



## Questions and Answers on EPA's RCRA Sham Recycling Rule

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The U.S. Environmental Protection Agency (EPA) regulations under the Resource Conservation and Recovery Act of 1976 (RCRA) impose a comprehensive and often onerous program regulating the disposal and recycling of hazardous wastes. The core issue determining whether a hazardous “secondary material” – for example, a spent material, a manufacturing byproduct, or a sludge – is a hazardous waste subject to the RCRA regulations is whether it meets the definition of “solid waste” under the regulations. The regulations exclude from the definition of solid waste many materials that are recycled by beneficial use or reuse of the material, or by reclamation by regeneration or the recovery of a usable product. From the outset of the RCRA program, however, EPA has stressed the need to distinguish between true (“legitimate”) recycling and fake (“sham”) recycling – in other words, is the activity really waste treatment or disposal in the guise of recycling, and thus subject to EPA enforcement under RCRA?

For many years after adoption of the RCRA regulations, EPA scrutinized recycling under a sham recycling policy. EPA adopted a regulation on sham recycling in 2008, and updated that regulation in its new Definition of Solid Waste rule, which became effective on July 13, 2015. The sham recycling rule may be found at 40 CFR §260.43. The rule has been adopted by a number of states, but has been challenged in court by both industry groups and environmental groups. *American Petroleum Institute v. United States Environmental Protection Agency*, U.S. Court of Appeals for the District of Columbia Circuit, No. 90-1038. The court’s ruling is expected to be issued in early 2017, but regardless of the outcome, it is clear that the distinction between legitimate and sham recycling will continue to be an issue in EPA’s RCRA enforcement.

### **As a manufacturer, when would I need to consider EPA’s sham recycling policy?**

If you generate a secondary material that would need to be managed as a hazardous waste if you disposed of it, but the material is being recycled instead, you must determine whether the recycling is legitimate if you wish to qualify for exemptions and exclusions from the RCRA regulations. You must make this determination whether you are doing the recycling, or you are sending the material to another party for recycling. EPA’s sham recycling rule applies to any recycling for the purpose of exclusion or exemption from the RCRA regulations. 40 CFR §260.43(a).

### **I have been recycling a secondary material stream for years. Will I need to re-evaluate this recycling for legitimacy?**

If EPA or a state agency previously determined recycling to be legitimate, its status should not change and the agency is unlikely to revisit its past determination. 80 Fed. Reg. 1753 (Jan. 13, 2015). In addition, if the recycling is “closed loop” recycling, or if the recycled product is known to meet commodity standards, a re-evaluation may be unnecessary. EPA has stated that most current recycling under existing exclusions is legitimate, and that the vast majority of recyclers will not need to take actions to show that their recycling meets the legitimacy factors. 80 Fed. Reg. 1722, 1765 (Jan. 13, 2015). But EPA continues to stress that it expects anyone relying on a recycling exclusion or exemption to do so legitimately.

## What requirements must be met to show that recycling is legitimate?

Recycling must meet four legitimacy factors under the sham recycling rule. Here is a brief paraphrased summary of the legitimacy factors:

- (1) The hazardous secondary material must provide a “useful contribution” to the recycling process or to the recycled product. It does this if it:
  - (i) contributes valuable ingredients;
  - (ii) replaces a catalyst or carriers;
  - (iii) is the source of a valuable constituent recovered in the recycling process;
  - (iv) is recovered or regenerated by the recycling process; or
  - (v) is used as an effective substitute for a commercial product.
- (2) The recycling process must produce a valuable product or intermediate that is sold to a third party, or used by the recycler or the generator as an effective substitute for a commercial product or as an ingredient or intermediate in an industrial process.
- (3) The generator and recycler must manage the material as a valuable commodity. If there is an analogous raw material, the hazardous secondary material must be managed consistently or in an equally protective manner as the raw material. If there is no analogous raw material, the hazardous secondary material must be contained.
- (4) The product of the recycling process must be comparable to a legitimate product or intermediate, or the recycler must assess, document, and certify the legitimacy of the recycling.

