CONSTRUCTION LAW NEWS
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HAZARDOUS WASTE REGULATION AND RECYCLING REVISITED IN 2008

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A. BACKGROUND

In October, 2008, the United States Environmental Protection Agency (EPA) adopted new regulations that may increase recycling opportunities for firms that would otherwise dispose of certain materials as hazardous waste. For several years, the United States EPA has focused on revising its regulations to allow for materials that are being reused, recycled and reclaimed to be relieved of the extensive hazardous waste regulations that are intended to govern wastes from cradle to the grave of disposal.

The United States EPA, through the Resource Conservation and Recovery Act (RCRA) program, and those states that have agreed to administer the program have historically construed solid waste in a manner that covers recycled and reclaimed materials. This interpretation appears to be at odds with the federal statute which defined solid waste on the basis of whether the material is discarded. See 42 USC 6903(27). Several federal courts have decided that the EPA regulations as applied in certain circumstances have violated this statutory definition. In recognition of this fact, as well as the growing interest in promoting greater recycling, the EPA embarked on an attempt to revise its regulations.

After circulating two versions of the proposed Rule, the Agency issued its Final Rule on October 7, 2008. The Rule includes an exclusion for (1) materials that are generated or legitimately reclaimed under the control of the generator which is intended to cover circumstances for materials that are generated and reclaimed on-site, by the same company, or under a tolling agreement; (2) materials that are generated and transferred to another company for legitimate reclamation under specific conditions; and (3) materials that the EPA or an authorized state decides are non-wastes, through a petition process. 40 CFR 260.10 & 260.30 - .31 & .34.

B. CHOICES

The new Rule is particularly intriguing because of its creation of generator control and transfer-based exclusions. These two options are summarized below.

1. Generator Control Exclusion

One option is for a firm to assume greater control over the reclamation process. For example, the new definition will exclude hazardous secondary materials that are generated under a written contract between a tolling contractor and a toll manufacturer and that are legitimately reclaimed without any speculative accumulation. 40 CFR 260.10 & 261.4(a)(23). A tolling contractor is a person who arranges for the production of a product or intermediate product by a toll manufacturer. The tolling contractor would have to certify that it has a written contract and that the tolling manufacturer will reclaim the material during the manufacture of the product or intermediate. The tolling contractor also must certify that it retains ownership of and liability for the secondary materials. This option, if selected by a firm, would likely mean that the

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firm would become a tolling contractor and would have to enter into an agreement with the reclaimer which presumably would become a toll manufacturer.

2. Transfer-Based Exclusion

On the other hand, a firm can take several specific steps, generally retain its current relationship with GEOdynamic by taking advantage of the exclusion for hazardous materials that have been transferred for the purpose of legitimate reclamation. This transfer-based exclusion could allow for the participation of intermediate facilities, which are defined as facilities storing hazardous secondary materials for greater than 10 days. See 40 CFR 260.10. Under the Final Rule, the EPA would allow a hazardous secondary material generator to make contractual arrangements with an intermediate facility and the ultimate reclaimer to ensure that the secondary material is sent to a reclamation facility or facilities identified by the generator and would require the generator to take "reasonable efforts" to examine each facility involved in the reclamation process to ensure that the hazardous secondary materials are properly and legitimately recycled. See 40 CFR 261.24(a)(24)(v)(B). As a part of this process, an intermediate facility would have to meet some of the same conditions as the reclamation facility.

a. Containment

A hazardous secondary material generator has a duty to contain the material. We are not aware currently of any further definition of "contain," but we would assume that appropriate drums, totes, vessels, tanks and tankers would be suitable for containment.

