

Waste and Resource Recovery Committee Newsletter

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PEOPLE OF EARTH (A MESSAGE FROM THE CO-CHAIRS)

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The Waste and Resource Recovery Committee (formerly the Waste Management Committee) has a new name reflecting its new direction.

In recent years, the management of solid waste has increasingly focused on strategies for recycling or reusing materials that in past decades have been disposed of in landfills. With our new name and broader focus, the committee will discuss some of the larger policy issues concerning recycling policies and practices, as well as keep our members on top of key developments in case law, legislation, and regulations.

We intend to communicate with our members and potential new members through welcome letters, newsletters such as this first one published under our new committee name, the committee list serve, and of course our *The Year in Review* contribution. The committee has a new complement of vice chairs (Mike McLaughlin, Newsletters/Publications; Jesse Souki, Membership; Deb Tellier, Programs; Heidi Price, Public Service; Art Siegal, Technology; and Dennis Conniff, *The Year in Review*) who have each injected new energy and ideas into our discussions and

publications. We are also researching new technologies to determine the optimal vehicle for fostering informal communication with and among our members, including use of the committee Web site and third party Web sites for disseminating new materials and to facilitate discussion groups.

If you are not a member, we invite you to join our committee. If you are a member and want to become more involved in the committee, please let one of us know.

We hope you enjoy this newsletter. Also, please visit our committee Web site at: www.abanet.org/environ/committees/solidwaste/

THE BATTLE OVER REGULATION OF COAL COMBUSTION PRODUCTS AS WASTE

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In the wake of the Tennessee Valley Authority's (TVA's) Kingston Facility coal ash spill into the Emory River, the Environmental Protection Agency (EPA) resurrected its long-time goal of regulating coal ash or coal combustion products (CCP) as a hazardous waste. CCP, more commonly known as coal ash, have

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been historically classified as a nonhazardous industrial waste and, consequently, are subject to less stringent regulation and handling. Times are changing, and current events have spurred a cry for more stringent regulation of coal ash. This article is an introduction to coal ash; the past, present, and future of coal ash regulation; and the potential effects of such regulation on the regulated community.

The catalyst that prompted interest in the reevaluation of coal ash regulation, in large part, took place on December 22, 2008, when the TVA’s coal ash impoundments failed, spilling millions of tons of coal ash from its Kingston fossil fuel plant in Roane County, Tennessee (Press Release, TVA, Fact Sheet—Ash-Slide at TVA’s Kingston Fossil Plant (Dec. 25, 2008), *available at* www.tva.gov). According to TVA officials, one of the walls of the retention pond in which the coal ash was stored gave way, allowing more than 5.4 million cubic yards of ash to escape. The ash and water that spilled spread over about half a square mile adjacent to the plant. Some flowed into the Emory River, which is a tributary of the Clinch River and Watts Bar Reservoir. Since then, there have been at least four other documented accidents involving coal ash retention facilities.

What Is Coal Ash?

When coal is burned, the heat is used to create electricity and the remaining ash is discarded. Coal ash is the byproduct of burning coal. There are four types of ash that comprise coal ash: fly ash, bottom ash, boiler slag, and gypsum. (<http://www.undeerc.org/carr/html/whatiscoalash.html>)

- Fly ash is the finest of coal ash particles and is transported from the combustion chamber by exhaust gases. It is a gray powder with a consistency similar to flour. As its name indicates, it is the component of coal ash that tends to float in the air. Despite its size, it also contains substances such as arsenic, cadmium, lead, mercury, and selenium. Fly ash, in particular, is used in building products the likes of cement, mortar, stucco, grout, and is a filler for road beds.

- Bottom ash is a denser, granular, incombustible byproduct that remains at the bottom of furnaces where the coal is burned. Bottom ash is somewhat coarser than fly ash, with grain sizes spanning from fine sand to fine gravel.
- Boiler slag is an even coarser substance than bottom ash and is formed in cyclone boilers that produce a molten ash that is cooled with water. Boiler slag is generally a black granular material with numerous engineering uses.
- Finally, gypsum is a byproduct of an air pollution control system used during the process of burning coal. Gypsum is produced by employing forced oxidation in the scrubber and is composed mostly of calcium sulfate. Gypsum can also be used, and is generally useful, in agriculture and in wallboard production.

