



**SWM-HW-P-0X-TEMPORARY ENFORCEMENT MORATORIUM-1021117**

**DISCLAIMER:** This document is policy only and does not create legal rights or obligations. It is intended to provide the Division of Solid Waste Management’s staff guidance on how to apply decisions, procedures and practices pertaining to the internal operation or actions of the Division. Decisions affecting the public, including the regulated community, in any particular case will be made applying applicable laws and regulations to the specific facts.

**Effective Date: 10/21/17**

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**Purpose:**

On January 13, 2015, the Environmental Protection Agency (EPA) promulgated a final rule governing when certain hazardous secondary materials qualify as “discarded” and hence are subject to the agency’s regulatory authority. Environmental and Industry Petitioners petitioned for review of that rule, arguing that certain aspects of that rule are unlawful, arbitrary, and capricious.

On July 7, 2017, the United States Court of Appeals, District of Columbia Circuit, issued an opinion and order which upheld in part and vacated in part the challenged agency rule. The court ruled that Factor 4 of the “legitimacy test” is vacated insofar as it applies to all hazardous secondary materials via § 261.2(g) (sham recycling definition) and vacated parts of the Verified Recycler Exclusion.

The Underground Storage Tanks and Solid Waste Disposal Control Board promulgated rules that include provisions similar to the federal provisions that, once the Court’s order is final, will be vacated. The Board’s Rule will become effective on October 21, 2017.

**POLICY:**

Staff are directed to apply subpart (5)(d)1(iv) of Rule 0400-12-01-.01, the state equivalent to EPA’s Factor 4 of the legitimacy test, on a case-by-case basis, in a manner consistent with the July 7, 2017 opinion and order of the United States Court of Appeals and any final clarifications issued by this Court. Staff are also directed to not issue Certificates to Operate, in accordance with subparagraph (4)(b) of Rule 0400-12-01-.01. When the EPA issues new rules in response to this opinion and order the Department will initiate a conforming rulemaking. Upon this conforming rulemaking becoming effective this Moratorium will be revoked.

Revision History

Revision Number	Date	Brief Summary of Change
0	10/21/17	Original document