b. No Speculative Accumulation and Legitimate Recycling

In considering the various requirements for a transfer-based exclusion, we would note that reliance on this exclusion requires that the hazardous secondary materials not be speculatively accumulated which means that a firm cannot rely on exclusion unless the material is potentially recyclable. See 40 CFR 261.4(a)(24)(i). In addition, a firm accumulating the hazardous secondary material must show during a calendar year that the amount of such material is recycled or transferred to a different facility for recycling is at least 75% by weight or volume of the amount of the secondary material present at the beginning of the period. In addition, legitimate reclamation is required. See 40 CFR 261.4(a)(24)(v) & 260.43. That means the material must provide a useful contribution to the recycling or process or product (e.g. contractor's valuable ingredients, replaces a catalyst or carrier in recycling, constitutes the source of a valuable constituent that is recovered, becomes recovered or regenerated, or has use as a substitute for a commercial product) and that the recycling process must produce a valuable product (e.g. sold to a third party, used as a substitute for a commercial product or an ingredient or intermediate). See 40 CFR 260.43(b). As part of the legitimacy determination, a firm should consider whether the hazardous secondary material as made is a valuable product and consider the levels of any toxic materials in the product as compared to analogous products made from erosion products.

c. Notification

In addition, the transfer-based exclusion requires notification by the generators, reclaimers and intermediate facilities prior to operation of the exclusion and by March 1 of even numbered years (i.e., every two years). See 40 CFR 260.42. The notice would include the name, address, EPA ID number of the facility; the name and telephone number of a contact person; the NAICS code of the facility; the exclusion under which the secondary materials would be managed; financial assurance in the case of the reclaimers and intermediate facilities managing these secondary materials; an approximate date when the facility expects to begin managing such materials; a list of hazardous secondary materials that will be managed according to the exclusion; an indication of whether the material or any portion will be managed in a land-based unit; the quantity of hazardous secondary material to be managed annually, and a certification signed and dated by an authorized representative. See 40 CFR 260.42(a).

d. "Reasonable Efforts"

In addition, the Rule requires generators to make "reasonable efforts" to ensure that the hazardous secondary materials are properly and legitimately recycled before shipping or otherwise transferring them to an intermediate facility or a reclamation facility. "Reasonable efforts" review must be repeated at least every three years. These are the equivalent of due diligence steps. See 40 CFR 261.4(a)(24)(v)(B)(1)-(5). A generator will be allowed to use credible evidence in making these reasonable efforts and gathering information provided by the reclaimer and intermediate facility or through a third party such as

an independent auditor. See 40 CFR 261.4(a)(24)(B). The five basic questions for satisfying the reasonable efforts conditions are as follows:

1. Does the available information indicate that the reclamation process is legitimate?
2. Does publicly available information indicate that the reclamation facility and any intermediate facility that is used by the hazardous secondary material generator has notified the appropriate authorities of the reclamation activities and has notified those authorities that the financial assurance condition is satisfied?
3. Does publicly available information indicate that the reclamation facility or any intermediate facility used by the hazardous secondary material generator has not had any formal enforcement actions taken against the facility in the previous three years for RCRA violations and has not been classified as a significant non-complier under RCRA subtitle C?
4. Does 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. If residuals are generated from the reclamation of the excluded hazardous secondary materials, does the reclamation facility have permits (if required) to manage residuals? If not, does the reclamation facility have a contract with an appropriate permitted facility to dispose of the residuals? If not, does the hazardous secondary material generator have evidence that the residuals were being managed in a manner that is protective of human health and the environment?

See 40 CFR 261.4(a)(24)(v)(B)(1)-(5).

e. Generator Documentation

The Rule will require generators to maintain documentation for at least three years showing that they have satisfied the reasonable efforts requirement prior to transferring the hazardous secondary materials to the intermediate facility or the reclamation facility. See 40 CFR 261.4(a)(24)(v)(C). Such records should include copies of audit reports or other relevant information used as the basis for responding to the inquires about such a facility. The generators will be required to certify for each reclamation and intermediate facility that "reasonable efforts" were made that ensure the proper and legitimate recycling. Generators also must keep records showing offsite shipments (e.g. name of transporter and date of shipment, name and address of each reclaimer and intermediate facility, and type and quantity of material shipped) and confirming receipt of materials by an intermediate facility or reclaimer for at least three years. 40 CFR 261.4(a)(24)(v)(D)-(E).

f. Requirements for Reclaimers and Intermediate Facilities

In the case of parties that transport hazardous secondary materials, those materials can only be stored for up to ten days at a transfer facility to be considered in transit. See 40 CFR 261.4(a)(24)(ii). However, if materials are stored for more than ten days, then the hazardous waste transportation firm would be considered an intermediate facility.

