

## **2018 Definition of Solid Waste Final Rule Frequent Questions<sup>1</sup> DRAFT – June 5, 2018**

### **Overview of the 2018 DSW Vacatur Response Final Rule**

#### **1. What is the 2015 DSW rule, and what specific regulatory changes to this rule did the court vacatur order?**

The 2015 Definition of Solid Waste (DSW) rule included several changes to the hazardous waste regulations that concern how the recycling of hazardous secondary materials is regulated. This 2015 rule revised a 2008 version of the regulations, adding conditions to the recycling exclusions and making several provisions more stringent. On July 7, 2017 and March 6, 2018, the United States Court of Appeals for the District of Columbia Circuit issued opinions that vacated several provisions of the 2015 DSW rule and reinstated the corresponding provisions from the 2008 DSW rule.

Specifically, the court (1) vacated the 2015 verified recycler exclusion for hazardous waste that is recycled off-site (except for certain provisions); (2) reinstated the transfer-based exclusion from the 2008 rule to replace the now-vacated 2015 verified recycler exclusion; (3) upheld the 2015 containment and emergency preparedness provisions and the eligibility of spent petroleum catalysts for the reinstated transfer-based exclusion; (4) vacated factor 4 of the 2015 definition of legitimate recycling in its entirety; and (5) reinstated the 2008 version of factor 4 to replace the now-vacated 2015 version of factor 4.

As a result, on May 30, 2018 EPA issued a final rule that implemented the court's decision.<sup>2</sup> As explained below, the resulting regulatory requirements include some elements of the 2008 DSW rule and some elements of the 2015 DSW rule.

#### **2. What is the impact of the vacatur in states that have already adopted the 2015 DSW rule?**

Because no state rules were challenged in the litigation, the court decision does not directly affect any state regulations. However, the vacatur does have an impact on state authorization. Specifically, for states that have already adopted the 2015 DSW rules, the vacatur and subsequent reinstatement of various provisions of the 2008 federal rules results in state provisions that are

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<sup>1</sup> This document is meant for public information purposes only. It describes law but does not substitute for the actual laws themselves. All persons subject to the laws mentioned in this document are advised to consult legal counsel if they have any concerns about compliance with laws mentioned in the document.

<sup>2</sup> 83 FR 34664, May 30, 2018. <https://www.federalregister.gov/documents/2018/05/30/2018-11578/response-to-vacatur-of-certain-provisions-of-the-definition-of-solid-waste-rule>

broader in scope for the purposes of state authorization than the federal program. Under RCRA section 3009, states may impose standards that are broader in scope or more stringent than the federal program. Therefore, should states choose to keep the 2015 DSW rules as part of their state programs, they may do so, with the understanding that their program would be broader in scope than the federal program for those provisions that have been vacated.

## **Definition of Legitimate Recycling**

### **3. What changed in the definition of legitimate recycling, and what stayed the same?**

Under the court decision, the only aspect of the definition of legitimate recycling under 40 CFR 260.43 that changed from the 2015 DSW rule was Factor 4, which sought to ensure that the product of recycling was comparable to a legitimate product in terms of hazardous constituent levels. This factor is sometimes referred to as the “toxics along for the ride” factor. The net result of the court decision is as follows: (1) the 2015 revision making the legitimacy factors applicable to all exclusions remains unchanged; (2) Factor 3 remains mandatory per the 2015 changes; (3) the 2015 version of Factor 4 is vacated in its entirety; and (4) the 2008 version of Factor 4 (which requires that the factor be “considered”) replaces the now-vacated 2015 version. The full text of the reinstated Factor 4 is below:

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**40 CFR 260.43(b)** The following factor must be considered in making a determination as to the overall legitimacy of a specific recycling activity.

(1) The product of the recycling process does not:

- (i) contain significant concentrations of any hazardous constituents found in appendix VIII of part 261 that are not found in analogous products; or
- (ii) contain concentrations of hazardous constituents found in appendix VIII of part 261 at levels that are significantly elevated from those found in analogous products, or
- (iii) exhibit a hazardous characteristic (as defined in part 261 subpart C) that analogous products do not exhibit.

(2) In making a determination that a hazardous secondary material is legitimately recycled, persons must evaluate all factors and consider legitimacy as a whole. If, after careful evaluation of these considerations, the factor in this paragraph is not met, then this fact may be an indication that the material is not legitimately recycled. However, the factor in this paragraph does not have to be met for the recycling to be considered legitimate. In evaluating the extent to which this factor is met and in determining whether a process that does not meet this factor is still legitimate, persons can consider exposure from toxics in the product, the bioavailability of the toxics in the product and other relevant considerations.

See chart below for a general summary and analysis of the 2008, 2015 and 2018 definition of legitimate recycling in 40 CFR 260.43.

