Solid Waste
What’s in a Name?

by Anthony B. Cavender

The latest on the EPA’s ongoing project to define the term “solid waste” in the context of regulating the recycling of hazardous secondary materials.

On July 7, 2017, the U.S. Court of Appeals for the District of Columbia issued its latest ruling on the U.S. Environmental Protection Agency’s (EPA) ongoing project to define the term “solid waste” in the context of regulating the recycling of “hazardous secondary materials”. This decision, American Petroleum Institute v. EPA, rejected some important provisions or components of the agency’s latest effort, promulgated in 2015, to regulate these recyclable materials, whose management is a serious and ongoing concern for many industries. For more than 30 years, EPA has attempted—with only some success—to conclusively define solid waste, which is of fundamental importance to the implementation and enforcement of the Resource Conservation and Recovery Act (RCRA) and the regulation of hazardous and solid waste.

EPA’s efforts have been made more difficult by the statute’s definition of solid waste, which references not only garbage, refuse and sludge, but also “other discarded materials”. The latter phrase is ambiguous and has presented considerable challenges to the agency when it confronts the issue of how to approach recycling operations, which can be a pretext for disposal operations that the law requires to be regulated. The agency has decided that it must comprehensively define “solid waste” so as to regulate only materials that are truly
discarded, while allowing legitimate recycling operations to proceed to adhere to RCRA's stated policy of promoting the recovery of materials that are valuable and need not be buried in landfills. As a result, over the years, EPA has not only defined solid waste in its RCRA rules, but has also made many separate exclusions to this definition. Those excluded materials are not, by definition, solid waste, and are therefore not subject to RCRA's stringent RCRA regulatory controls.

For more than 30 years, EPA has attempted—with only some success—to conclusively define solid waste.

**Background**

Since the early 1980s, EPA has tried to reform, reduce, and relax the regulatory obstacles to the reclamation and recovery of valuable byproducts generated by manufacturing and other industrial practices and operations. On December 10, 2014, the then-EPA Administrator signed a final rule, which again revised the agency’s regulatory definition of “solid waste,” which is the lynchpin of EPA’s authority to regulate the management of hazardous waste. (Note: The rule was published in the Federal Register on January 13, 2015.)

This action reversed the modest regulatory actions taken by EPA in October 2008 to encourage the legitimate recycling of “hazardous secondary materials” that would otherwise be subject to EPA’s very strict and complex RCRA Subtitle C hazardous waste rules. The agency states that it revised the 2008 rules because it was concerned that the application of those rules would increase risk to human health and the environment from discarded hazardous secondary materials without additional safeguards. The many conditions that EPA placed on the new recycling exclusions in 2008 were made more prescriptive, to the extent that the conditions attending a proposed recycling activity are similar in scope and complexity to the rules that apply to permitted RCRA treatment, storage and disposal facilities.

**The 2015 Rules**

Under the 2015 rules, EPA took the following actions:

1. amended the “generator-controlled exclusion”;
2. replaced the “transfer-based exclusion” with a new “verified recycler exclusion”;
3. established a new “remanufacturing exclusion” to permit the controlled reclamation of specifically listed solvents;
4. codified the agency’s long-standing policy that hazardous secondary materials determined to have been “sham recycled” are automatically considered to be discarded and solid waste;
5. changed the 2008 definition of “legitimate recycling”; and
6. substantially revised the procedures by which a solid waste variance or non-waste determination will be made.

Most of these changes were not disturbed by the July meeting.

The 2015 rules considerably tightened the 2008 recycling exclusions. For example, the “generator-controlled” exclusion was revised by providing that the reclamation process must meet the revised definition of “legitimate recycling” and EPA substantially revised the “speculative accumulation” rule. In addition, this exclusion mandated adherence to new record-keeping requirements, expanded notification requirements, new emergency response and preparedness conditions, and hazardous secondary materials must be managed in units that satisfy the new “contained” definition.

Much of the 2008 “transfer-based exclusion” was jettisoned, and generators who wish to take advantage of this exclusion would be obliged to use the services of a third-party “verified recycler” that has obtained either a federal or state authorization and has proof of financial responsibility. The new “remanufacturing exclusion” will permit the reclamation of specific hazardous secondary materials that are listed high-value solvents—these materials will not be considered solid wastes if they are processed in accordance with this rule. New notification requirements also apply to this new exclusion, and the remanufacturing facility must prepare and follow a satisfactory “remanufacturing plan,” whose criteria are spelled out in the rule. In addition, these solvent reclamation facilities must adhere to complex and extraordinarily-detailed U.S. Clean Air Act emission control requirements that are modeled on the existing requirements applicable to certain RCRA-permitted or authorized units.

