



## EPA Promulgates Long-Awaited Final Rule Revising the Definition of Solid Waste

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On December 10, 2014, the U.S. Environmental Protection Agency (EPA) published a long-awaited final rule (Final DSW Rule) revising the regulatory definition of “solid waste” (DSW) under the Resource Conservation and Recovery Act (RCRA) as it relates to recycling activities. Among other things, the Final DSW Rule revises the definition of “legitimate recycling” and makes changes to two conditional exclusions for recycling that were created by a 2008 revision to the definition of “solid waste.” These changes are intended to address EPA’s concerns about “sham recycling”—the situation where secondary or spent material that should be considered solid waste and, therefore, regulated as hazardous wastes under RCRA Subtitle C ends up being “under-regulated” because it is classified as recycled and subject to other less stringent requirements. While the Final DSW Rule tightens some of the revisions made in 2008, the final rule does not go as far as EPA had proposed in 2011. Where EPA administers the RCRA program, the 2014 Final DSW Rule will become effective within 180 days after publication in the *Federal Register*. However, in states authorized to administer their own RCRA programs, the state will need to adopt the rule before it becomes effective.

### BACKGROUND

RCRA imposes significant regulatory obligations for hazardous waste under Subtitle C—including a “cradle-to-grave” system for tracking and handling that waste. EPA’s definition of “solid waste” is important because only materials that are considered “solid waste” can be considered “hazardous waste” subject to regulation under RCRA Subtitle C. Hazardous materials that are legitimately recycled are not considered “discarded” and therefore are not “solid wastes.” In addition, the definition of “solid waste” includes a number of long-standing exclusions for specific materials, including scrap metal.

In October 2008, EPA promulgated a final rule (2008 DSW Rule) creating two provisions that conditionally excluded recycled hazardous secondary materials (HSM) from the definition of “solid waste”: (1) a “generator-controlled” exclusion that excludes from the definition of “solid waste” hazardous secondary materials that are legitimately reclaimed under the control of the generator; and (2) a “transfer-based” exclusion that excludes from the definition of “solid waste” hazardous secondary materials that are transferred to a different entity for reclamation. The 2008 DSW Rule also codified a definition of “legitimate recycling,” with four legitimacy factors—two mandatory factors and two discretionary factors—to ensure that the recycling was not a “sham.” However, the 2008 DSW Rule only made legitimacy a condition of the exclusions in *that* rule and did not require demonstration of the legitimacy criteria for HSM recycled under pre-2008 exclusions.

In 2011, in response to litigation and a controversial environmental justice report, EPA published a proposal to re-examine the 2008 DSW Rule in order to close regulatory gaps created by that rule (2011 Proposed Rule). The 2011 Proposed Rule would have made all four legitimacy criteria mandatory, would have made changes to the criteria, and would have applied the criteria to both exclusions created by the 2008 DSW Rule and to prior exclusions. In addition, the 2011 Proposed Rule would have withdrawn the transfer-based exclusion and replaced it with alternative Subtitle C regulation; revised the generator-controlled exclusion; and created an exclusion for high-valued remanufactured HSM, among other things.

The Final DSW Rule finalizes this proposal with significant changes, as summarized below.

## OVERVIEW OF KEY PROVISIONS

The Final DSW Rule withdraws and revises various provisions in the 2008 DSW Rule. EPA made revisions to, but did not withdraw, the generator-controlled exclusion and the non-waste determination petition process. EPA withdrew the transfer-based exclusion and replaced it with a new “verified recycler” exclusion. The Final DSW Rule also revises the definition of “legitimate recycling,” and explains what facilities must do to comply with the revised definition.

### 1. The Rule Retains and Revises the Generator-Controlled Exclusion

The Final DSW Rule retains the “generator-controlled” exclusion for onsite recycling, recycling within the same company, and recycling through toll agreements. However, the rule makes the following revisions, among others:

- **Notification.** The rule requires notification to the regulatory authority as a condition of the exclusion. Failure to notify could thus result in loss of the exclusion.
- **Legitimacy.** The rule requires generators to document that their recycling is “legitimate” by maintaining on-site documentation of how they meet all four legitimacy factors.
- **Containment.** The rule requires generators to “contain” HSM pursuant to a new definition of “containment,” which includes three criteria: the unit must (1) be in good condition; (2) be properly labeled; and (3) hold HSM that are compatible with the unit and its contents. If the criteria are not met, the HSM would be considered solid waste.