	2008 Legitimacy Definition	2015 Legitimacy Definition	2018 Legitimacy Definition
<b>Applicability</b>	Only the 2008 DSW exclusions	All recycling under RCRA	All recycling under RCRA
<b>Factor 1 (useful contribution)</b>	Must be met	Must be met	Must be met
<b>Factor 2 (valuable product)</b>	Must be met	Must be met	Must be met
<b>Factor 3 (managed as a valuable commodity)</b>	Must be considered	Must be met	Must be met
<b>Factor 4 (no toxics)</b>	Must be considered	Must be met, with	Must be considered

along for the ride)		exception process	
Documentation	None	Documentation and notification when factor 4 is not met but recycling is still legitimate	None

**4. Is documentation of legitimacy a requirement of the regulations?**

Documentation of legitimacy is not a requirement under the definition of legitimate recycling per 40 CFR 260.43.

However, the requirement to document legitimacy as part of the generator controlled exclusion per 40 CFR 261.4(a)(23)(ii)(E) remains in place (with conforming changes to reflect the fact that factors 1-3 are mandatory and factor 4 must be considered). In addition, the reinstated transfer-based exclusion requires that generators who send their hazardous secondary materials to facilities without a RCRA permit document that reasonable efforts were made to ensure that the hazardous secondary materials would be recycled legitimately, and otherwise managed in a manner that is protective of human health and the environment, and that such efforts were based on current and accurate information. See 40 CFR 261.4(a)(24)(v)(B) and (C)

**Replacement of Verified Recycler Exclusion with Hybrid Transfer-Based Exclusion**

**5. How does the 2018 hybrid transfer-based exclusion differ from the 2015 verified recycler exclusion and the 2008 transfer-based exclusion?**

In promulgating the 2015 verified recycler exclusion EPA made four key changes to the language of the 2008 transfer-based exclusion: (1) removed a prohibition that had made certain spent petroleum catalysts (hazardous waste codes K171 and K172) ineligible for the new recycling exclusions (i.e., these materials became eligible under the 2015 exclusion); (2) added a specific “contained” standard for the management of the materials prior to being recycled; (3) added emergency preparedness and response requirements; and (4) replaced a requirement for generators to make a “reasonable effort” to audit the recycling facility prior to sending their material to be recycled with a requirement that the recycling facility obtain a variance from the regulations prior to accepting the recyclable materials.

In its decisions vacating the 2015 verified recycler exclusion and ordering the reinstatement of the 2008 transfer-based exclusion, the court found that the first three provisions listed above would not be affected by the vacatur. Instead, these provisions were retained in the reinstated transfer-

based exclusion found in the revised version of 40 CFR 261.4(a)(24). In addition, the export requirements for the transfer-based exclusion found at 40 CFR 261.4(a)(25) were also reinstated.

As a practical matter, this means the requirements of the 2018 hybrid transfer-based exclusion are the same as the 2015 verified recycler exclusion, except (1) instead of requiring reclamation facilities without RCRA permits to obtain a variance, the 2018 transfer-based exclusion requires generators to perform a “reasonable efforts” environmental audit of the unpermitted recycling facility every three years, and (2) hazardous secondary materials can be exported, provided the requirements of 40 CFR 261.4(a)(25), including obtaining notice and consent and filing annual reports, are met.

See chart below for a general summary of the changes.

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	2008 Transfer-Based Exclusion	2015 Verified Recycler Exclusion	2018 Hybrid Transfer-Based Exclusion
Emergency response Requirements	No	Yes	Yes
Contained Standard	In preamble	Codified	Codified
Spent Petroleum Catalysts	Not eligible	Eligible	Eligible
Intermediate and Reclamation Facilities	Must either be RCRA permitted or must pass a “reasonable efforts” environmental audit by the generator	Must either be RCRA permitted or must obtain a “verified recycler variance”	Must either be RCRA permitted or must pass a “reasonable efforts” environmental audit by the generator
Exports	Eligible with notice and consent per 40 CFR 261.4(a)(25)	Not eligible	Eligible with notice and consent per 40 CFR 261.4(a)(25)

Note: All other requirements for the exclusion at 40 CFR 261.4(a)(24) are the same in 2008, 2015 and 2018.

**6. I am currently operating under the verified recycler exclusion. May I continue to do so?**

Yes, if your facility is in compliance with the requirements of the 2015 verified recycler exclusion, it would also be in compliance with the hybrid transfer-based exclusion and therefore the hazardous secondary materials would continue to be excluded from the definition of solid waste under the new requirements.

