

New RCRA Guidance and Checklist Issued

By

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The U.S. Environmental Protection Agency (EPA) issued important guidance under the Resource Conservation and Recovery Act (RCRA) on the regulatory status of commercial chemical products (CCP). This column explains why the guidance is important, and explains it in more detail.

Background

EPA's authority under Subtitle C of RCRA covers the management of solid and hazardous wastes, but does not cover the management of materials that are considered products. Under RCRA, the term "commercial chemical products" (CCP) generally refers to materials that would, under usual circumstances, be considered products that are not wastes, but if they are solid wastes would be considered hazardous because they are listed as hazardous waste or exhibit a characteristic of hazardous waste.

EPA issued the guidance, *Checklist to Assist in Evaluating Whether Commercial Chemical Products are Solid and Hazardous Waste under the Resource Conservation and Recovery Act*, reportedly in response to questions raised by inspectors and state agencies as to whether a material is a product that is being stored before use, or a waste that is being stored in

lieu of proper treatment and disposal. In essence, the new guidance accomplishes two important objectives.

First, the guidance reiterates that a CCP is not solid waste if it is being appropriately stored or managed for use, *legitimately* recycled, or appropriately stored or managed for legitimate reclamation. EPA notes that CCPs are not solid waste when accumulated before legitimate recycling (*i.e.*, that the speculative accumulation provision does not apply). Conversely, the guidance states that a CCP is a solid and possibly hazardous waste if it is abandoned by being accumulated or stored in lieu of being disposed, burned, or incinerated.

Second, the guidance provides a useful checklist designed to assist regulators and the regulated community in applying this *regulatory* structure to specific situations. The checklist prompts the user to obtain information that can be used to determine the regulatory status of CCPs based on observations made during an inspection. The checklist is divided into three sections. The first section focuses on whether the CCP is being managed as a valuable commodity, while the second addresses whether the CCP is being used in the production of products or in support of production operations, and the third section focuses on whether the CCP is a product and if there is a market or potential market for it.

EPA notes that checklists have “proven to be valuable tools for obtaining well-reasoned, consistent and well-documented information across different operational processes -- including RCRA facility inspections.” That said, EPA acknowledges that checklists will be

utilized differently by EPA inspectors so that there may nonetheless be regional/state differences as to the interpretation of how the checklist might apply to any given factual situation.

The guidance also notes that the checklist is intended to assist inspectors in gathering information to assist in differentiating between materials that are “products” and materials that have been abandoned, or stored in lieu of abandonment. Inspectors are urged in the guidance to take into account site-specific circumstances in making any determination regarding into which bucket a particular material is believed to fall.

The guidance also contains a number of photographs that depict examples of potential mismanagement of commercial chemical products.

Discussion

RCRA’s uniquely complicated set of definitions and decisional analysis as to what is and is not a solid and thus a hazardous waste has been one of life’s great mysteries for over 30 years. The guidance provides some useful structure to inspectors who are tasked with differentiating between discarded materials and CCPs.

As is always the case, guidance materials that are designed to assist RCRA inspectors are materials on regulated entities’ must read list. It is important to be familiar with the guidance if you manage materials subject to RCRA and thus need to know the difference between a discarded material and a CCP.

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