How Is Coal Ash Regulated?

Coal ash regulation has become a contentious issue with much back-and-forth for the past thirty years over how it should be regulated. Congress first introduced the proposal of regulating coal ash as a hazardous waste in 1980, but regulators did not move fast enough, and, in March 2000, EPA decided it would designate coal ash a nonhazardous solid waste, a designation that remains to this day.

Currently Regulated as a Solid Waste

Currently, EPA regulates the handling of coal ash as a nonhazardous solid waste (40 C.F.R. § 261.4(b)(4) (2009)). Accordingly, it is regulated under subtitle D of the Resource Recovery and Conservation Act (RCRA) (<http://www.epa.gov/osw/nonhaz/industrial/special/fossil/index.htm>).

Subtitle D provides authority for state and local governments to provide primary planning, permitting, regulating, implementing, and enforcement responsibilities for the management and disposal of

nonhazardous solid wastes (<http://www.epa.gov/osw/inforesources/pubs/orientat/>). In turn, EPA is charged with establishing minimum standards for disposal facilities. EPA can specify minimum standards to which the individual states must adhere, however, EPA does not have a direct role in permitting and enforcement. Nevertheless, it can perform compliance inspections if, and only if, it has determined the state's solid waste program to be inadequate (<http://yosemite1.epa.gov/r10/OWCM.NSF/RCRA/Subtitle+D>).

Subtitle C, on the other hand, contains express requirements for management of hazardous waste as well as requirements for treatment, storage, and disposal facilities. EPA can authorize a state to operate some or all of the hazardous waste programs in the place of EPA (42 U.S.C. §§ 6901–6992 (2009)).

Coal ash also may be exempt from solid waste regulation through a beneficial reuse exemption. It can be beneficially reused in concrete, road base, and reclamation of surface coal mining operations, to name a few.

Controversy Surrounding Designation as a Solid Waste

Every year in the United States, power plants generate around 129 million tons of coal ash (Juliet Eilperin, *Disposal of Coal Ash Rises as Environmental Issue*, WASH. POST, <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/15/AR2009011503987.html>). The coal ash must be disposed of in a way that is safe for humans and the environment, and economically feasible for the disposer. Beginning in the 1980s, EPA toyed with the idea of designating coal ash as a hazardous waste under federal law, but in the end, it always seemed to shy away from such a designation.

If coal ash were deemed to be a hazardous waste under federal waste laws, it would trigger a domino effect of federal controls over the handling, transporting, and dumping of waste. Some argue that costs would increase for utilities, which would, in turn, be borne by individuals, families, and businesses across the nation. The Environmental Council of the States sent a letter to EPA on October 15, 2009, presenting

the results of a survey conducted of forty-two state agencies. Among other things, the survey results showed that states would have to hire additional employees at a cost of \$414,000 per state, the coal ash beneficial reuse industry would suffer a “chilling effect,” and that thirty-six out of forty-two states already regulate the disposal of coal ash in landfills, and that many of those states also impose performance standards (Charlotte E. Tucker, *Regulating Coal Ash as Hazardous Waste Would Cost States Millions, Survey Indicates*, 40 Env’t Rep. (BNA) No. 44 at 2566 (Nov. 6, 2009)).

Political History Behind Designation (i.e., Clinton v. Bush v. Obama Administrations)

The regulation of coal ash, as occurs with many other issues, is largely dictated by the ebb and flow of political tides. History demonstrates a twisted path punctuated by the changes in executive administrations. In fact, former EPA Deputy Administrator Michael McCabe is quoted as saying, in terms of environmental policy decisions, “You’ve got to do your science work and your political homework, too, so you’re not shot out of the water” (<http://www.publicintegrity.org/blog/entry/1107/>).

