

ADMIRALTY & MARITIME

ANTITRUST & TRADE REGULATION

APPELLATE LITIGATION

AVIATION

BANKING, FINANCIAL SERVICES &
COMMERCIAL LAW

BANKRUPTCY, RESTRUCTURING &
CREDITORS-DEBTORS RIGHTS

BUSINESS & COMMERCIAL LITIGATION

CLASS ACTION DEFENSE

COMMERCIAL LENDING & FINANCE

CONSTRUCTION

CORPORATE & SECURITIES

CORPORATE COMPLIANCE & WHITE
COLLAR DEFENSE

ECONOMIC DEVELOPMENT

EMPLOYEE BENEFITS, ERISA, &
EXECUTIVE COMPENSATION

ENERGY

ENVIRONMENTAL & TOXIC TORTS

GAMING

GOVERNMENT RELATIONS

HEALTH CARE

INSURANCE, BANKING & FINANCIAL
SERVICES

INTELLECTUAL PROPERTY

INTERNATIONAL

LABOR & EMPLOYMENT

MERGERS & ACQUISITIONS

PRODUCTS LIABILITY

PROFESSIONAL LIABILITY

PROJECT DEVELOPMENT & FINANCE

PUBLIC FINANCE

REAL ESTATE: LAND USE,
DEVELOPMENT & FINANCE

TAX (INTERNATIONAL,
FEDERAL, STATE & LOCAL)

TELECOMMUNICATIONS & UTILITIES

TRUSTS & ESTATES

VENTURE CAPITAL &
EMERGING COMPANIES

NEW RCRA RULE: EPA SAYS, GO FORTH AND RECYCLE

By: [Stanley A. Millan](#)

The U.S. EPA's proposed rule on the modification of the term "solid waste" had been pending for several years. The reason for the new definition (really a set of exclusions) is the hiatus in federal court cases for the past 20 years, starting with American Mining, in defining when a material is solid waste, i.e., discarded material, for purposes of regulation under the Resource Conservation and Recovery Act ("RCRA") and comparable state programs. To be subject to more strenuous hazardous waste regulation, a material first has to be considered a "solid waste" under RCRA rules. The problem is complex when dealing with a material that is recycled, re-used, and never truly enters into the waste world. However, some recycling has the same dangers as hazardous waste disposal, so the EPA has been cautious as when to regulate and not regulate recycled material as hazardous waste. The new rule, though complex, provides some clarification at long last. It was issued on October 7, 2008, and will be effective soon (within 60 days of publication in the Federal Register). However, states with primacy under RCRA, including Texas and Louisiana, may decide for themselves whether to adopt the new EPA RCRA exclusions.

The new rule excludes from hazardous waste regulation certain recycled hazardous secondary material, such as hazardous co-products, by-products and residues, e.g., spent solvents, etc. Most of the affected facilities are in the manufacturing sector; however, other industries are also affected including transportation, wholesale trade, and administrative support for waste management and remediation. The EPA estimates that 1.5 million tons per year of hazardous secondary material is handled by these entities, and the more common types are metal-bearing hazardous secondary material (e.g., sludges and spent catalysts from commodity metals recovery and organic chemical liquid recovery of solvents).

The new exclusion from solid waste regulations cover three types of recycling activity. The first type is reclamation under the control of the generator of the waste, whether on-site (by a contractor or otherwise) or off-site at a facility also controlled by that generator. Additionally, reclamation under the control of the generator includes tolling agreements, whereby an off-site tolling contractor produces a product for the tolling manufacturer, and the secondary material remains under the control of the tolling contractor. The generator can pursue the exclusion by recycling. The second type covers materials that are transferred off-site to another entity for purposes of legitimate reclamation. These two types of exemptions are self-implemented by generators, intermediaries, and recyclers. The third type is voluntary if the generator does not wish to pursue the first two self-implementing exemptions, and it is a formal EPA "non-waste" determination that affects case-by-case materials generated from a facility provided that they are recycled.

