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Appeals Court Recycles RCRA Recycling Exclusions

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On May 30, 2018, U.S. EPA published [revised Resource Conservation and Recovery Act \(RCRA\) requirements](#) governing hazardous waste generators. These revised requirements implement a mandate by the [U.S. Court of Appeals for the District of Columbia](#). The court's decision was based on consideration of revisions U.S. EPA had proposed to the RCRA rules in [2015](#). Pursuant to the court's orders, the 2015 verified recycler exclusion for hazardous waste that is recycled off-site is vacated and replaced by the [2008](#) transfer-based exclusion and Factor 4 of the 2015 definition of legitimate recycling is vacated and replaced by the 2008 version Factor 4. Here is a closer look at the revised requirements:

Removal of 2015 Verified Recycler Exclusion and Reinstatement of the 2008 Transfer-Based Exclusion

The goal of both the verified recycler and transfer-based exclusions was to exempt from regulation off-site recycling of hazardous waste when certain conditions were met. The 2015 version had required that the recycling facilities obtain a variance from the regulations prior to accepting the recyclable material. The court vacated that provision of the rule. With the revised, reinstated requirements, the 2008 version requiring that generators make a "reasonable effort" to audit the recycling facility prior to sending their material to be recycled is put back into place.

The [revised version](#) of the recycler exclusion did retain certain other elements

of the 2015 version, including: (1) certain spent petroleum catalysts are eligible for the recycling exclusions (they were not eligible under the 2008 version); (2) the material must be contained as defined in 40 CFR 260.10; and (3) the hazardous secondary material generator must comply with emergency preparedness and response conditions.

Removal of 2015 Factor 4 in the Definition of Legitimate Recycling and Reinstatement of 2008 Factor 4

Legitimacy was defined in both the 2008 and 2015 regulations to distinguish between real recycling activities and sham recycling undertaken to avoid the hazardous waste handling requirements. Factor 4 in the definition of legitimate recycling specifically addresses the concept that the product of the recycling process is comparable to a legitimate product or intermediate in terms of hazardous constituents or characteristics. Under the 2008 rule, Factor 4 only had to be considered. The 2015 revisions made Factor 4 mandatory. Pursuant to the court's order, the 2008 version of Factor 4 (which requires only that the factor be "considered") replaces the now-vacated 2015 version. Importantly, EPA may [authorize states](#) to administer and enforce hazardous waste programs.

In the states with RCRA authorization, new federal requirements and prohibitions do not take effect until they are adopted by the states. Authorized states are required to modify their programs only when EPA enacts federal requirements that are more stringent than existing requirements. Because the changes discussed above were vacated by the court, it is as if the vacated parts of the rule never existed.

In non-authorized states and territories where EPA enforces RCRA directly (i.e. Alaska, Iowa and Puerto Rico), that means the reinstated rules take effect immediately. In authorized states that have not yet adopted the 2015 verified recycler exclusion, these states are not required to adopt the transfer-based exclusion because the transfer-based exclusion is less stringent than full Subtitle C hazardous waste regulations. However, states that have RCRA authorization but have not adopted the 2015 definition of legitimate recycling are required to do so because it is at least as stringent as the 2008 definition.