Office of Resource Conservation and Recovery
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Implementation of the Definition of Solid Waste (DSW) Exclusion Found at Title 40 of the Code of Federal Regulations (CFR) Section 261.4(a)(24)

Transfer-Based Exclusion (2018) vs. Verified Recycler Exclusion (2015)[1]

Contents

Background

The recycling exclusions promulgated under EPA's Definition of Solid Waste (DSW) rulemakings are intended to facilitate the legitimate reclamation of hazardous secondary materials to encourage resource conservation and materials recovery, while also maintaining protection of human health and the environment. The conditions associated with the exclusion at 40 CFR Section 261.4(a)(24) are meant to ensure that materials are safely and legitimately recycled and not discarded.

The litigation history around the DSW rulemakings from 2008 to 2018, coupled with a state's ability to be more stringent than the federal requirements, has resulted in a complex national landscape for this exclusion. Currently, a state program may include one of two different versions of the 40 CFR Section 261.4(a)(24) exclusion for hazardous secondary materials that

[1] Disclaimer: This document describes and summarizes statutory provisions, regulatory requirements, and policies. It is not a substitute for these provisions, regulations, or policies, nor is it a regulation itself. The information in this document does not constitute legal, technical, or other advice.

are transferred to another party for reclamation. The 2015 version is known as the "verified recycler exclusion," and the 2018 version is known as the "transfer-based exclusion." (The original version of the exclusion was promulgated in 2008 and will be referred to as the "2008 transfer-based exclusion" in this document).

On July 7, 2017 and March 6, 2018[2], the United States Court of Appeals for the District of Columbia Circuit issued opinions that, among other things,[3] (1) vacated the 2015 verified recycler exclusion for hazardous waste that is recycled off-site (except for certain provisions); (2) reinstated the 2008 transfer-based exclusion to replace the now-vacated 2015 verified recycler exclusion; and (3) upheld the 2015 containment and emergency preparedness provisions and the eligibility of spent petroleum catalysts and applied these to the reinstated transfer-based exclusion.

As a result, EPA issued the 2018 DSW final rule that implemented the court's decision on May 23, 2018. Refer to volume 83 of the Federal Register starting on page 24664 (https://www.epa.gov/hw/final-rule-2018-definition-solid-waste-dsw-response-court-vacatur).

Effect on State and Tribal Programs

To promote consistency and facilitate nationwide recycling, EPA encourages all states to adopt the 2018 version of the rules to match the federal program.

However, states that have adopted the 2015 version of 40 CFR Section 261.4(a)(24) are not required to revise their programs to match the 2018 version of the rules. Under Resource Conservation and Recovery Act (RCRA) section 3009, states may impose standards that are broader in scope or more stringent than the federal program. States may choose to keep the 2015 DSW rules as part of their state programs, with the understanding that their program would be broader in scope than the federal program for those provisions that have been vacated.[4] States that have not adopted any version of the 40 CFR Section 261.4(a)(24) exclusion are also not required to do so, since the base program is broader in scope than the solid waste exclusion.

Tribes can also play a key role in assisting in the implementation of a hazardous secondary materials recycling program and may set more stringent requirements as well as have specific recycling requirements or bans.

The most recent EPA information on state adoption and authorization of these rules can be found at: https://www.epa.gov/hw/where-2018-definition-solid-waste-rule-effect.

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[2] *American Petroleum Institute v. Environmental Protection Agency*, 862 F.3d 50 (D.C. Cir. 2017), decision modified on rehearing, 883 F.3d 918 (D.C. Cir. 2018).

[3] The court also vacated factor four of the 2015 definition of legitimate recycling found at 40 CFR Section 260.43 and reinstated the 2008 version of factor four to replace the now-vacated 2015 version of factor four.

[4] Refer to EPA 2014. *Determining Whether State Hazardous Waste Requirements Are More Stringent or Broader In Scope Than The Federal RCRA Program*, January 13, 2014. RO# 14848. https://rcrapublic.epa.gov/rcraonline/details.xhtml?rcra=14848

Comparison of 2015 Verified Recycler vs. 2018 Transfer-Based Exclusions

In 2015, EPA made four key changes to the language of 40 CFR Section 261.4(a)(24):

1. Removed a prohibition that had made certain spent petroleum catalysts (hazardous waste codes K171 and K172) ineligible for the new recycling exclusion;
2. Added a specific "contained" standard for the management of the hazardous secondary materials prior to being recycled;
3. Added emergency preparedness and response requirements; and,
4. Replaced a requirement for generators to make a "reasonable effort" to audit the recycling facility prior to sending their material to be recycled with a requirement that the recycling facility obtain a variance from the regulations prior to accepting the recyclable materials.

In 2018, the court upheld the first three provisions, which were retained in the reinstated transfer-based exclusion, and vacated the fourth, reinstating the 2008 language. In addition, the export requirements for the transfer-based exclusion found at 40 CFR Section 261.4(a)(25) were also reinstated.

