

A Better Partnership®



Recycling Opportunities and Risk Factors

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Recycling in Michigan

Management of nonhazardous wastes and by-products is addressed by Part 115 of NREPA (Solid Waste Management) and a number of waste-specific statutes, including:

- Part 121, Liquid Industrial By-Products
- Part 167, Used Oil Recycling
- Part 169, Scrap Tires
- Part 171, Battery Disposal
- Part 173, Electronics



Recycling in Michigan - continued

The largest share of waste streams and by-products suitable for recycling and reuse are governed by Part 115.

Public Act 178 of 2014: Beneficial Reuse Amendments

- Amended Part 115 to facilitate reuse of certain low-toxicity industrial by-products for designated purposes.
- Allows the MDEQ to approve materials and uses not specified in the statute.



Recycling in Michigan - continued

The beneficial reuse provisions of Part 115 identify five uses, and match specific categories of materials to those uses:

- Beneficial Use 1: by-products used as aggregate, road material, or building material when bonded or encapsulated by cement, limes, or asphalt.
- Beneficial Use 2: by-products used as construction fill at non-residential property or beneath or along roadways.
- Beneficial Use 3: by-products used as soil amendments or that are land applied for agronomic purposes.
- Beneficial Use 4: by-products used to treat waste or wastewater or for use in response activity, corrective action, or landfill construction.
- Beneficial Use 5: by-products blended with other materials to manufacture soil.



Recycling in Michigan - continued

Specifically identified “beneficial use by-products” include:

- Coal bottom ash
- Wood ash
- Pulp and paper mill ash
- Cement kiln dust
- Lime kiln dust
- Stamp sands
- Foundry sand (ferrous or aluminum)
- Pulp and paper mill material
- Spent sandblasting media
- Dewatered concrete grinding slurry
- Lime water residuals
- Soil washed from sugar beets
- Segregated flue gas desulfurization material



Recycling in Michigan - continued

- Section 53 of Part 115 allows the MDEQ to approve petitions to permit reuse of by-products and uses in addition to those specified.
- Beneficial use by-products are excluded from the definition of “solid waste.”



Recycling in Michigan - continued

- Beneficial reuse is subject to numerous additional requirements, including:
 - Material cannot be stored at site of generation for more than 3 years.
 - 3-year turnover must be at least 75%.
 - Material must be stored to control wind dispersal and prevent loss beyond storage area.
 - Use must be for a legitimate beneficial purpose, not as a means to discard.
 - For certain uses, material must meet specified chemical parameters and management requirements.
 - See Section 51 of Part 115.



Recycling in Michigan - continued

- Act 178 also included key amendments to the Part 201 definitions of “facility” and “release.”
 - Application of beneficial use by-products in accordance with Part 115 is not a “release,” and property does not become a “facility” as the result of such beneficial reuse.
- Other relevant provisions of Part 115:
 - New definition of “source-separated material” excludes waste streams from regulation as solid waste, subject to controls and restrictions.



Recycling in Michigan - continued

- › Exclusions are definition-intensive and complex.
- › Source-separated material includes materials and uses approved by the MDEQ under the beneficial reuse program.
- Section 53 authorizes the MDEQ to approve other materials and uses as a beneficial use by-product, source-separated material, inert material, or low-hazard industrial waste.
 - › MDEQ can impose additional conditions on the use of material.



CERCLA and Intent

CERCLA

- Imposes strict cleanup liability on a person who arranges for disposal of hazardous substances.
- In *Burlington Northern and Santa Fe Railway Co. v. United States*, the Supreme Court held that an entity must take “intentional steps to dispose of a hazardous substance” in order to be found liable as a CERCLA “arranger.”
 - The party at issue, Shell Oil, was aware of regular spillage and leakage of its product.
 - The Court found that an entity’s knowledge is insufficient, by itself, to establish intent to dispose.



CERCLA and Intent - continued

- Prior to *Burlington Northern*, an entity could be a liable arranger even if it did not intend to dispose.
- Circuit courts adjudicating arranger liability since *Burlington Northern* have imposed the element of intent.
 - 7 of 11 federal circuits have published opinions interpreting and applying the *Burlington Northern* intent standard.
 - First Circuit found intent to dispose where General Electric sold off-spec “scrap” Pyranol to a manufacturer whose property became contaminated by releases of the material.
 - › Court must ascertain a party’s intent through a “fact-intensive inquiry.”



CERCLA and Intent - continued

- Comparable state cleanup statutes are not governed by *Burlington Northern*. The Montana Supreme Court and the Washington Court of Appeals have expressly declined to follow *Burlington Northern* in construing their respective states' cleanup statutes.
- For a summary of relevant cases, see https://files.wnj.com/HUBBARSD/Burlington_Northern_summary.pdf
Link expires December 9, 2016.

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Questions & Answers

Thank you!

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