



## Alerts

### U.S. EPA's Proposed Recycling Rules Change Will Affect Numerous Manufacturing and Scrap Processing Companies

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*Hinshaw Alert*

This summer, the U.S. Environmental Protection Agency (EPA) proposed significant changes in the definition of "solid waste" (Definition) under the Resource Conservation and Recovery Act (RCRA). If adopted, the changes—which are subject to public comment until October 20, 2011—will significantly alter and tighten the rules respecting what is legitimate recycling exempt from RCRA regulation.

The changes will affect numerous companies now relying on the recycling exemption for part of their materials-handling operations. The specific changes are detailed in a 61-page Federal Register notice. They include substantive revisions of:

- The exclusion for hazardous secondary materials reclaimed under the control of the generator
- The criteria for determining whether a recycling activity is legitimate, as opposed to "sham recycling"
- The so-called "transfer-based" exclusion

The EPA also proposes to change the conditions for solid-waste variances and nonwaste determinations. Additionally, the agency seeks comment on an exclusion from the Definition for specific types of high-value hazardous secondary materials sent for remanufacturing into similar products. In addition, it seeks comments on revisions that would affect other Definition exclusions and hazardous-waste exemptions for recyclable materials.

*Materials Under Generator Control:* Present rules exempt materials under generator control, provided that the accumulation is not speculative and the generator's recycling is genuine recycling and not a "sham." The EPA proposes to retain the exclusion for hazardous secondary materials reclaimed under the control of the generator with certain revisions, including: (1) adding a regulatory definition of "contained" to 40 CFR 260.10; (2) making notification a condition of the exclusion; (3) adding a recordkeeping requirement for speculative accumulation in 40 CFR 261.1(c)(8); and (4) adding a recordkeeping requirement for reclamation under toll-manufacturing agreements in 40 CFR 261.4(a)(23)(i)(C). Additionally, the EPA seeks comments on whether to withdraw the exclusion's toll-manufacturing provisions.

#### Service Areas

Environmental



*Criteria for Sham Recycling:* The EPA is also proposing revisions to the definition of “legitimacy” in 40 CFR 260.43, including: (1) applying the codified definition to all recycling activities regulated under 40 CFR 260–266; (2) making all legitimacy factors mandatory, with a petition process for situations where an affected party does not meet the literal definition but believes the recycling is legitimate. Recordkeeping requirements are added as well.

*Transfer-Based Exclusions:* A significant change is proposed for persons shipping material offsite for third-party processing under a recycling exclusion. Currently, many facilities ship materials offsite to third parties for beneficial use by those persons or entities, sometimes involving reprocessing, or otherwise involving use as raw materials in the third party’s process. The EPA announced in its proposal that it believes there is a sense of such materials being discarded by the original processor, and also that the present regulations do not adequately protect the public health or the environment. In place of the current regulations, EPA proposes a new rule. The EPA proposes to require prior notice of reliance on the new rule to the agency or to the state. Although accumulation for up to one year by a generator will be allowed, the EPA is proposing new alternative-hazardous-waste standards under 40 CFR Part 266, Subpart D for generators of hazardous waste being reclaimed. The “alternative” standards are so much like the existing RCRA rules governing hazardous waste that some commenters believe they offer little relief at all.

*Other EPA Concerns:* The EPA raises a number of specific issues, including toll manufacturing and viability of generator control rules, possibly creating an additional exclusion for some high-value material reprocessing. It seeks comment on further revisions to record-keeping and notice requirements.

*Summary:* Dozens of industries and institutions rely on recycling to one degree or another at thousands of facilities nationwide. Organizations whose processes involve production of byproducts that are currently managed as recycled materials should become aware of these significant EPA proposals, for which the agency has published explanations and details. Similarly, operations that buy secondary materials face a possible change of supply due to the change in the transfer exemption. Although the new rules will only be immediately effective in six states, U.S. territories, and tribal areas where the EPA’s program is in place, the RCRA requires that state programs will have to deal with effectively the same rules soon.

Download to read: [Details in the Federal Register of the changes in the definition of “solid waste”](#)

Download to read: [Overview of the Definition of Solid Waste Proposed Rule](#)

For further information, please contact or [Harvey M. Sheldon](#) or your regular [Hinshaw attorney](#).

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