So, the 2018 transfer-based exclusion is largely the same as the 2015 verified recycler exclusion, except (1) instead of requiring reclamation facilities without RCRA permits to obtain variances, the 2018 transfer-based exclusion requires generators to perform "reasonable efforts" environmental audits of the unpermitted recycling facilities every three years, and (2) hazardous secondary materials can be exported, provided the requirements of 40 CFR Section 261.4(a)(25), including obtaining notice and consent and filing annual reports, are met.

Table 1: Comparison of 2015 and 2018 Versions of 40 CFR Section 261.4(a)(24)

	2015 Verified Recycler Exclusion	2018 Transfer-Based Exclusion
Generator	Must send their materials to either a RCRA permitted reclamation facility or to a facility with a "verified recycler variance"	Must send their materials to either a RCRA permitted reclamation facility or successfully perform a "reasonable efforts" audit on the unpermitted recycling facility
Intermediate and Reclamation Facility	Must either be RCRA permitted or must obtain a "verified recycler variance"	Must either be RCRA permitted or must pass a "reasonable efforts" environmental audit by the generator
Export	Not eligible	Eligible with notice and consent per 40 CFR Section 261.4(a)(25), among other requirements

Imports and Exports

Facilities may import hazardous secondary materials and manage the materials domestically under either the 2018 transfer-based exclusion or the 2015 verified recycler exclusion. The importer assumes the responsibilities of a generator of the hazardous secondary materials and must manage the materials according to the generator-specific conditions found in 40 CFR Section 261.4(a)(24)(v) and must notify per 40 CFR Section 261.4(a)(24)(vii).

Facilities may not export under the 2015 verified recycler exclusion.

Facilities may export under the 2018 transfer-based exclusion provided the requirements of both 40 CFR Section 261.4(a)(24)-(25) are met, including:

1. Notifying EPA prior to operating under the exclusion and by March of each even-numbered year after that to the Regional Administrator using EPA Form 8700-12 (https://www.epa.gov/form8700-12) concerning the materials they intend to manage, or are managing under the exclusion;
2. Notifying EPA electronically of an intent to export using RCRAInfo Waste Import Export Tracking System at least 60 days prior to the desired date of the initial shipment;
3. Receiving an Acknowledgment of Consent from EPA signifying the country of import has consented to the shipments;
4. Re-notifying EPA in the event of certain changes in the original notification; and
5. Filing an annual report electronically by March 1 of each year summarizing the types, quantities, frequency, and ultimate destination of all hazardous secondary materials exported during the previous calendar year.

Interstate Transport Between States with Different Versions of 40 CFR Section 261.4(a)(24)

For a hazardous secondary material to be excluded under 40 CFR Section 261.4(a)(24), the generator must be located in a state that has adopted the exclusion. However, a generator may send their excluded material to a RCRA permitted hazardous waste recycling facility in a state that has not adopted the exclusion if the hazardous secondary material is managed as hazardous waste in the receiving state.

A generator may also send excluded materials to a state that has adopted a different version of 40 CFR Section 261.4(a)(24), and the materials would be excluded in both the generating state and the receiving state, as long as the conditions of both sets of state regulations are met.

From a practical perspective this means:

- For generators in states that are operating under the 2015 DSW Rule that send their material to a reclamation facility operating under the 2018 DSW rule, the recycling must

be done at a RCRA permitted facility (since there is no “reasonable efforts” option in a state that has adopted the 2015 verified recycler exclusion and no “verified recycler” option in a state that has adopted the 2018 transfer-based exclusion).

- For generators that are operating under the 2018 DSW Rule that send their material to a reclamation facility operating under the 2015 DSW rule, they may send their material to a RCRA permitted facility or to an unpermitted facility with a verified recycler variance (in compliance with the receiving state requirements), but in the case of the unpermitted facility, they also must perform a “reasonable efforts” audit on that facility (in compliance with the generating state requirements).

In addition, if a shipment of hazardous secondary material is being transported through a state that has not adopted the exclusion, that transit state’s hazardous waste regulations could apply once the shipment reaches the border of that state. We encourage companies to contact all states through which interstate transport of your hazardous secondary materials may occur to ensure compliance with each state's regulations.

Table 2: Status of Hazardous Secondary Materials Shipments Depending on Which Version of 40 CFR Section 261.4(a)(24) Has Been Adopted

		Receiving State		
		No Exclusion	**2015 Verified Recycler Exclusion**	**2018 Transfer-Based Exclusion**
Generating State	**No Exclusion**	**Shipments are Hazardous Waste**	**Shipments are Hazardous Waste**	**Shipments are Hazardous Waste**
	2015 Verified Recycler Exclusion	**Shipments are Excluded in Generator State but Hazardous Waste in Receiving State**	**Shipments are Excluded**	**Shipments are Excluded if they go to RCRA Permitted Recycler**
	2018 Transfer-Based Exclusion	**Shipments are Excluded in Generator State but Hazardous Waste in Receiving State**	**Shipments are Excluded if they go to RCRA Permitted Recycler or to a Verified Recycler on which the Generator Performs a Reasonable Efforts Audit**	**Shipments are Excluded**

Reasonable Efforts Audit

The “reasonable efforts” audit requirement that was reinstated in the 2018 DSW rule is found at 40 CFR Section 261.4(a)(24)(v)(B).

