The RCRA DSW Rule: EPA Expands its own Jurisdiction

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EPA's DSW Rule

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Definition of Solid Waste

- By statute, EPA's jurisdiction to regulate hazardous waste is limited to "solid waste"
- "Solid" doesn't mean solid, but "waste" does mean waste: *i.e.*, material that has been "discarded" in the "ordinary, plain-English meaning" of that term
- Unfortunately, EPA's *regulatory* definition of "solid waste" has never been limited to discarded material
- Result: and endless cycle of rulemaking & litigation

The Issue: Recycling

- EPA has always wanted to regulate recycling
- Not just recycling of discarded material subject to its jurisdiction, but “recycling” of material that is recycled *instead of being discarded*:
  - Including valuable materials being sold for use or for their material value
  - Including in-process “recycling” integral to ongoing manufacturing processes

Two Types of DSW "Exclusion"

- True exclusions from the definition of solid waste
  - Material falling under the exclusion is not solid waste subject to RCRA jurisdiction
  - EPA does not (and cannot) regulate it
- "Conditional exclusions"
  - Material meeting the terms of the "exclusion" isn't considered solid waste *if requirements imposed as conditions of the exclusion are complied with*
  - EPA regulates the material through the "conditions"

EPA's DSW Rule

- Significantly amends the 2008 conditional exclusions for recycling of materials traditionally defined as "solid waste" when recycled (*e.g.*, spent solvents being reclaimed)
- Tinkers with various other recycling provisions, and
- Adopts "legitimacy" rules that effectively make *all other RCRA recycling exclusions conditional*

The Bottom Line

- The conditional exclusions are interesting, but have limited utility
- The “legitimacy” rules are the big ticket item
  - They give EPA the ability to regulate all recycling of hazardous secondary materials whether the materials are “discarded” or not
  - This is probably the most aggressive effort EPA has ever made to expand the scope of its RCRA authority
- Stay tuned for the next round of litigation

Regulation Through “Legitimacy”

40 C.F.R. §§261.1(g), 260.43

The Truth About "Sham Recycling"

- The "sham recycling" policy was nothing more than gloss on the text of the recycling exclusions
- The only regulatory issue was whether the terms of an exclusion were actually met (*i.e.*, whether the recycling was "real" or a "sham")
- Regulators had no legal authority to disallow a plainly-applicable recycling exclusion
- Anything more was unenforceable

The “Legitimacy” Rule

- EPA has now imposed four new “legitimacy” uber-criteria *that limit the scope of all RCRA recycling exclusions*
- These new criteria do not merely distinguish “sham” (*i.e.*, fake) recycling from real recycling
- Instead, they are designed to give EPA the authority to disallow recycling activities it does not consider to be “environmentally responsible”

#1: “Useful Contribution”

- The material recycled must make a “useful contribution” to the recycling process or to a product or intermediate
- However, it is not enough to confirm that a recycling activity really does utilize material value
- EPA can “trump” an exclusion because it doesn’t think the recycling activity is *efficient enough*
  - Not enough material value
  - Rate of recovery/utilization not high enough

#2: “Valuable Product”

- Product must have economic or intrinsic value
- As demonstrated by
  - Sale or other economic exchange
  - Replacement of product or raw material that would otherwise be purchased
  - Actual use is not enough
- Beware of potential comparisons with virgin commercial products

#3: Management Requirements

- Must manage materials in a manner at least as "protective" as for an "analogous" raw material
- In this context, "analogous" means virtually identical in every material respect
- If no there is no "analogous" raw material, the secondary material must be "contained":
  - Comply with RCRA standards
  - Or chance very demanding narrative standards

Practical Impact

- EPA gets to regulate the management of all material being recycled *whether it is discarded material or not*
- The choice is between RCRA standards or potential “case-by-case” quibbling over whether
  - An analogous product is “analogous”
  - Management is at least as “protective”
  - The narrative “contained” standard has been satisfied

#4 Product Regulation

- The product of the recycling process must be “comparable to a legitimate product or intermediate”
- Where there is an “analogous” product, the product of recycling must:
  - Exhibit no hazardous characteristics the “analogous” product does not
  - Contain no different or higher levels of hazardous constituents than the "analogous” product (!)

#4 Product Regulation (cont'd)

- Where there <u>is not</u> an "analogous product," the product of recycling must be:
  - A commodity meeting widely-recognized commodity standards (*e.g.*, scrap metal commodities)
  - Be returned to the original process from which the secondary material was produced
- Otherwise the recycler must document that product does not pose a significant risk <u>and must notify EPA</u>

The Patter

- EPA says the “legitimacy” rule is nothing new, but it is really a dramatic change in the law
- EPA suggests that existing detailed recycling exclusions should not be affected, but they are
- EPA says previous agency determinations should not be affected, but they are
- “Interpretation” will be critical, but – long term – “regulatory creep” only goes in one direction

We’ll have to see what the D.C. Circuit has to say this time around

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