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More Opportunities for Recycling with EPA's New Proposed Waste Definition

On March 26, 2007, EPA issued a supplemental proposal to revise the definition of solid waste to encourage the recycling of more hazardous secondary materials - 72 Fed. Reg. 14172 (2007). This supplemental proposal amends EPA's October 23, 2003 proposed revision to the definition of solid waste. The changes to the definition are in response to several court decisions that held EPA's regulatory definition was overly broad and did not clearly delineate when a material is discarded.

Impact on the surface finishing industry

The proposed new definition of solid waste could facilitate more recycling of electroplating waste water treatment sludge, *i.e.*, the listed hazardous waste, F006. Under the proposal, sludge that is reclaimed for metals recovery would not be "discarded" for regulatory purposes, and would not, therefore, be subject to hazardous waste regulations, provided that plating facilities and reclamation facilities meet a set of conditions regarding the management and recycling of the sludge.

Excluding the recycling of F006 sludge from the hazardous waste regulatory restrictions can encourage more recycling of the sludge and save platers money. The proposed rule is also broad in scope and could beneficially impact recycling of other hazardous secondary materials used in the finishing industry such as solvents.

While the basic structure of the proposed rule appears to facilitate the recycling of waste water treatment sludge, the industry is in the process of assessing the conditions for the exclusion and what is needed for the

industry to meet those conditions. In the preamble to the proposed rule, EPA also offers additional regulatory options regarding the recycling of hazardous secondary materials like F006 sludge that must be considered along with the proposed regulatory language.

The NASF will be submitting comments on how the new proposed definition of solid waste affects the surface finishing industry and to what extent it would facilitate recycling of secondary materials in the industry. Comments are due on May 25, 2007, unless EPA grants an extension of the comment period.

Regulatory analysis of the proposed rule

The proposed definition of solid waste is comprehensive and detailed rulemaking. A brief summary of some of the highlights of the proposed rule is provided below.

While the proposal does not include specific regulatory language for the recycling of electroplating waste water treatment sludge (*i.e.*, F006), the rule does allow for the exclusion of the sludge from the definition of solid waste when it is recycled. The new proposal provides three types of exclusions from the definition of solid waste for materials that are reclaimed: (1) exclusion for hazardous secondary materials that are reclaimed under the control of the generator, (2) conditional exclusion for hazardous secondary materials that are



transferred to another person for reclamation and (3) petition process for case-specific non-waste determination for certain hazardous secondary materials. In addition, to be excluded from the definition of solid waste, the secondary materials must be legitimately recycled consistent with the restructured legitimacy factors.

Exclusion when reclaimed under the control of the generator

Secondary materials are not considered discarded for regulatory purposes and are excluded from the definition of solid waste, if they are generated and then reclaimed onsite at the same facility, by the same company, or pursuant to an agreement whereby the generator retains ownership of, and responsibility for, the material. EPA indicated that evidence shows that when materials remain under the control of the generator, fewer environmental problems result from the recycling activity. This could include onsite reclamation of metals from F006 sludge through electrowinning

or other metals recovery processes and tolling agreements with off-site facilities to recover the metal from the metals-bearing sludge.

Accordingly, EPA is proposing to exclude these reclaimed materials from the definition of solid waste without any conditions, provided they remain under the control of the generator. Materials cannot be accumulated speculatively prior to reclamation and generators must submit a one-time notification to EPA to qualify for the exclusion.

Conditional exclusion when transferred to a facility for reclamation

Because EPA has greater concerns about hazardous secondary materials that are not under the control of the generator, the Agency proposed a conditional exemption when the materials are transferred to another facility for reclamation. EPA indicated that the materials must be transferred directly to the reclaimer and not through a middleman or broker.

EPA clarified that the same materials may need more than one reclamation

step. For example, a recyclable hazardous secondary material such as electroplating waste water treatment sludge might have a relatively high moisture content and need to be dried and blended before they are amenable to a "final" reclamation process such as metals smelting. In this example, even though the two different reclamation processes might be conducted by different companies and/or at different facilities, the transfer-based exclusion would be available for waste water treatment sludges that need to be dried and blended before metals recovery. The generator would, however, need to make "reasonable efforts" to examine each separate reclamation facility or company in order to ensure that the material will be safely and legitimately recycled.

Reasonable efforts exclusion condition for generators

Generators of secondary materials must meet certain conditions in order for the material transferred to another facility for reclamation to be excluded from the definition of solid waste. Based on its analysis, EPA found that environmental

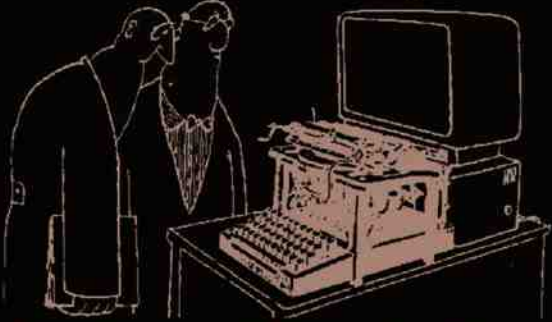
problems associated with recycling were significantly reduced where companies had performed some type of environmental due diligence on the recycling facility and company. Under the proposal, generators must, therefore, take "reasonable efforts" to ensure that their materials are safely and legitimately recycled before shipping or otherwise transferring them to a reclamation facility.

