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

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# Background: Waste

- 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.

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# 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.

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# 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.

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# 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 Rules Regarding Legitimate Recycling

- 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).



# Questions & Answers

## Thank you!

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