

Revisions to the Definition of Solid Waste

Final Rule

73 FR 64668

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What is this Federal Register About?

This is a Final rule. It will be effective in States not authorized by U.S. EPA to implement the RCRA Subtitle C hazardous waste program within the state on December 29, 2008. Ohio is an authorized State; the rule will not be effective in Ohio until adopted by Ohio EPA.

U.S. EPA has finalized revisions to the definition of solid waste, 40 Code of Federal Regulations (CFR) part 261.2 and the exclusions, 40 CFR part 261.4, that exclude hazardous secondary materials (HSM) from regulation if they are reclaimed under the control of the generator or by another person when certain conditions are met. Also, a generator or reclaimer has the option to obtain a non-waste determination from the overseeing agency to reclaim HSM; the procedure is similar to obtaining a variance from classification as a waste under OAC rule 3745-50-23. Hazardous secondary material means a secondary material (e.g., spent material, by-product, or sludge) that when discarded, would be identified as hazardous waste under 40 CFR part 261.

The types of HSM that are eligible for the exclusions include listed and characteristic spent materials, listed by-products and listed sludges. Under the past federal rules, these HSM's were subject to full regulations under the hazardous waste rules when reclaimed. However, the exclusions do not apply to the reclamation of HSM that are inherently waste-like, used in a manner constituting disposal, burned for energy recovery, spent lead acid batteries, listed hazardous wastes K171 and K172 or not otherwise subject to a material-specific exclusion under 40 CFR part 261.4 (a). Furthermore, the exclusions do not apply to characteristic by-products and sludges that are reclaimed.

In addition, U.S. EPA codified two factors to define legitimate recycling of hazardous secondary materials and two factors that must be considered by the recycler. The two required factors are 1.) The HSM must provide a useful contribution to the process or product and 2.) The product must be valuable. The two factors that need to be considered by the reclaimer are 1.) The management of HSM as a valuable material and 2.) The presence of toxic constituents contained in the product.

Summary of Final Rule

Hazardous secondary materials reclaimed according to the following are not defined as a solid waste and therefore, are not defined as a hazardous waste.

A. HSM reclaimed under the control of the generator

1. HSM generated and reclaimed under the control of the generator at the generating facility is not a solid waste. The reclamation can be done by the generator, a person who comes on-site with a mobile reclamation unit or at a fixed facility on the generator's property that is operated by someone other than the generator.

2. HSM generated and reclaimed by the same person, as defined in 40 CFR part 260.10 is not a solid waste. It does not matter where in the United States the reclamation is done however; the reclamation must be done by a person who is under a common control with the generator. A condition of this particular exclusion is that the generator must certify that it and the reclaimer are under common control.

3. HSM reclaimed according to a contract between a tolling contractor and a batch manufacturer. This type of reclamation is common in the specialty chemical manufacturing industry.

The conditions applicable to the three reclamation scenarios given above are:

1. Notification to the overseeing agency by the generator and reclaimer;
2. No speculative accumulation of HSM;
3. HSM is not otherwise subject to a specific exclusion under 261.4(a) when reclaimed;
4. HSM may not be reclaimed outside of the United States or Territories;
4. HSM must be legitimately recycled; and
5. HSM is contained.

B. HSM that is generated and transferred to another person for reclamation

Under this reclamation scenario, the parties do not need to be related. However, the following conditions must be met:

1. HSM must be legitimately recycled;
2. No speculative accumulation of HSM;
3. Notification to the overseeing agency by the generator and reclaimer;
4. HSM may only be managed by generator, transporter, intermediate fac. & reclaimer
5. HSM must be managed in a protective manner;
6. Export notice to U.S. EPA for HSM reclaimed outside of the United States/Territories;
7. Reclaimer must have financial assurance as given in rule 40 CFR part 260.140;
8. Generator must perform reasonable efforts (i.e., an evaluation of the reclaimer);
9. Generator must document reasonable efforts and certify;
10. Generator must maintain records of each off-site shipment of HSM;
11. Generator maintains confirmations of receipt of HSM from reclaimers
12. HSM is not otherwise subject to a specific exclusion under 261.4(a) when reclaimed; and
13. HSM must be contained

How does this rulemaking affect existing exclusions, waste determinations and variances?

This rule does not supersede any of the current exclusions or other prior solid waste determinations and variances, including letters of interpretation. For example, characteristic sludges and by-products are not defined as solid wastes when reclaimed according to 40 CFR 261.2 (c); the new exclusions and legitimacy factors do not apply to such materials

Also, a HSM specifically identified in an existing exclusion under 40 CFR 261.4 (a) is not eligible for the final exclusions. The HSM must be managed according to the requirements of the existing exclusion in order to no longer be defined as a solid waste when recycled by reclamation. Such materials include: spent wood preserving solutions reclaimed on-site; shredded circuit boards; mineral processing spent materials; spent caustic solutions from petroleum refining liquid treating processes; and cathode ray tubes.

The legitimacy factors finalized in this rulemaking are only applicable to the exclusions and non-waste determinations adopted in this rulemaking; they do not apply to existing exclusions, variances, and waste determinations (e.g., use/reuse determinations). The long standing legitimacy criteria set forth in the 1989 Sylvia Lowrance memo will remain applicable to existing recycling scenarios.

What does this mean to the regulated community?

In short, HSM reclaimed as described above would not be considered discarded. Therefore, such materials would not be defined as a solid or a hazardous waste and would not be subject to full regulation under the hazardous waste rules.

With the codification of legitimacy factors, any generator or reclaimer who recycles HSM will need to ensure that the recycling of the HSM meets the two factors of legitimate recycling and demonstrate that the other two factors were considered. If the two required factors are not met, then the recycling activity would be considered hazardous waste treatment and possibly subject to hazardous waste permitting.

When are these rules effective in Ohio?

These rules will be effective in Ohio when Ohio EPA formally adopts the rules into the Ohio Administrative Code. If Ohio EPA decides to adopt the rules, we anticipate that the rule adoption process will take close to a year to complete.

These rules are not automatically effective in Ohio because Ohio is authorized to implement the hazardous waste program in Ohio and the rules are considered less stringent than the current definition of solid waste rule and exclusions. Since U.S. EPA allows authorized states to have rules that are more stringent than the federal rules, Ohio is not required by U.S. EPA to adopt less stringent federal rules.

Link to Federal Website to rule:

<http://www.epa.gov/federalregister/EPAFR-CONTENTS/2008/October/Day-30/contents.htm>

Link to Federal Website about the Definition of Solid waste; includes factsheets and additional information about the rule:

<http://www.epa.gov/osw/hazard/dsw/index.htm>