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RCRA Developments – What's Hot, What's Simmering?

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ABSTRACT

EPA's efforts to regulate certain types of wastes as hazardous wastes -- some decades in the making -- are starting to see the light of day. Ranging from "very hot" to "simmering," a number of EPA's rules under the Resource Conservation and Recovery Act (RCRA) were finalized in 2013, and others are anticipated to resolve in 2014. For most of the rules, the journey has been mired by hundreds of thousands of comments, changes in administrations, insufficient funding at EPA, and fierce litigation. This paper highlights the most significant regulatory initiatives under RCRA that have travelled or are travelling the long and winding road to become final regulations.

What's Hot?

1. Hazardous Waste Goes Electronic – EPA Final Rule Issued Jan. 13, 2014

On October 5, 2012, President Obama signed into law the Hazardous Waste Electronic Manifest Establishment Act[1] which authorizes EPA to implement a national electronic manifest system, commonly referred to as the "e-Manifest." This national system will facilitate the electronic transmission of the hazardous waste manifest form and make the use of the manifests much more cost-effective and convenient for users. EPA estimates the total cost of the current paper system is $200-$500 million per year. Estimated savings from phasing out the antiquated paper manifest system and moving to an electronic platform are likely to exceed $75 million per year.

EPA is developing two rules to implement the Act. The first rule[2] addresses the use of electronic manifests, and was published in the Federal Register on February 7, 2014. It becomes effective on August 6, 2014. The second rule will establish the e-Manifest system, and the initial fee structure for the use of e-Manifest. However, EPA anticipates the implementation and compliance date for the second rule will be delayed until the e-Manifest system is up and running, and a fee schedule for manifest-related services has been announced.

The good news for generators, transporters, and disposal facilities is that e-manifests will be deemed to be the legal equivalent of paper manifests. Users may, however, opt out of the

[1] http://beta.congress.gov/bill/112th-congress/senate-bill/710/text
[2] http://www.gpo.gov/fdsys/pkg/FR-2014-02-07/pdf/2014-01352.pdf

electronic system, and continue to use hard copy manifests instead. In such cases, EPA will still accept paper manifests, but will process the data from those manifests so that they are included in the e-Manifest system. EPA will also be evaluating the fee structure for e-Manifests to ensure it can recover costs of processing both electronic and paper manifests. EPA is signaling its strong preference for generators, transporters, and disposal facilities to go electronic as soon as possible.

EPA recognizes that many states regulate additional wastes as hazardous or special wastes under their state regulatory programs. Fortunately for hazardous waste generators, especially in California which regulates many types of non-RCRA hazardous wastes, the national e-Manifest system can also be used to track such state-regulated wastes. The final rule will still require authorization by the states. Electronic FAQs[3] are posted on EPA's website.

The regulated community has expressed concern that EPA will treat all data contained in individual hazardous waste manifests as public information, available to anyone online, and thus ineligible for treatment as confidential business information. This transparency may allow competitors to have insight into how other companies are creating their products. However, it is anticipated that manifests will not be publically available on-line until after 90 days after submittal when they are considered to be a "complete and final document." This 90-day blackout period is not likely to satisfy industry concerns regarding confidential business information, so challenges to this new rule are expected.

2. Coal Combustion Residual Rules – Ready by December 2014?

Coal combustion residuals (CCRs) made front page news in December 2008 when the Tennessee Valley Authority's (TVA's) coal ash impoundment, holding approximately 1 billion gallons of coal ash slurry, discharged into the Emory River and the nearby town. CCRs are still making front page news with the recent release of approximately 82,000 tons of CCRs into the Dan River in North Carolina from a retired power plant in January 2014. The impact on human health and the environment from such incidents can be tremendous, and the long and winding road to a better regulatory solution for management may now be in sight.

CCRs, frequently referred to as coal ash, are the materials that remain after coal has been burned in power plants for electricity, and can include wastes such as fly ash, bottom ash, boiler slag, flue gas, and desulfurized gypsum. These residual materials typically contain a broad range of metals, including arsenic, chromium, lead, mercury, selenium, and cadmium. CCRs are one of the largest waste streams generated in the United States. EPA estimates that over 70 million tons of coal ash are disposed of annually in landfills or surface impoundments, and that there are nearly 800 active coal ash impoundments in the United States, many of which have operated for decades.[4]

Regulation of CCRs dates back to the early 1980s when RCRA's "Bevill Amendment" exempted CCRs from regulation as a hazardous waste. Fast forward almost two decades when EPA, in response to the TVA spill and increasing concerns about the volume of stored CCRs, proposed regulations[5] in June 2010 offering two possible alternatives for the management of CCRs, both to be regulated by RCRA. The first alternative would reverse the Bevill Amendments and categorize CCRs as a "special waste" subject to regulation under Subtitle C.

