by EPA or the authorized State for 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; and (iii) materials that are reclaimed under the control of the generator, as demonstrated in some fashion different than the demonstration required under the generator control exclusion. The result of obtaining a non-waste determination would be that once granted, the secondary material would not be subject to the conditions

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attached to the above exclusions.

A potentially fatal limitation of this approach is whether authorized States in all, or even most, instances will adopt the procedures for non-waste determinations, which may be unlikely because reviewing and ruling on petitions could impose significant additional administrative burdens. Additionally, EPA seeks comment on whether certain materials not subject to the proposed conditional exclusion should be considered for non-waste determinations--inherently waste-like materials, materials used in a manner constituting disposal, materials used to produce products placed on the land, materials burned for energy recovery or used to product a fuel or otherwise contained in fuels--implicitly recognizing that at least certain recycling activities involving these types of materials do not necessarily constitute discard.

3. Impact on Existing Exclusions.

EPA proposes that to the extent exclusions currently exist in the regulatory definition of solid waste, these exclusions will be retained as written, and secondary materials will remain subject to these exclusions, not to the exclusions in the March 26, 2007 Supplemental Proposal. Thus, secondary materials that are currently excluded under existing exclusions that contain specific requirements or conditions would be required to continue to meet those requirements. EPA seeks comment on whether any existing exclusions should be revised to avoid confusion or contradictions with this proposal.

EPA also solicits comment on the option of allowing a regulated entity to choose whether an existing exclusion or the new March 2007 proposed exclusions would apply if more than one was potentially applicable.

4. Recycling Studies

In response to comments received on EPA's 2003 Proposal, the Agency performed additional studies of secondary materials recycling. Three Reports are found in the docket:

- "An Assessment of Current Good Practices for Recycling of Hazardous Secondary Materials";
- "An Assessment of Environmental Problems associated with Recycling of Hazardous Secondary Materials ("Damage Case Study")"; and

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- "Potential Effects of Market Forces on the Management of Hazardous Recyclable Materials".

The Damage Case Study identified 208 cases in which environmental damages allegedly resulted from recycling activities. EPA found that 40% of the cases involved mismanagement of hazardous secondary materials prior to reclamation, and 34% involved mismanagement of recycling residuals. Apparently, only 7 of the 208 cases were "sham recyclers," while a total of 69 cases involved abandonment of materials. Only a small number of cases (13) involved on-site recycling. The Agency seeks comment on both the results of the recycling studies and industry experiences that may not be reflected in the studies.

D. Effect of State Programs

EPA appears to have been successful in what the trade press reported was a dispute with the Office of Management and Budget ("OMB") over whether the March 26, 2007 Proposal should be characterized as less stringent, which would mean that States would not be required to adopt its changes to existing programs, or instead more stringent, meaning that these changes would become part of the RCRA state authorization process. EPA characterizes the March 26, 2007 Supplemental Proposal as less stringent than its current regulations, meaning that most authorized States will not be required to adopt these changes (although EPA "strongly encourages" States to do so). In States that incorporate federal regulations by reference or have specific state statutory requirements that their state programs can be no more stringent than the federal regulations, however, these changes will generally become state law.

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