Sham or Legitimate?
Recycling Under The New “Definition of Solid Waste” Rules

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• The Resource Conservation and Recovery Act of 1976 (RCRA) and Michigan’s Part 111 govern disposal and recycling of hazardous wastes.

• Waste = “discarded materials.”

• “Discarded materials” include those that are “recycled.”
Background: Reuse and Recycling (Old)

- Excluded scrap metal.
- Coproducts / manufacturing process unit.
- Reclaimed and beneficially reused (e.g. distilled solvent).
- Reuse without reclamation (used as ingredients, effective substitutes for commercial products) (e.g., solvent ingredient).
- Three closed loop exemptions.
Background: Reuse and Recycling (New)

- Generator controlled recycling (on-site, same company, toll manufacturing recycling).
- Verified recycler exclusion (recyclers have a permit or variance).
- Manufacturing exclusion (higher value solvents).
Background: Reuse and Recycling (New)

General requirements:
• Notification.
• Containment.
• Records / documentation.
• Speculative accumulation.
• Emergency preparedness.
Background: Legitimate Recycling

• Legitimate Recycling:
  - All recycling must qualify as “legitimate recycling” to be exempt.
  - This has generally always been the case, but now the rules are codified.
  - Attempt to address perverse economic incentives that can result in over-accumulation, mismanagement and sham recycling.
Recycling: Legitimate or Sham?

**Legitimate:** Lead-contaminated foundry sands reused in foundry molds

**Sham:** Lead-contaminated foundry sands reused as playground sand

Source: U.S. EPA, *Overview of the 2015 Definition of Solid Waste Rule*
Legitimate Recycling: Regulations

- EPA updated its legitimate recycling regulations in its Definition of Solid Waste rule, effective July 13, 2015.
- The legitimate recycling provision is codified at 40 CFR 260.43.
  - Applicable to all hazardous secondary material and hazardous waste recycling.
  - Applies all four legitimacy factors.
Legitimate Recycling: Requirements

- Four requirements must be met to qualify as legitimate:
  - **Factor 1:** Hazardous secondary materials must provide a useful contribution to the recycling process or to a product or intermediate.
  - **Factor 2:** Recycling must produce a valuable product or intermediate.
  - **Factor 3:** Hazardous secondary materials must be managed as valuable commodities.
  - **Factor 4:** Products of recycling must be comparable to legitimate products or intermediates.
Factor 1: Useful Contribution

- Materials must provide a useful contribution to the recycling process or to a product or intermediate:
  - Contributes valuable ingredients.
  - Replaces a catalyst or carrier in the recycling process.
  - Is a source of a valuable constituent recovered.
  - Is recovered or regenerated. OR
  - Is used as an effective substitute for a commercial product.
Factor 1: Useful Contribution

- The hazardous constituent does not have to be what is being recycled.
  - However, recycler is responsible for proper management of any hazardous residuals.

- If two or more hazardous secondary materials are blended together prior to recycling, both must provide a useful contribution and contribute to the final product or to the process.
Factor 2: Valuable Product

- Recycling must produce a valuable product or intermediate.
  - Sold to a third party. **OR**
  - Used by the recycler or generator as an effective substitute for a commercial product or as an ingredient or intermediate in an industrial process.

- A product can be a valuable intermediate if it is used in the process even if it has no value on the open market.
  - BUT product must have a real use in the process.
Factor 3: Valuable Commodities

- Factor 3: Materials must be managed as valuable commodities.

- Materials are managed as valuable commodities if:
  - Where there is an analogous raw material, the material is managed consistently or in an equally protective manner. **OR**
  - Where there is no analogous raw material, the material is “contained.”

- If the hazardous secondary material is replacing a material that it resembles, it should be managed in the same way or in a way that is equally likely to prevent a release.
Factor 4: Comparable to Legitimate Products

• Factor 4: Products of recycling must be comparable to legitimate products or intermediates.

• This determination depends on:
  1. Whether or not the product of the recycling process has an analogous legitimate product.
  2. Evaluating any hazardous characteristics or hazardous constituents of the recycled product.
Factor 4: Comparable to Legitimate Products

• If there **IS** an analogous product or intermediate, recycled product is comparable if:
  1. It does not exhibit a hazardous characteristic not exhibited by the analogous product. **AND**
  2. It does not contain higher levels of hazardous constituents than the analogous product, or it meets widely recognized commodity standards and specifications.
Factor 4: Comparable to Legitimate Products

• If there is NO analogous product or intermediate, recycled product is comparable to a legitimate product if:

  1. The product meets widely-recognized commodity standards and specifications. OR

  2. The secondary material is fed back into the original process from which it was generated to be reused.
Factor 4: Comparable to Legitimate Products

- A product from recycling could have a higher level of hazardous constituents than an analogous product, but still be considered to be comparable to a legitimate product.
  - The recycling may still be legitimate due to the lack of exposure from toxics in the product, or the lack of the bioavailability of toxics in the product.

- In those cases, the generator must:
  1. Document why the recycling is still legitimate.
  2. Notify EPA or the state.
Application: Who must consider EPA’s Legitimate Recycling Rules?

- EPA’s legitimate (and sham) recycling rules apply to any recycling for the purpose of exclusion or exemption from the RCRA regulations.
- Facility must make this determination whether it is doing the recycling itself or is sending the material to another party for recycling.
Application: Is written documentation of the legitimacy of recycling required?

- Documentation of legitimacy determination is required if:
  - Facility conducting reclamation under the control of the generator.
  - Narrative description.
  - All four factors.
  - The product of the recycling process has levels of hazardous constituents that are not comparable to a legitimate product or intermediate (Factor 4), but recycling is nonetheless legitimate.
Application: Should existing recycling of materials be re-evaluated for legitimacy?

- EPA expects any facility relying on a recycling exclusion or exemption to do so legitimately.
- 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.
MDEQ’s Proposed Rules Regarding Legitimate Recycling

- MDEQ has proposed revisions to the administrative rules promulgated pursuant to Part 111 of the Natural Resources and Environmental Protection Act.
- Revisions incorporate EPA’s 2015 amendments to the definition of solid waste.
- New proposed rule regarding legitimate recycling of hazardous secondary materials to be codified at Michigan Administrative Code Rule 299.9232.
MDEQ’s proposed provisions regarding legitimate recycling (MI Admin Code R 299.9232) are nearly identical to EPA’s legitimate recycling regulation (40 CFR 260.43).
Thank you!

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