**7. Do I need to re-notify under the 2018 hybrid transfer-based exclusion if I have already notified under the 2015 verified recycler exclusion?**

No, if you have already submitted a notification for the verified recycler exclusion under 40 CFR 260.42, you are considered to have met the requirement for notification for the hybrid transfer-based exclusion and do not need to re-notify until the normal two-year re-notification timeframe is reached (March 1 of every even numbered year).

**8. How do I notify that I will be managing my hazardous secondary material under the hybrid transfer-based exclusion?**

If you wish to submit a notification that you will be managing hazardous secondary material under the hybrid transfer-based exclusion, you must fill out the current Subtitle C Site Identification form (EPA form 8700-12), using the following steps:

**STEP 1:** Under “Reason for Submittal,” check the box as follows:

- If this is the first time the facility has ever submitted a Site ID form, check the box marked “To provide initial Notification...”
- If this is NOT the first time the facility has submitted a Site ID form, check the box marked “To provide Subsequent Notification...”

**STEP 2:** Complete the Site ID form as applicable for your facility.

**STEP 3:** When you reach the Addendum to the Site ID Form: Notification of Hazardous Secondary Material Activity, complete the Addendum as applicable. However, when completing the Table in Item 2, select from the list of facility codes below that apply to the hybrid transfer-based exclusion rather than using the list in the current Site ID instructions that apply to the verified recycler exclusion.

<b>Transfer-Based Exclusion (40 CFR 261.4(a)(24) and (a)(25))</b>	
<b>Code</b>	<b>Facility Code Description</b>
<b>06</b>	<b>HSM Generator transferring HSM off-site to a reclamation facility:</b> This code applies if you generate and send hazardous secondary material for reclamation to an off-site reclamation facility.
<b>07</b>	<b>Reclaimer receiving HSM from off-site:</b> This code applies if you reclaim hazardous secondary material received from an off-site hazardous secondary material generator or other facility and you certify that you have financial assurance per 40 CFR 260.42.
<b>08</b>	<b>Intermediate facility receiving HSM from off-site:</b> This code applies if you receive hazardous secondary material from an off-site hazardous secondary material generator or another facility and you store it for more than ten days and you certify that you have financial assurance per 40 CFR 260.42. This code does not apply if you generate or reclaim the hazardous secondary material.
<b>09</b>	<b>HSM Generator exporting HSM to a foreign entity for recycling:</b> This code applies if you generate and plan to send hazardous secondary material for reclamation to a foreign entity for reclamation and will meet the notice and consent procedures in 40 CFR 261.4(a)(25).
<b>10</b>	<b>HSM Generator importing HSM from a foreign entity to send to recycling:</b> This code applies if you import hazardous secondary material from a foreign entity and send the material to a reclamation facility.
<b>11</b>	<b>HSM Generator <u>AND</u> Reclaimer of imported HSM:</b> This code applies if you import hazardous secondary material from a foreign entity and reclaim the material at your facility.

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## Imports, Exports and Interstate Transport

### **8. Can I import hazardous secondary materials and manage the materials under the final rule exclusions?**

Yes. You may import hazardous secondary materials and manage the materials domestically under one or more of the final rule exclusions. As an importer, you assume the responsibilities of a generator of the hazardous secondary materials and thus must manage the materials according to the generator-specific conditions of the applicable exclusion(s) used.

### **9. Can I export hazardous secondary materials under any of the DSW exclusions?**

Yes. While exports of hazardous secondary materials are not allowed under the generator-controlled or remanufacturing exclusions, you may export under the 2018 hybrid transfer-based exclusion provided the requirements of 40 CFR 261.4(a)(25) are met, including (1) notifying EPA of an intent to export at least sixty days prior to the initial shipment, (2) receiving an Acknowledgement of Consent from EPA signifying the country of import has consented to the shipments (3) re-notifying EPA in the event of certain changes in the original notification, and (4) filing an annual report summarizing the types, quantities, frequency and ultimate destination of all hazardous secondary materials exported during the previous calendar year.

### **10. How do interstate shipments work when one state has adopted an exclusion but another state has not adopted?**

In general, in order for a hazardous secondary material to remain excluded under any of the new exclusions in the final rule, the generator, reclaimer (or remanufacturer), and (in the case of the verified recycler exclusion) any intermediate facility must be located in a state that had adopted the exclusion. However, for the verified recycling exclusion, a generator may send their excluded material to a RCRA hazardous waste permitted recycling facility in a state that has not adopted the exclusion if the hazardous secondary material is managed as hazardous waste in the receiving state.

In addition, if a shipment of hazardous secondary material is just being transported through a state that has not adopted the exclusion, that transit state's hazardous waste regulations could apply once the shipment reaches the border of that state. We encourage you to contact all states through which interstate transport of your hazardous secondary materials may occur in order to ensure compliance with each state's regulations.