In all of these cases, the generator, intermediary, and transferee facility must give bi-annual notice to the EPA and states (EPA Form 8700-12) of the specifics of the

- ADMIRALTY & MARITIME
- ANTITRUST & TRADE REGULATION
- APPELLATE LITIGATION
- AVIATION
- BANKING, FINANCIAL SERVICES & COMMERCIAL LAW
- BANKRUPTCY, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS
- BUSINESS & COMMERCIAL LITIGATION
- CLASS ACTION DEFENSE
- COMMERCIAL LENDING & FINANCE
- CONSTRUCTION
- CORPORATE & SECURITIES
- CORPORATE COMPLIANCE & WHITE COLLAR DEFENSE
- ECONOMIC DEVELOPMENT
- EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION
- ENERGY
- ENVIRONMENTAL & TOXIC TORTS
- GAMING
- GOVERNMENT RELATIONS
- HEALTH CARE
- INSURANCE, BANKING & FINANCIAL SERVICES
- INTELLECTUAL PROPERTY
- INTERNATIONAL
- LABOR & EMPLOYMENT
- MERGERS & ACQUISITIONS
- PRODUCTS LIABILITY
- PROFESSIONAL LIABILITY
- PROJECT DEVELOPMENT & FINANCE
- PUBLIC FINANCE
- REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE
- TAX (INTERNATIONAL, FEDERAL, STATE & LOCAL)
- TELECOMMUNICATIONS & UTILITIES
- TRUSTS & ESTATES
- VENTURE CAPITAL & EMERGING COMPANIES

recycling activity. The generator must also certify its control in the first “generator control” exclusion and acknowledge full responsibility for safe management of the hazardous recovery materials being recycled. The off-site transferee in the “transfer-based” exclusion must provide adequate financial assurances to the EPA and states that any hazardous waste secondary residues are removed from the recycling site at the time it is closed for operations. Hazardous materials also must not be speculatively accumulated (held for too long a period) by generators and recyclers and must always be legitimately recycled. In other words, no “toxics along for the ride” (TAR) or “sham” recycling, as in the *Marine Shale* case.

The generator must retain its records for three years (e.g., certification, notices, due diligence inquiries, receipts, bills of lading, Department of Transportation shipping papers, etc.) and must undertake “reasonable efforts” to assure that the intermediate facility (e.g., if reclamation takes more than one step or is stored for more than 10 days while in transit) or transferee/reclaimer, is a legitimate recycler. This includes “credible evidence” by examining public records for the compliance status of the reclaimer, verifying the recycler’s notice to the EPA, reviewing the descriptive literature of the facility, hiring an auditor to assess the facility, assuring that the recycler is adequately financed, and so forth.

Materials that are inherently waste-like (certain “F” code hazardous waste, etc.), used in a manner constituting disposal on land, or burned for energy recovery, are generally not subject to the new solid waste exclusions.

Additionally, legitimate recycling of hazardous secondary material depends on whether it is a useful contribution to the recycling process and includes whether that material contributes valuable ingredients to a product, replaces a catalyst in the recycling process, is a source of a valuable constituent in the recycling process, is recovered or regenerated by the recycling process, or is used as an effective substitute for a commercial product. The recycled product or intermediate product must be valuable if it is sold to a third party, or otherwise it must be used by the recycler or generator as an effective substitute for a commercial product or industrial process. The overall legitimacy also includes evaluation of whether the hazardous secondary material does not contain significant concentrations of hazardous constituents or hazardous characteristics that are not found in analogous products, e.g., routine sand fill having 4 ppm or less lead as compared to recycled foundry sand having 200 ppm lead which may not be excluded.

“Non-waste” determinations are formal EPA determinations on a case-by-case basis and include legitimate recycling criteria such as whether the market participant treats the secondary material as a product rather than a waste, whether the identity of the secondary material is comparable to commercial products or intermediates, whether it is used within a “reasonable time frame” (which may or may not involve some speculative accumulation) and not abandoned, and whether it is actually reclaimed rather than being released into the environmental media.