[3] http://www.epa.gov/osw/hazard/transportation/manifest/e-man-faqs.htm#ga5
[4] http://www.epa.gov/osw/nonhaz/industrial/special/fossil/coalashletter.htm
[5] http://www.regulations.gov/#!documentDetail;D=EPA-HQ-RCRA-2009-0640-0352

The alternative proposal would regulate CCRs under Subtitle D of RCRA which regulates solid, non-hazardous wastes. EPA also introduced a "Subtitle D prime" option where existing surface impoundments would not have to close or install composite liners, and could continue to operate for their useful life, but would remain subject to the other elements in the subtitle D option. EPA received over 450,000 comments on the proposed regulations, but has not moved ahead with finalizing the rule.

In April 2012, eleven environmental groups brought a RCRA citizen suit - *Appalachian Voices et al. v. Jackson* - alleging EPA had failed to review and revise the 2010 proposed regulations. The Plaintiffs asserted three claims for relief based on EPA's failure to complete the required review of the regulations. On October 29, 2013, the DC District Court, in its Memorandum Opinion,[6] concurred with Plaintiffs' position that EPA had failed to conduct the required review of its waste regulations under RCRA every three years. The Court then ordered EPA to provide the court with a schedule for EPA's compliance by December 29, 2014. The parties subsequently agreed to settle the *Appalachian Voices* case whereby EPA would finalize the pending Subtitle D coal ash regulations by December 19, 2014, pursuant to a Consent Decree.[7] However, as of the date of this paper, the Judge had not yet approved and executed the Consent Decree.

Parallel efforts to regulate CCRs are underway on Capitol Hill with the introduction of HR 2218, the Coal Residuals Reuse and Management Act of 2013.[8] The Bill passed the House in a 265-155 vote in July 2013. It would place primary regulatory oversight of CCRs with the states and not EPA. Among other things, supporters of HR 2218 assert the legislation will provide more jobs, encourage recovery and beneficial uses of CCRs, allowing states to create and implement their own programs, with limited oversight by EPA. As of the date of this paper, the Senate had not voted on the Bill. Prior efforts to legislate on this issue in 2011 and 2012 were unsuccessful (*e.g.*, H.R. 3409, S. 1751, and H.R. 2273).

Recent developments suggest EPA may be embracing the management of CCRs for beneficial use. In February 2014, EPA released a paper entitled "Coal Combustion Residual Beneficial Use Evaluation: Fly Ash Concrete and FGD Gypsum Wallboard."[9] EPA reported that "based on the conclusion of the analysis in this document stated above, and the available environmental and economic benefits, EPA supports the beneficial use of coal fly ash in concrete and FGD gypsum in wallboard. The Agency believes that these beneficial uses provide significant opportunities to advance Sustainable Materials Management."[10]

3. Carbon Capture & Hazardous Waste – Final Rule Published Jan. 3, 2014

In response to President Obama's Interagency Task Force on Carbon Capture and Storage, EPA proposed a rule on August 8, 2011 that would conditionally exclude from the definition of hazardous waste certain carbon dioxide (CO_2) streams that are injected into Underground Injection Control (UIC) Class VI wells for purposes of geologic sequestration (GS). A swift regulatory effort - two and a half years in the making – led to EPA's publication of the final Rule[11] on January 3, 2014.

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[6] http://earthjustice.org/sites/default/files/files/Memorandum_10-29-13.pdf
[7] http://www.recyclingfirst.org/pdfs/124.pdf
[8] https://www.govtrack.us/congress/bills/113/hr2218
[9] http://www.epa.gov/wastes/conserve/imr/ccps/pdfs/ccr_bu_eval.pdf
[10] Id. at page 2.
[11] http://www.gpo.gov/fdsys/pkg/FR-2014-01-03/pdf/2013-31246.pdf

By way of background, GS involves the process of injecting CO_2 that is captured from industrial or energy-related sources (*e.g.*, steel and cement production plants, power plants, natural gas processing facilities), into deep subsurface rock formations for long-term storage. This process is often referred to as "carbon capture and storage" or CCS. While the underground injection of CO_2 is not new, injecting CO_2 for CSS presents greater process challenges given the much larger injection volumes of CO_2 associated with the CSS process.