Prior to arranging for transport of hazardous secondary materials to an unpermitted reclamation facility, and every three years after that, the hazardous secondary material generator must make reasonable efforts to ensure the material will be managed safely and be legitimately reclaimed.

To perform such an audit, hazardous secondary material generators must affirmatively answer all of the following questions for each reclamation facility and any intermediate facility, using publicly available information from EPA or the state, information from a third-party auditor, or information provided by the facility itself:

(1) **Legitimate Recycling.** Does the available information indicate that the reclamation process is legitimate pursuant to 40 CFR Section 260.43?

(2) **Notification and Financial Assurance.** Does the publicly available information indicate that the reclamation facility and any intermediate facility that is used by the hazardous secondary material generator notified the appropriate authorities of hazardous secondary materials reclamation activities pursuant to 40 CFR Section 260.42 and have they notified the appropriate authorities that the financial assurance condition is satisfied per 40 CFR 261.4(a)(24)(vi)(F)?

(3) **Compliance with RCRA Regulations.** Does publicly available information indicate that the reclamation facility or any intermediate facility that is used by the hazardous secondary material generator has not had, for the past three years, any formal enforcement actions taken against the facility for violations of the RCRA hazardous waste regulations and has not been classified as a significant non-complier with RCRA Subtitle C? If the reclamation facility or any intermediate facility that is used by the hazardous secondary material generator has had a formal enforcement action taken against the facility in the previous three years for violations of the RCRA hazardous waste regulations and has been classified as a significant non-complier with RCRA Subtitle C, does the hazardous secondary material generator have credible evidence that the facilities will manage the hazardous secondary materials properly?

(4) **Equipment and Trained Personnel.** Does the available information indicate that the reclamation facility and any intermediate facility that is used by the hazardous secondary material generator have the equipment and trained personnel to safely recycle the hazardous secondary material?

(5) **Safe Management of Residuals.** If residuals are generated from the reclamation of the excluded hazardous secondary materials, then does the reclamation facility have the permits required (if any) to manage the residuals? If not, does the reclamation facility have a contract with an appropriately permitted facility to dispose of the residuals? If not, does the hazardous

secondary material generator have credible evidence that the residuals will be managed in a manner that is protective of human health and the environment?

Other Requirements Found in 40 CFR Section 261.4(a)(24)

Other requirements found in 40 CFR Section 261.4(a)(24) are the same in both the 2015 and 2018 versions. Below is a summary of the current requirements in the current transfer-based exclusion.

- No speculative accumulation allowed. 40 CFR Section 261.4(a)(24)(i).
- Material is handled only by the generator, transporter, intermediate facilities, and reclamation facility, and is packaged according to Department of Transportation requirements while in transport. 40 CFR Section 261.4(a)(24)(ii).
- Material is not otherwise subject to material-specific management conditions of a 40 CFR Section 261.4(a) exclusion when reclaimed, and it is not a spent lead-acid battery. 40 CFR Section 261.4(a)(24)(iii).
- Material is legitimately reclaimed. 40 CFR Section 261.4(a)(24)(iv).
- Material is contained. Hazardous secondary material managed in a unit with leaks or other continuing releases is discarded and a solid waste. 40 CFR Section 261.4(a)(24)(v)(A).
- The generator sends the material to a facility with a RCRA permit or performs a reasonable efforts audit of the facility. 40 CFR Section 261.4(a)(24)(v)(B).
- Reasonable efforts must be documented and documentation maintained for at least three years. 40 CFR Section 261.4(a)(24)(v)(C).
- Records for off-site shipments of hazardous secondary materials and confirmations of receipt must be maintained for at least three years. 40 CFR Section 261.4(a)(24)(v)(D); 40 CFR Section 261.4(a)(24)(v)(E); 40 CFR Section 261.4(a)(24)(vi)(A).
- The generator must comply with emergency preparedness and response conditions. 40 CFR Section 261.4(a)(24)(v)(F).
- The intermediate facility must send the hazardous secondary material to the reclaimer(s) designated by the hazardous secondary materials generator. 40 CFR Section 261.4(a)(24)(vi)(B).
- The reclaimer and any intermediate facility must send to the hazardous secondary material generator confirmations of receipt for all off-site shipments of hazardous secondary materials. 40 CFR Section 261.4(a)(24)(vi)(C).
- The reclaimer and intermediate facility must manage the hazardous secondary material in a manner that is at least as protective as that employed for an analogous raw material and must be contained. 40 CFR Section 261.4(a)(24)(vi)(D).

- Any residuals that are generated from reclamation processes will be managed in a manner that is protective of human health and the environment. 40 CFR Section 261.4(a)(24)(vi)(E).
- Reclaimer and intermediate facility must have financial assurance. 40 CFR Section 261.4(a)(24)(vi)(F).
- All persons claiming the exclusion must notify. 40 CFR Section 261.4(a)(24)(vii).

Contact Information

For questions regarding the DSW recycling exclusions, or to provide suggestions for improving this guide or for future DSW implementation guides, please contact:

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