In addition, EPA took the following steps:

1. included a provision that the EPA Administrator’s decision whether to grant a petition seeking a variance from a material’s classification as a “solid waste” that is being reclaimed by a verified recycler will depend on whether the reclamation
or intermediate facility's petition addresses the “potential for risk to proximate populations from unpermitted releases…and must include consideration of potential cumulative risks from nearby stressors” (this new provision appears to address some of the environmental justice concerns the agency has grappled with over the years);

2. added that, any variance or non-waste determination will be effective for no more than 10 years, which is consistent with the length of a RCRA permit;

3. stated the new definition of “contained” provides that a compliant unit must address “any potential risks of fires or explosions,” which EPA states will make spent petroleum catalysts eligible for inclusion in the generator-controlled exclusion; and

4. deferred, for the time being, a review of all pre-2008 recycling exclusions.

The D.C. Court Rules

The American Petroleum Institute v. EPA decision reviewed only four issues from EPA’s 2015 rulemaking: the revision and expansion of the legitimacy factors EPA uses to police sham recycling operations that are in truth another way to dispose of discarded materials; making spent catalysts amenable to its own exclusion from strict RCRA hazardous waste regulation; deferring for another time whether to subject all previous regulatory exclusions (of which there are more than 20) to the new 2015 conditions; and replacing the 2008 Transfer-based Exclusion with the Verified Recycler Exclusion.

In its opinion, the D.C. Court of Appeals upheld most of EPA’s new “legitimate recycling criteria,” set forth at 40 C.F.R. § 260.43(a) (https://www.ecfr.gov/cgi-bin/text-idx?SID=f1af47aa546d340a59c98df057df4a46&node=40:26.0.1.1.1.3.1.13&rgn=div8), except for Factor 4 which the court held imposed unacceptably “draconian” conditions on recyclers; vacated the Verified Recycler Exclusion set forth at 40 C.F.R. § 261.11(a)(24) (https://www.ecfr.gov/cgi-bin/text-idx?SID=77e67a5e0d111f49766ee5ef25b0084b0&m=true&node=s e40.28.261_11&rgn=div8) with some exceptions; and

reinstated the 2008 Transfer-based Exclusion and vacated a recycling bar that affected spent catalysts. The arguments of the environmental petitioners were rejected, as was industry’s argument, mistaken according to the court, that the legitimacy factors should also be vacated as to Used Oil Recycling. According to the court, all the parties agreed that some form of legitimate third party reclamation would be consistent with the statute, but EPA’s new advance administrative approval requirements in the Verified Recycler Exclusion were not adequately justified as required by the Administrative Procedure Act and many decisions of the D.C. Circuit.

What Are the Results of the Ruling?
The bulk of the new recycling/reclamation rules are now effective, subject of course, to additional litigation. These rules include:

1. New and revised definitions of “facility,” “hazardous secondary material,” “contained,” and “remanufacturing” (40 CFR Section 260.10);

2. Non-waste determination procedures (40 CFR Section 260.34);

3. Notification requirements for hazardous secondary materials (40 CFR Section 260.42);

4. Legitimate recycling criteria—as revised by the court (40 CFR Section 260.43);

5. Definitions of materials “reclaimed” and “accumulated speculatively” (40 CFR Section 261.1);

6. New exclusions promulgated for material not considered solid waste, as revised by the court (40 CFR Section 261.4(a));

7. Financial Assurance requirements for owners and operators of facilities reclaiming hazardous secondary material (40 CFR Section 261.140-151); and

8. New standards applicable to remanufacturing units and equipment managing hazardous secondary material (40 CFR Section 261.170-1089).

It is likely that there will be additional litigation in this case. For one thing, the court’s discussion of the uncertain regulator status of spent catalysts included an invitation to the parties to file petitions for rehearing on this issue to give the court an opportunity to issue a clarifying opinion, and several petitions have been filed.

After these petitions are addressed, the next issue to be determined is whether and when the new rules will be effective in states having delegated RCRA authority. Not all states have adopted either the 2008 or 2015 rules, and steps must be taken in these states to revise or modify their existing RCRA rules to incorporate these changes. Pursuant to RCRA, the new rules will be immediately effective in those few states that do not have a final RCRA delegation, but the complexity of the RCRA delegation program means that the determination of the status of these rules in the other states must proceed carefully on a state-by-state basis. These rules are unusually complex, and all parties must be especially cautious in working with them.

Anthony B. Cavender is Senior Counsel for Environment, Land Use, and Natural Resources at Pillsbury Law.
E-mail: anthony.cavender@pillsburylaw.com.