



U.S. EPA Proposes to Relax “Solid Waste” Definition Under RCRA to Encourage Recycling

In 2003 the U.S. Environmental Protection Agency (USEPA) proposed to redefine the regulatory definition of “solid waste” to encourage recovery of hazardous wastes. The 2003 proposal was roundly criticized and had to be withdrawn. In an effort to put waste “recovery” back into the Resource Conservation and Recovery Act (RCRA) and if adopted as proposed, EPA’s most recent proposal ([see](#) 72 Fed. Reg. 14172-14218, March 26, 2007) would provide three different categories of exclusions from the definition of solid waste and would codify “legitimate recycling” criteria. These proposed exclusions are in addition to the existing regulatory exclusions provided at 40 C.F.R. Part 261.

Category One Exclusion

Under a full exclusion for hazardous waste generated and reclaimed under the waste generator’s control, the waste must:

1. Be generated and reclaimed within the US or its territories.
2. Be managed in: non-land-based units (e.g., tanks, containers, containment buildings); or land-based units (e.g., landfills, surface impoundments, waste piles) that contain the material (e.g., case-by-case determination of no movement of waste from the unit).
3. Not be speculatively accumulated.
4. Be identified on a 1-time notification to USEPA or the authorized state agency.
5. Be solely under the generator’s control (i.e., part of the generator’s operations).

Category Two Exclusion

Under a conditional exclusion for hazardous waste generated and transferred to another entity in the United States, the waste must: meet the criteria under the Category One Exclusion items 1 through 4 above; and not be handled by an entity other than the generator, transporter, or reclaimer. To be eligible for this exclusion, the generator must:

1. Make reasonable efforts to ensure: the reclaimer intends to legitimately recycle the material; and the material will be managed in an environmentally protective manner.
2. Retain records of all off-site shipments for at least 3 years.
3. Ensure any land-based management is contained.

Additional specific requirements apply to reclaimers.

Category Three Exclusion

Under the case-by-case non-waste determination exclusion, a generator and/or reclaimer could petition for an exclusion for materials not eligible for the Category One and/or Two Exclusions highlighted above. There are three subcategories of determinations:

1. The material is recycled in a continuous industrial process.
2. The material is indistinguishable from the product or intermediate.
3. The material is reclaimed under the control of the generator via a tolling arrangement or similar contractual arrangement.

Each subcategory has its own criteria. Under all three subcategories, the petitioner must show that hazardous constituents in the material are effectively recycled as opposed to being released to the environment from the primary production process. The petitioner also has an opportunity to provide any other relevant information to demonstrate that the material is not discarded.

“Legitimate Recycling” Criteria

The USEPA also proposes to codify “legitimate recycling” criteria. Under the proposal:

1. The material being recycled must provide a useful contribution to the recycling process or to the product of the process; and
2. The product of the recycling process must be valuable.

Although not mandatory, the following two criteria must also be considered:

1. How the material is managed; and
2. The presence of hazardous constituents in the product of the recycling activity (e.g., “toxics along for the ride”).

Comment Opportunity

Because the proposal is deregulatory in nature, each authorized state must adopt the final regulations before they become effective in the state. In light of many states’ practices of adopting USEPA regulations by reference or verbatim, now is the time to comment on this proposal.

The deadline for comments on the proposal is May 25, 2007. If you have any questions regarding the proposal, would like a copy of the proposal, or would like assistance in preparing comments, do not hesitate to contact Colleen Grace Donofrio at (856) 686-4608 or cdonofrio@bccz.com or Joe Reinhart at (412) 394-5452 or jreinhart@bccz.com.