### 2. The Rule Replaces the Transfer-Based Exclusion with a Verified Recycler Exclusion

EPA withdrew the 2008 DSW Rule’s “transfer-based” exclusion. In its place, EPA promulgated an exclusion for HSM sent to a verified recycler (“verified recycler exclusion”). Under the “verified recycler exclusion,” generators who want to recycle HSM must send it to either (1) a RCRA-permitted reclamation facility; or (2) a verified recycler that has obtained a specific solid waste variance. A key provision of the verified recycler exclusion includes a requirement that facilities obtain a variance in order to become a “verified recycler.” This is one of the major differences between this exclusion and the transfer-based exclusion, and will allow EPA and the states to verify that the recycler has appropriate safety measures in place.

### 3. The Rule Creates a High-Value Remanufacturing Exclusion

The rule finalizes a conditional exclusion for high-value solvents transferred from one manufacturer to another for the purpose of extending the useful life of the spent solvent by remanufacturing it back into commercial grade solvent. This exclusion is limited to 18 solvents used by specific manufacturing sectors. However, the rule allows persons to petition for exclusions for other HSM that are remanufactured into high-value commercial grade products.

### 4. The Rule Adds a Prohibition on “Sham Recycling” to the Definition of “Solid Waste”

The 2008 DSW Rule only codified a legitimacy requirement for the exclusions in that particular rulemaking. The Final DSW Rule, however, requires *all* HSM recycling to be legitimate by adding to the definition of “solid waste” a prohibition on “sham recycling”—defined as recycling that does not meet the legitimacy factors. EPA does not, however, intend to cause facilities that are legitimately recycling to revisit their practices or for state agencies to revisit past legitimacy determinations.

### 5. The Rule Revises the Definition of “Legitimate Recycling”

The Final DSW Rule revises the definition of “legitimate recycling” found at 40 C.F.R. § 260.43. The revised definition makes mandatory all four of EPA’s legitimacy factors, which are that: (1) the recycling involves HSM that provide a useful contribution to the recycling process or to a product; (2) the recycling produces a valuable product or intermediate; (3) the HSM is managed as a valuable commodity; and (4)

the product must be comparable to a legitimate product, i.e., there are not “toxics along for the ride” in the product. In the 2008 DSW Rule, only the first two factors were mandatory, while Factors 3 and 4 had to be “considered,” but not necessarily met. Although the rule makes Factors 3 and 4 mandatory, EPA also has revised these factors to provide some additional flexibility for facilities seeking to meet them, including a self-certification option for facilities that cannot meet Factor 4.

## 6. Legitimacy Documentation Requirements

In a change from the 2011 Proposed Rule, the Final DSW Rule does not, as a general matter, require specific documentation of legitimacy. However, persons claiming exclusions must be able to demonstrate that recycling is legitimate in any enforcement action brought against them. This is similar to the approach adopted by the 2008 DSW Rule.

## 7. Revisions to Solid Waste Variance and Non-Waste Determination Procedures

Under current regulations, the Administrator has authority to grant a variance from the definition of solid waste or to make a non-waste determination on a case-by-case basis for recycled HSM. The Final DSW Rule retains these processes, but revises them in several ways.

## IMPLICATIONS

**Effect of the Final DSW Rule on the 2008 Solid Waste Exclusions.** Facilities operating under the generator-controlled exclusion must comply with the revised standards by the effective date of the rule. Facilities operating under the transfer-based exclusion must meet the terms of the verified recycler exclusion by the effective date of the rule. Facilities exporting HSM under the transfer-based exclusion must cease operating under the verified recycler exclusion because it is limited to recycling in the United States.

**Effect of the Final DSW Rule on Pre-2008 Solid Waste Exclusions.** The Final DSW Rule formalizes the requirement that recyclers of HSM demonstrate the legitimacy of that recycling using the four legitimacy factors. However, EPA clarified that it does not intend to supersede any specific prior determinations that recycling is legitimate, including through interpretation letters, inspection reports, or other means, for pre-2008 solid waste exclusions.

There are two main recordkeeping revisions in the rule that may nonetheless impact facilities operating under pre-2008 exclusions. These include requirements for speculative accumulation as well as for recyclers of HSM that cannot meet Factor 4 and comply with the legitimacy requirement through self-certification.

EPA did *not* finalize the application of the “contained” standard and notification requirements to pre-2008 exclusions that had been proposed in the 2011 Proposed Rule.

## For more information

Van Ness Feldman closely monitors and counsels clients on waste, water, air, and other environmental regulatory developments. If you would like more information about the Final DSW Rule or have specific compliance questions, please contact [Marlys Palumbo](#), [Britt Fleming](#), or any member of the firm’s [Environmental](#) Practice in Washington, D.C. at (202) 298-1800 or in Seattle, WA at (206) 623-9372.

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