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Important Changes to EPA's RCRA Program

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The Environmental Protection Agency (EPA) has made several recent changes that will affect compliance obligations under the Resource Conservation and Recovery Act (RCRA). First, EPA finalized revisions to the definition of solid waste, which will impact extractive and other industries involved in secondary materials recycling. Second, EPA launched its new Electronic Hazardous Waste System designed to streamline tracking hazardous waste shipments. Both developments reflect important changes to the implementation of the RCRA program.

Revisions to the Concept of “Waste” and the Legitimacy Factors

On May 30, 2018, EPA promulgated a [final rule](#) implementing the U.S. Court of Appeals for the District of Columbia Circuit's (D.C. Circuit's) March 6, 2018, decision to vacate some, but not all, provisions of EPA's rule defining solid waste under RCRA. EPA proceeded without notice or comment in carrying out “the ministerial task of implementing court orders vacating these rules and reinstating the prior versions.”

Under RCRA, EPA and the states manage the treatment, storage, and disposal of solid and hazardous waste. The statute defines solid waste to include, in part, “discarded material.” Waste that is not “solid waste” because it is never discarded may not be regulated as hazardous waste. Thus, extreme import is placed on defining “solid waste,” and more specifically defining “discarded material.” For years, EPA has attempted to address the management, and more specifically, the recycling of secondary materials—those substances left over after various industrial processes, which may, nonetheless, remain useful. These various rulemaking efforts were designed to encourage the legitimate recycling of secondary materials while subjecting materials actually being discarded to the full suite of applicable RCRA requirements. To this end, EPA developed various legitimacy criteria, which over time were codified into four core “legitimacy” factors.¹

The D.C. Circuit's March ruling, and EPA's recent rule, concerns the fourth legitimacy factor: whether the product of the recycling process is comparable to a legitimate final product. This factor was designed to prevent what EPA termed “toxics along for the ride” (i.e., introduction of hazardous secondary materials that provide no recognizable benefit to the end product). While industry has generally not opposed the concept, there has been much debate about whether meeting the condition should be mandatory. Grounded in the D.C. Circuit's lengthy opinion, EPA's latest rule clarifies that factor four need only be “considered” not necessarily satisfied when making a determination about the legitimacy of a specific recycling activity.

The benefits to various industries engaged in hazardous secondary

material recycling under RCRA may be significant. For example, it may now be more streamlined for a mining company to make a legitimacy demonstration for secondary materials sent off-site for further extraction or purification that contain substantial concentrations of valuable precious metals but also trace hazardous constituents. Other industries impacted by EPA's decision include petroleum refining, metals recycling, building products manufacturers, electronics industry, various textile companies, chemical manufacturers, and cement and steel manufacturers, among many others. Please let the authors know if you have any questions about how this rule may affect your company or operations.

Electronic Hazardous Waste System

On June 30, 2018, EPA launched a national system for tracking hazardous waste shipments electronically. While EPA strongly encourages the use of electronic manifests after this date, paper manifests may continue to be used (details and other FAQs available [here](#)). EPA developed the e-Manifest system in accordance with the Hazardous Waste Electronic Manifest Act (e-Manifest Act). The e-Manifest Act authorizes EPA to implement a national electronic manifest system and to require that the costs of developing and operating the system be recovered from user fees charged to those who using the electronic system.

EPA estimates that the e-Manifest system will eventually reduce the costs to government and industry users associated with preparing and processing shipping manifests. EPA expects benefits to include:

- Cost savings;
- Accurate and more timely information on waste shipments;
- Rapid notification of discrepancies or other problems related to a shipment;
- Creation of a single hub for one-stop reporting of manifest data for EPA and states' use;
- Increased effectiveness of compliance monitoring waste shipments by regulators; and
- The potential for integrating manifest reporting with RCRA biennial reporting processes and other federal and state information systems.

Please feel free to reach out to any of the authors of this client alert or any other attorneys in our [Environment, Energy, and Natural Resources practice group](#) for assistance in implementing any changes needed to comply with these recent RCRA actions.

¹The four legitimacy factors are: (1) the hazardous secondary material must provide a useful contribution to the recycling process; (2) the recycling process must produce a valuable product or intermediate; (3) the persons controlling the secondary material must manage it as a valuable commodity, and (4) the product of the recycling process must be

comparable to a legitimate final product or intermediate.