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Kristin Watt, partner in the Vorys Columbus office, David Edelstein, partner in the Vorys Cincinnati office, and Jacob Bartlett, associate in the Vorys Cincinnati and Washington, D.C. offices, co-authored an article for *Law360* titled, "Ohio's Adoption Of EPA Rules Will Aid Hazardous Waste Cos."

The full text of the article is included below with permission from *Law360*.

Ohio's Adoption Of EPA Rules Will Aid Hazardous Waste Cos.

On June 2, Ohio's Environmental Protection Agency filed its final hazardous waste rules package. The rules will significantly improve business opportunities for industries handling hazardous waste in, or transporting it through, Ohio — including those with federal Resource Conservation and Recovery Act Subparts AA/BB/CC permits for the RCRA organic air emissions regulations.

The rules package brings not only Subparts AA/BB/CC, but also the 2018 RCRA definition of solid waste, and multiple exclusions, to Ohio. This brings Ohio's hazardous waste rules in line with the U.S. Environmental Protection Agency's program, and those of many other states.

These revisions therefore offer significant benefits to Ohio, and to out-of-state businesses that handle hazardous waste. The rules package went into effect on June 12, so businesses should assess how to best capitalize on these revisions.

RCRA Background

The RCRA, originally enacted in 1976, regulates solid and hazardous waste. "Solid waste" is broadly defined as "any discarded material" including those that are "abandoned ... recycled ... considered inherently waste-like ... or a military munition."

Once a material is determined to be a solid waste, an entity must determine whether the material is also a hazardous waste, and thus subject to additional RCRA requirements, such as the hazardous waste manifesting rules for shipments of hazardous waste.

Solid wastes are hazardous wastes under the RCRA if: (1) they exhibit one of four defined characteristics found in Title 40 of the Code of Federal Regulations, Part 261, Subpart C, and are thus classified as characteristic hazardous wastes, or (2) they are specifically listed by the EPA in Part 261, Subpart D, and are thus categorized as listed hazardous wastes.

If a material is classified as a hazardous waste, the strict RCRA regulations apply to the material from the point of generation through treatment or disposal. This is often referred to as cradle-to-grave regulation. The EPA enforces the federal RCRA program, with its many rules found in Parts 239 through 299.

The RCRA also allows states to adopt and enforce their own state RCRA programs, in lieu of the federal program being implemented within those states. However, a state must receive EPA authorization showing that its rules are equivalent to, or more restrictive than, the federal RCRA rules. So states can create and enforce hazardous waste rules that go beyond what the federal program requires — but the federal rules set the floor.

Some states do this intentionally, and adopt rules that are more restrictive than the RCRA. In other cases, a state ends up with more restrictive rules because it is slow to adopt revisions that the EPA has implemented, and which are less restrictive than the state's prior rules.

States can also forgo RCRA authorization entirely, or just forgo it for aspects of the RCRA. In those situations, the EPA implements the federal program within that state to fill the gaps.

In 2008, the EPA made significant revisions to the RCRA rules that included several exclusions to determining whether materials were classified — and thus regulated — as solid and hazardous waste under the RCRA. These revisions are often referred to as the definition of solid waste rules, since they primarily affect how a material is determined to be a solid waste, and thus subject to RCRA.

The EPA again made significant revisions to the definition of solid waste, or DSW, in 2015. The 2015 revisions were challenged by industry petitioners in *American Petroleum Institute v. EPA*, a case filed in the U.S. Court of Appeals for the District of Columbia Circuit. The court held in 2018 that the 2015 revisions were largely impermissible, but it did find that parts of the rule could be kept.

The EPA therefore adopted a new DSW in 2018, which reimposed some aspects of the 2008 revisions and kept the provisions from the 2015 rule allowed by the court. But the court decision, and the EPA's adoption of the 2018 DSW, only affected the federal RCRA regulations; they did not affect authorized state programs and their rules.

This back-and-forth movement of the DSW, and the rules governing what materials were regulated under the RCRA, led to a patchwork of state programs with varying DSW standards. Several states quickly followed the EPA's actions and amended their state programs accordingly. Others decided to wait and see — or to reject the EPA's revisions and keep their more restrictive state rules, with pieces taken from the

2008 and 2015 revisions.

Ohio's Hazardous Waste Rules Package

Ohio's adoption of its hazardous waste rules package addresses both of the issues described above: It adopts the 2018 DSW to align Ohio's rules with the federal program, and it adopts the organic air emissions regulations — an aspect of the RCRA that Ohio has not previously implemented or been authorized to implement.

Both of these additions create major opportunities for businesses that manage hazardous waste within Ohio, or transport it through Ohio.

First, the 2018 DSW has several beneficial exclusions, not previously available in Ohio, which businesses can now rely upon to handle certain materials and avoid the hazardous waste regulations. The 2018 DSW exclusions include the transfer-based exclusion, the generator-controlled exclusion and the remanufacturing exclusion.

These exclusions apply to the generation of hazardous secondary materials that can be reclaimed, recycled or reused instead of disposed of as hazardous waste. If the exclusion requirements are met, then Ohio's EPA will not regulate the materials as waste — and thus, the more onerous RCRA regulations do not apply.

As more states follow suit and adopt the 2018 DSW, consistency in state programs provide clear benefits to businesses that transport hazardous secondary materials or wastes across state lines. With the current patchwork of state rules, it is often the case that materials that are not wastes in one state are regulated as wastes in a neighboring state.

This causes logistical issues, and complicates the movement of these materials — forcing businesses to either find a route through states that have adopted the same rules, or to transport the materials under the most restrictive regulatory regime that may apply, even if it is only applicable for one leg of the trip.

A second benefit that Ohio's new hazardous waste rules package provides is that it allows businesses with a federal RCRA Subpart AA/BB/CC permit for organic air emissions to shift to a state-issued hazardous waste permit.

Since Ohio's hazardous waste regulations did not include the RCRA Subpart AA/BB/CC organic air emissions regulations as part of the state's authorized program before the new rules package, the U.S. EPA implemented these rules for Ohio facilities, instead of the Ohio EPA. That meant that businesses with activities that fell under the Subparts AA/BB/CC requirements had to obtain permits from both federal and state regulators.

Now that the hazardous waste rules package has gone into effect, these businesses are only required to have state hazardous waste permits from the Ohio EPA. However, companies must take affirmative action to modify their current permits, as the changes do not occur automatically.

While the hazardous waste rules package went into effect in Ohio on June 12, the Ohio EPA must seek full

authorization from the U.S. EPA for formal recognition of the rules. Since they mirror the current federal regulations without changes, U.S. EPA authorization is expected expeditiously.

Fortunately, even without authorization, Ohio businesses can rely on the 2018 DSW and its beneficial exclusions as of June 12.