## How would I show that the product of the recycling process is comparable to a legitimate product or intermediate (legitimacy factor 4)?

Comparing the recycled product to a legitimate product requires determining whether or not there is an analogous legitimate product, and on evaluating any hazardous characteristics or hazardous constituents of the recycled product. Hazardous characteristics are the characteristics of ignitability, reactivity, corrosivity, or toxicity that cause a solid waste to be RCRA-regulated as a hazardous waste. Hazardous constituents are chemical contaminants listed in Appendix VIII to 40 CFR Part 261.

- If there is an analogous product or intermediate, the recycled product is comparable if (a) it does not exhibit a hazardous characteristic not exhibited by the analogous product, and (b) it does not contain higher levels of hazardous constituents than the analogous product, or it meets widely recognized commodity standards and specifications that address those constituents.
- If there is no analogous product or intermediate, the recycled product is comparable to a legitimate product if (a) it meets widely recognized commodity standards and specifications; or (b) it is “closed loop recycled” – that is, returned to the original process from which it was generated to be reused.

## **If the recycled product contains hazardous constituents, but is not comparable to a legitimate product or intermediate, could the recycling still be legitimate?**

To make the legitimacy determination under these circumstances, the recycler would need to:

- Conduct an assessment and prepare documentation showing legitimacy.
- Demonstrate “lack of exposure from toxics in the product, lack or bioavailability of toxics in the product, or other relevant considerations which show that the recycled product does not contain levels of hazardous constituents that pose a significant human health or environmental risk.”
- Certify that the recycling is legitimate.
- Notify EPA of the recycling activity using Form 8700-12.
- Retain the documentation on site for three years after the recycling ceases.
- 40 CFR §260.43(a)(4)(iii). Note that preparation of this documentation by the recycler does not guarantee that EPA would not disagree with the demonstration and pursue enforcement against the generator or the recycler on the grounds that the recycling was not legitimate.

## **Am I required to analyze the secondary material I generate for the presence of hazardous constituents?**

No, because the legitimacy factors are based on comparing the recycled product to a comparable legitimate product. However, EPA will allow the recycler to compare the hazardous constituents in a hazardous secondary material feedstock to those in an analogous raw material feedstock, on the assumption that if the feedstocks are comparable, the recycled product will not contain excess hazardous constituents. 80 Fed. Reg. 1726 (Jan. 13, 2015).

## **Is written documentation of the legitimacy of recycling required?**

Documentation of the legitimacy determination is required under two circumstances:

- If you are the generator of a hazardous secondary material, and it is reclaimed under your control, then you must maintain documentation of your legitimacy determination on-site. This documentation must describe how the recycling meets each of the four legitimacy factors. 40 CFR §261.4(a)(23)(ii)(E).
- As discussed above, documentation of legitimacy must be prepared by the recycler if the product of the recycling process has levels of hazardous constituents that are not comparable to a legitimate product or intermediate.

## **What will happen if the court tosses out the new sham recycling rule?**

If the court were to vacate EPA’s 2015 amendment of the sham recycling rule, then the pre amendment 2008 version of the rule would likely be in force. The 2008 version includes consideration of whether the product of the recycling process contains hazardous constituents at levels higher than those in analogous products, but this factor is not mandatory. In determining whether recycling is legitimate, the generator can consider “protectiveness of the storage methods, exposure from toxics in the product, the bioavailability of the toxics in the product, and other relevant considerations.” 73 Fed. Reg. 64759-60. Under the 2008 version, however, a generator might still be at risk of EPA enforcement if the recycled product contained “toxics along for the ride.” A manufacturer would need to know if the recycled material contains hazardous constituents, and if so, must be prepared to defend the legitimacy of the recycling process.