In the Final Rule, EPA took the position that CO_2 streams sent to a UIC Class VI well for purposes of GS are "solid waste," despite numerous and strong comments to the contrary. EPA views these waste streams as "discarded material" from industrial and commercial operations, as they are similar to other types of wastes listed in the RCRA definition of solid waste. Regarding the issue of whether such discarded materials would be subject to regulation as a hazardous waste, EPA acknowledged that such waste would not be a "listed waste" under 40 CFR Part 261. As such, CO_2 streams could only be defined as a hazardous waste if they exhibit one or more of the hazardous waste characteristics. Although EPA doesn't anticipate CO_2 streams would meet any of the hazardous waste characteristics, EPA "could not unequivocally conclude that supercritical CO_2 streams will *never* exhibit *any* RCRA hazardous waste characteristics and commentators provided no information to the contrary." In the end, EPA took a middle-of-the-road approach and developed a conditional exclusion from RCRA, subject to the following:

i. The transportation of the CO_2 stream must be in compliance with US and state requirements, including pipeline safety laws;
ii. Injection of CO_2 must be in compliance with requirements for Class VI UIC wells;
iii. No hazardous waste shall be mixed with or otherwise co-injected with the CO_2 stream; and
iv. The generator of CO_2 that claims the exclusion must have a signed certification of compliance with the regulations.

The Final Rule also included reference to a draft guidance document[12] (which is currently available for public comment) that will provide information regarding transitioning Class II wells used to inject carbon dioxide for oil and gas development to Class VI wells used for carbon capture and sequestration. The comment period closes on March 1, 2014.

4. Hazardous Waste Enforcement in the Retail Sector -- Targeting Target and Other Big Box Stores

Headlines like "Wal-Mart Pleads Guilty to Dumping Hazardous Waste in California, Fined $81 Million" brought to light the challenges of managing everyday products that, when thrown away, would be considered hazardous waste. K-Mart was one of the earliest companies to be hit by an enforcement action in California in 2009, resulting in $8 million in penalties.

Wal-Mart was targeted twice for violations of hazardous waste handling, transport and disposal requirements – first in 2010 resulting in a fine of $27.6 million, and again in 2013 with a fine of $81 million to settle civil and criminal claims. In the 2013 enforcement action, federal

[12] http://water.epa.gov/type/groundwater/uic/class6/gsguidedoc.cfm#draftdocs

prosecutors charged Wal-Mart with numerous civil and criminal violations of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), the Federal Clean Water Act (CWA), and RCRA in California and Missouri. The alleged wrongdoing involved the improper handling of discarded products such as pesticides, solvents, detergents, paints, aerosols, cleaners, and the like, in violation of federal law. Other counts included the disposal of materials into a sanitation drain.

Other Big-Box retailers have faced similar enforcement actions in the past few years. Target paid $22.5 million to settle similar claims in 2011. In 2012, Costco paid $3.6 million to settle a lawsuit filed by 29 district attorneys alleging that the retailer failed to label and sort products with hazardous materials that customers had returned or which it had not sold. The products at issue included oven cleaners, bleach, pool chlorine, batteries, and nicotine patches. Perhaps fearing the potential for another large "Walmart" settlement, Costco settled the case two days after it was filed.

Proper disposal of waste pharmaceuticals is another hot button for EPA. In 2013, CVS Pharmacy paid a fine of $12.3 million to settle claims that the company allegedly mishandled medical, pharmaceutical and photographic waste, along with other hazardous and corrosive materials returned by customers over a seven-year period.

Retail businesses, like other waste generators, must make hazardous waste determinations for products returned to the stores by customers (referred to as "reverse distribution"), and other products that can no longer be sold in the retail market. This is challenging as hazardous waste generation rates in retail stores can vary greatly, subjecting retailers to varying status as a generator (*e.g.*, one month a small quantity generator, and the next month a large quantity generator).

To address these issues, on February 7, 2014, EPA issued a prepublication Notice of Data Availability,[13] entitled "Hazardous Waste Management and the Retail Sector: Providing and Seeking Information on the Practices to Enhance Effectiveness to the RCRA Program." EPA is inviting comments and questions about the hazardous waste practices of the retail sector with the hopes of making this regulatory program more effective and less burdensome.