EPA states that "generators can use any credible evidence available in making his reasonable efforts, including information gathered by the generators, provided by the reclaimer, and/or provided by a third party, in lieu of personally performing an environmental audit." Where practical, a site visit to the reclamation facility and a financial evaluation of the company would be advisable.

The "reasonable efforts" condition applies only to generators who send hazardous secondary materials to recyclers that are not operating under a RCRA Part B permit. Materials sent for reclamation to RCRA permitted facilities would be excluded from the definition of solid waste, provided that the other conditions are met.

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Exclusion conditions for reclaimers

Reclamation facilities must also meet some conditions for the exclusion from the definition of solid waste to apply to the materials being reclaimed, including record keeping, management of hazardous secondary materials, management of recycling residues and financial assurance requirements.

Materials management. Reclamation facilities must manage secondary materials in a manner that is at least as protective as that used for analogous raw materials. If the secondary material is not analogous to raw materials, then the material must be contained as to prevent releases into the environment. This may include using tanks or containers, wetting dry materials to prevent any releases or designing containment systems to prevent releases from land-based management units.

Residuals management. EPA's studies indicated that the mismanagement of recycling residues was the cause of one third of the environmental contamination associated with recycling facilities. As a result, EPA proposed that any residuals generated from the reclamation process must be managed in a manner that is protective of human health and the environment.

Recycled secondary materials such as electroplating waste water treatment sludge being recycled are not discarded and, therefore, are excluded from the definition of solid waste (provided the exclusion conditions are met). Accordingly, EPA stated that the residues from recycling materials that would otherwise be considered listed hazardous waste (e.g., F006) would not be subject to the so-called "derived-from rule." The residues would be regulated as hazardous waste only if they exhibited a hazardous characteristic or were listed hazardous wastes themselves and were discarded. This proposed change by itself could facilitate the recycling of significantly more F006 sludge generated by the surface finishing industry.

Financial assurance requirements. As a regulatory precaution to guard against recycling facilities not having the necessary financial resources to address any potential environmental releases or contamination, EPA proposed that reclamation facilities that receive hazardous secondary materials from off-site generators must meet the financial assurance requirements in the current RCRA regulations. Reclamation facilities must demonstrate that financial resources will be available to pay for closure and post-closure care of the facility or in the event of environmental

contamination from the release of hazardous constituents at the facility. In addition, reclaimers must meet the liability coverage requirements for sudden and accidental occurrences at their facility.

Legitimacy factors



In the October 2003 proposal, EPA proposed several criteria to determine if the recycling of hazardous secondary materials was legitimate. With this new rule, EPA proposes to change the structure of the legitimacy criteria, which are now called factors. Two of the factors are mandatory and must be met to exclude the recycled hazardous secondary materials from the definition of solid waste. The legitimacy factors also include two non-mandatory factors and some additional guidance and clarification on how the economics of recycling can be considered in making legitimacy determinations.

Mandatory factors

The core of legitimate recycling rests on the following mandatory factors: (1) the hazardous secondary materials must provide a useful contribution to the recycling process or to the product of the recycling process and (2) the product of the recycling process is valuable. EPA indicates that these two factors are fundamental to legitimate recycling and any industrial process that does not conform to these factors would be considered "sham" recycling.

Non-mandatory factors

EPA also proposes that the following additional factors should be considered in assessing whether the recycling is legitimate: (1) how the secondary materials are

managed to prevent releases into the environment and 2) whether hazardous constituents are in the product of the recycling activity (which is generally referred to as "toxics along for the ride"). EPA considers these factors as important in determining legitimacy, but they are not considered mandatory because some legitimate recycling does not necessarily conform to these factors. In the preamble to the proposed rule, EPA provides several examples of how these factors can be applied.

Economic considerations

Economics of a recycling activity can be used to determine whether the recycling operation is legitimate. EPA states that when the economics of a recycling operation is similar to that of manufacturing activity using raw materials, then the recycling is likely to be legitimate. The economics of many legitimate recycling activities may, however, differ from traditional manufacturing operations. For example, generators may be willing to pay recyclers where the recycling is less expensive than disposal or other waste management options. While EPA has not proposed to include economics as a legitimacy factor, it does request comments on how economics of recycling activities should be considered in legitimacy determinations and whether economics should be a separate factor that is included in the regulatory language.

Conclusion

The proposed new definition of solid waste appears to provide more opportunities to recycle hazardous secondary materials. The rule does, however, include many details and options that must be evaluated to identify the most appropriate and effective manner to encourage safe and legitimate recycling and its impact on regulated industries such as the surface finishing industry.

In addition to the proposed exclusions, conditions, legitimacy factors and petition procedures in the rule, EPA identifies other possible options that may be considered to govern recycling activities and requests comments on them. These issues will be addressed in industry comments on the proposed rule.

If you have any questions on EPA's proposed new definition of solid waste and how it may impact the surface finishing industry, please contact Jeff Hannapel at jhannapel@thepolicygroup.com. *P&SF*