In the case of reclaimers and intermediate facilities, they must give notice as indicated above and maintain records similar to those required for the hazardous secondary material generators. See 40 CFR 261.4(a)(24)(vi)(A). Reclaimers and intermediate facilities would have to maintain records for a period of three years of all shipments attached with secondary materials that were received at the facility and if applicable, all shipments of hazardous secondary materials sent offsite to any facility. The records, which must be maintained for at least three years, would document the name and address of the hazardous secondary material generator, the type and quantity of hazardous secondary materials received at the facility, any intermediate facilities that manage the hazardous secondary materials, the name of the transporter and the date such materials were received at the facility. For materials that are subsequently transferred offsite for further reclamation, reclaimers and intermediate facilities would have to document the name and address of the hazardous secondary material generator, the date of shipment, the identity of the transporter, the name and address of the subsequent relcaimer, or subsequent intermediate facility, and the type and quantity of hazardous secondary materials in the shipment. This recordkeeping requirement could be satisfied by ordinary business records such as bills of lading.

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In addition, reclaimers and intermediate facilities will have to send confirmation of receipt of the hazardous secondary material generator for all offsite shipments of hazardous secondary materials received at the facility in order to verify that the hazardous secondary materials reached the intended destination and were not discarded. See 40 CFR 261.4(a)(24)(vi)(C). The reclaimer and intermediate facilities must send documentation of receipt of the hazardous secondary materials that includes the name and address of the reclaimer and intermediate facility, the type and quantity of hazardous secondary materials received and the date when the hazardous secondary materials were received. This documentation again can be satisfied through routine business records without creating a special form.

Reclaimers and intermediate facilities have the added requirement of managing the material in a manner that is at least as protective as analogous raw materials and in a manner that is protective of human health and environment. See 40 CFR 261.4(a)(24)(vi)(D)-(E). Materials that exhibit a hazardous characteristic or that are listed as hazardous waste will need to be managed according to RCRA requirements at the reclaimer or intermediate facility under 40 CFR parts 260-272.

Further, reclaimers and intermediate facilities would have to meet certain requirements under the financial assurance provisions, including some recordkeeping requirements. See 40 CFR 261.4(a)(24)(vi)(F). Several instruments can be used for proving financial assurance by owners or operators of reclamation or intermediate facilities. These include trust funds, surety bonds, letters of credit, insurance, satisfaction of a financial test, corporate guarantees or a combination of the above. See 40 CFR 261.143.

g. Consequences for Failures

If a hazardous secondary material generator fails to meet the conditions provided in the new Rule, then the hazardous secondary materials would be viewed as discarded and would be subject to RCRA requirements. The failure of a reclaimer or intermediate facility to meet the conditions of exclusion will not necessarily mean that the hazardous secondary material will be considered as waste, provided the generator can demonstrate that it met its obligations to make reasonable efforts to ensure that the hazardous secondary material would be reclaimed legitimately and properly managed. A hazardous secondary material generator should be able in good faith to ship its excluded materials to a reclamation facility or intermediate facility where due to the circumstances beyond the generator's control the materials were released and caused environmental problems. The generator's decision to ship to a reclaimer or intermediate facility will be evaluated on the basis of whether it had an objectively reasonable belief that the hazardous secondary materials would be claimed legitimately and managed consistent with the regulation. Documentation obviously will be important in demonstrating that the terms of the exclusion have been satisfied.

C. CONCLUSION

Despite the new rule, potentially positive benefits and regulation cannot take effect in Michigan unless the Michigan Department of Evironmential Quiality (MDEQ) adopts the new federal rule. The MDEQ Waste and Hazardous Materials Division has signaled an interest in considering this new change; however, actions may not occur for several months.

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