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BANKING, FINANCIAL SERVICES &
COMMERCIAL LAW

BANKRUPTCY, RESTRUCTURING &
CREDITORS-DEBTORS RIGHTS

BUSINESS & COMMERCIAL LITIGATION

CLASS ACTION DEFENSE

COMMERCIAL LENDING & FINANCE

CONSTRUCTION

CORPORATE & SECURITIES

CORPORATE COMPLIANCE & WHITE
COLLAR DEFENSE

ECONOMIC DEVELOPMENT

EMPLOYEE BENEFITS, ERISA, &
EXECUTIVE COMPENSATION

ENERGY

ENVIRONMENTAL & TOXIC TORTS

GAMING

GOVERNMENT RELATIONS

HEALTH CARE

INSURANCE, BANKING & FINANCIAL
SERVICES

INTELLECTUAL PROPERTY

INTERNATIONAL

LABOR & EMPLOYMENT

MERGERS & ACQUISITIONS

PRODUCTS LIABILITY

PROFESSIONAL LIABILITY

PROJECT DEVELOPMENT & FINANCE

PUBLIC FINANCE

REAL ESTATE: LAND USE,
DEVELOPMENT & FINANCE

TAX (INTERNATIONAL,
FEDERAL, STATE & LOCAL)

TELECOMMUNICATIONS & UTILITIES

TRUSTS & ESTATES

VENTURE CAPITAL &
EMERGING COMPANIES

The new regulations have a ripple effect across RCRA regulations; however, they are not intended to affect other regulatory exclusions or limit the U.S. EPA's right to pursue clean-up or cost recovery for releases or threatened releases of hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), e.g., if the transferee recycler has a release and if its financial assurances prove to be inadequate. However, as long as the generator pursues "reasonable efforts" to assure that the transferee is legitimately recycling, the EPA says regulatory RCRA violations will be on the part of the transferee and not the generator.

Thus, due diligence in verifying the legitimacy of transferee recyclers, and determining whether to pursue one of the two self-implementing exclusion (generator control or transfer-based) through the generator or transferee in lieu of a formal EPA "non-waste" determination, are new challenging issues that the regulated community faces. Additionally, legal questions have arisen about the EPA's authority to regulate "non-waste" recyclers, whether the EPA has broadened the recycling field too much, and whether its new rule is "protective of human health and the environment" as mandated by RCRA. Court challenges are expected.

For more information on hazardous waste management in Texas and Louisiana, contact [Mike Chermekoff](#), [Boyd Bryan](#), or [Stan Millan](#).

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BANKING, FINANCIAL SERVICES & COMMERCIAL LAW

BANKRUPTCY, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS

BUSINESS & COMMERCIAL LITIGATION

CLASS ACTION DEFENSE

COMMERCIAL LENDING & FINANCE

CONSTRUCTION

CORPORATE & SECURITIES

CORPORATE COMPLIANCE & WHITE COLLAR DEFENSE

ECONOMIC DEVELOPMENT

EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION

ENERGY

ENVIRONMENTAL & TOXIC TORTS

GAMING

GOVERNMENT RELATIONS

HEALTH CARE

INSURANCE, BANKING & FINANCIAL SERVICES

INTELLECTUAL PROPERTY

INTERNATIONAL

LABOR & EMPLOYMENT

MERGERS & ACQUISITIONS

PRODUCTS LIABILITY

PROFESSIONAL LIABILITY

PROJECT DEVELOPMENT & FINANCE

PUBLIC FINANCE

REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE

TAX (INTERNATIONAL, FEDERAL, STATE & LOCAL)

TELECOMMUNICATIONS & UTILITIES

TRUSTS & ESTATES

VENTURE CAPITAL & EMERGING COMPANIES

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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