Specifically EPA will be seeking input on the following topics:

- Ways to improve RCRA hazardous waste policies, guidance and regulations for retail operations
- Information about the retail universe, and the types and quantities of hazardous waste generated
- Information about episodic generation (*e.g.*, seasonal merchandise changes, recalls)
- Information about retail stores' current hazardous waste management practices
- Training programs for employees managing hazardous waste
- Information on the management of discarded aerosol cans
- Information about reverse logistics centers

Comments must be received within 60 days after the date of publication in the Federal Register. As of the date of this publication, the final Notice had not yet been published.

[13] http://www.epa.gov/waste/hazard/generation/retail.htm

5. Regulation of Pharmaceuticals Waste

Another big area of concern for EPA is the improper management of hazardous waste pharmaceuticals. In early 2014, EPA reported that it is developing a new proposal[14] to establish standards for the management and disposal of hazardous waste pharmaceuticals. The new proposal will build on EPA's proposed 2008 rule[15] to add hazardous waste pharmaceuticals to its existing Universal Waste Program[16] which currently includes items such as batteries, pesticides, mercury-containing equipment and bulbs (lamps).

The 2008 proposed rule anticipated covering pharmaceutical wastes generated by pharmacies, hospitals, physicians' offices, dentists' offices, other health care practitioners, outpatient care centers, ambulatory health care services, residential care facilities, veterinary clinics and reverse distributors. If adopted, the new rule will address notification and tracking issues, along with other hazardous waste pharmaceutical management issues. The anticipated proposed rulemaking will only pertain to those pharmaceutical wastes that meet the current definition of a RCRA hazardous waste generated by the covered facilities. Until the newly proposed rule is finalized and adopted by authorized states, healthcare facilities and other business entities that generate hazardous waste pharmaceuticals must manage these wastes in accordance with the RCRA Subtitle C generator requirements.

6. Conditional Exclusions for Solvent-Contaminated Wipes

EPA published its final rule[17] providing conditional exclusions for certain solvent-contaminated wipes under RCRA on July 31, 2013. According to EPA, the purpose of the rule is "to provide a consistent regulatory framework for solvent-contaminated wipes that is appropriate to the level of risk posed by these wipes in a way that maintains protection of human health and the environment, while reducing overall compliance costs for industry, many of which are small businesses."

Under the new rule, solvent-contaminated wipes are conditionally excluded under RCRA in two scenarios: (i) wipes cleaned for reuse, and (ii) wipes disposed of at a municipal landfill or solid waste combustor, subject to specific storage requirements. Additionally, disposable wipes contaminated with trichloroethylene will remain regulated as hazardous waste and not subject to the exclusion. The final rule became effective on January 31, 2014.

7. Non-Hazardous Secondary Materials Rule

After a long journey, EPA published its companion rules: "Standards of Performance for New Stationary Sources and Emissions Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units" (CISWI Rule) and the "Non-Hazardous Secondary Materials Rule" (NHSM Rule) on February 7, 2013.[18] While the CISWI Rule principally deals with air quality issues rather than waste, the NHSM rule is important as it identifies which materials are considered a waste, rather than a fuel, when burned in combustion units. The default

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[14] http://www.epa.gov/waste/hazard/generation/pharmaceuticals.htm
[15] http://www.gpo.gov/fdsys/pkg/FR-2008-12-02/pdf/E8-28161.pdf#page=1
[16] http://www.epa.gov/osw/hazard/wastetypes/universal/
[17] https://www.federalregister.gov/articles/2013/07/31/2013-18285/conditional-exclusions-from-solid-waste-and-hazardous-waste-for-solvent-contaminated-wipes
[18] http://www.gpo.gov/fdsys/pkg/FR-2013-02-07/pdf/2012-31632.pdf

assumption is that, unless the operator can demonstrate that the material is a legitimate fuel or ingredient, and not waste disposal, then it will be considered a regulated waste under RCRA. The NHSM Rule also includes revised definitions and codifying determinations that certain NHSMs are non-wastes when used as fuels. A recent ABA publication[19] available to members provides greater insight into the interplay between the two rules.

What's Simmering?

1. Definition of Solid Waste Rule

Entering its fourth decade of development, the Definition of Solid Waste (DSW) rule[20] may have stalled out once again. The saga started in 1980 with EPA adopting an interim final rule addressing the definition of solid waste and its associated exclusions. The initial rule left many unanswered questions regarding what materials were solid and/or hazardous waste when recycled.

Subsequent rulemakings and litigation[21] ensued over a number of years. In response to the 1980 proposed rule, EPA published another proposed rule in 1983 to address the question of which materials are solid waste when recycled. That rule was finalized in 1985. Fast forward another decade and a half, when the "Bush Rule," drafted to streamline regulation of hazardous secondary materials to encourage recycling, was finalized in 2008.

With a change in the Administration, the Obama EPA moved forward with revisions to the 2008 DSW Rule on July 22, 2011. The "Obama Rule"[22] proposed to modify EPA's 2008 DSW Rule to improve accountability and oversight of hazardous materials recycling. In the Obama Rule, the agency proposed that industry would need to meet all four criteria for determining whether recycling was legitimate and exempt from regulation:

i. The material must provide a useful contribution to the recycling process or a product;
ii. The recycling process must result in a valuable product;
iii. The material must be handled in a way that would show it is a valuable commodity; and
iv. The resulting recycled product cannot have concentrations of hazardous constituents in quantities higher than those found in similar products.

Environmentalists have generally supported the Obama Rule, while industry has expressed concerns that the rule will raise costs and discourage recycling. The comment period on the Obama Rule closed in October 2011. In late 2012, there was speculation that EPA had sent the rule to OMB for review, but there has been no movement since that time. EPA, on its website,[23] indicates the projected date for publication of the final rule in the Federal Register will be February 2014. Stay tuned.

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[19] http://www.americanbar.org/publications/trends/2012_13/march_april/epa_issues_final_revisions_to_non_hazardous_secondary_materials_rule_but_questions_remain.html
[20] http://www.epa.gov/wastes/hazard/dsw/
[21] http://www.epa.gov/wastes/hazard/dsw/rulemaking.htm
[22] http://www.regulations.gov/#!documentDetail;D=EPA-HQ-RCRA-2010-0742-0001
[23] http://yosemite.epa.gov/opei/rulegate.nsf/byRIN/2050-AG62?opendocument

2. **E-waste Recycling**

E-waste represents one of the fastest growing elements in America's solid waste streams. EPA's most recent e-waste report,[24] published in 2011, indicates that Americans discarded or recycled 142,000 computers and over 416,000 mobile devices every day, resulting in over 3.41 million tons of e-waste being generated in 2011 alone. Of this amount, only 850,000 tons or 24.9 percent was recycled, up from 19.6 percent in 2010. The other 75 percent was disposed of in landfills or burned in incinerators. EPA's major concern with the land disposal of e-waste is the risk that metals and other hazardous materials used in such products will leach into soil and groundwater.

At present, there is no federal mandate to recycle e-waste. Recent attempts to develop a federal law led to the introduction of HR 2791,[25] the "Responsible Electronics Recycling Act," or "RERA," which seeks to ban electronic recycling exports. If passed, the bill would prohibit the shipment of designated used electronics to developing countries, and enhance EPA's oversight and regulation of e-waste. Under RERA, regulated e-waste would include used computers, televisions, video game systems and telephones, which typically contain lead, cadmium, mercury, organic solvents, hexavalent chromium, and other compounds. The bill has a strong group of supporters - an active industry group, the Coalition for American Electronics Recycling (CAER), NRDC, and the Electronic TakeBack Coalition. Opposition to the bill comes from the broader scrap recycling industry which has challenged RERA. A companion Senate bill is anticipated in early 2014.

In the absence of federal legislation, half of the states have implemented mandatory electronics recovery programs.[26] Several more states are developing new laws or working to improve existing laws. With the exception of California and Utah, states are using the "Producer Responsibility" approach, where the manufacturer, and not the consumer, must pay for recycling or safe disposal of its products. The principle behind this approach is that, when manufacturers take responsibility for the recycling of their own products, they will use safer and fewer materials in the manufacturing of those products.

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[24] http://www.epa.gov/osw/conserve/materials/ecycling/docs/summarybaselinereport2011.pdf
[25] https://www.govtrack.us/congress/bills/113/hr2791#summary
[26] http://www.electronicstakeback.com/promote-good-laws/state-legislation/