The root of coal ash regulation takes us to the early 1980s, when the “Bevill Amendment” to Resource Conservation and Recovery Act (RCRA), named for former Representative Tom Bevill of Alabama, exempted coal ash from regulation as a hazardous waste. The Bevill Amendment further required EPA to “conduct a detailed and comprehensive study and submit a report” to Congress on the “adverse effects on human health and the environment, if any, of the disposal and utilization” of coal ash (Lisa Dowden, *Coal Ash Will Not Be Regulated as Hazardous Waste*, 2 WASTE MGMT. COMMITTEE NEWSL. (Section of Environment, Energy, and Resources, American Bar Association) 2 (July 2000) available at <http://www.abanet.org/environ/committees/solidwaste/newsletter/july00/dow.shtml>).

Consider twenty years after the passing of the Bevill amendment, at the very end of the Clinton administration, following a strong push by environmental groups to acknowledge at least sixty

cases of alleged leaching of coal ash from surface ponds and landfills. At that point, EPA seemed poised and ready to make the announcement that coal ash would be federally regulated as a hazardous waste. Some sources say that EPA even composed a draft determination that read, in part, as follows: “Public comments and other analyses . . . have convinced EPA that these wastes can, and do, pose significant risks to human health and the environment when not properly managed, and there is sufficient evidence that adequate controls may not be in place for a significant number of facilities. This, in our view, justifies the development of tailored regulations under [the hazardous] Subtitle C of RCRA” (Kristen Lombardi, *Coal Ash: The Hidden History*, <http://www.publicintegrity.org/blog/entry/1107/>). Needless to say, that regulation never materialized, and the close of the Clinton administration found itself with coal ash being regulated as a solid waste, governed primarily by the states.

EPA did not issue any regulations regarding coal ash during the Bush administration, nor did it make any significant changes in coal ash treatment, whether more

CALL FOR NOMINATIONS

The Environment, Energy, and Resources Government Attorney of the Year Award will recognize exceptional achievement by federal, state, tribal, or local government attorneys who have worked or are working in the field of environment, energy, or natural resources and are esteemed by their peers and viewed as having consistently achieved distinction in an exemplary way. The award will be for sustained career achievement, not simply individual projects or recent accomplishments. Nominees are likely to be currently serving, or recently retired, career attorneys for federal, state, tribal, or local governmental entities. Nominations for the award are due at the ABA Section office by April 23, 2010.



**For more information, visit
www.abanet.org/environ/sectaward/**

stringent or more relaxed (Kelly Hearn, *Tennessee Spill: Regulation Hazards*, <http://www.thenation.com/doc/20090629/hearn/2>). Research, however, continued, and in August 2007, an EPA analysis found that people exposed to coal ash have a substantially greater risk of getting cancer than they would otherwise.

Recently, the Obama administration has moved forward with leaps and bounds regarding the regulation of coal ash. In fact, on January 14, 2009, at her confirmation hearing, current EPA Administrator Lisa Jackson was asked by Senator Boxer if she would commit to quickly assessing coal combustion impoundments for immediate hazards (Elizabeth Shogren, *Obama's EPA Pick Would Address Coal Ash Issue*, <http://www.npr.org/templates/story/story.php?storyId=993853570>). In addition, in the last six months, EPA issued letters to U.S. power plants requesting information regarding the integrity of the structures and the safety of surrounding residents, shared safety reports with the general public, and generally has been vocal in achieving its goal of more stringent regulation (<http://www.epa.gov/osw/nonhaz/industrial/special/fossil/coalashletter.htm>).

What Does the Future Hold for Coal Ash Regulation?

Hazardous Waste

If the regulation of coal ash were to take a turn toward being a subtitle C “hazardous waste,” major changes would have to occur. There are tremendous benefits to be had; however, at the same time, there stands much to be lost. For instance, the public would gain assurance by virtue of EPA’s direct federal enforcement of regulations. Second, the public can rest assured that EPA would impose a permitting process that would ensure controls over the industry. Finally, the threat of incidents the likes of the Kingston coal ash spill, although not completely eliminated, would be drastically reduced. The flip side of the coin, however, is that the implementation of such regulations takes time. It would take, some estimate, between two and five years to take effect after being promulgated. In addition, such a change would inflict immediate hardship on the utility, coal, and beneficial reuse industries. New reports estimate a rise in costs

between \$11.2 million and \$20.4 million (Robert W. Delinger, *Coal Combustion Residuals*, http://www.astswmo.org/files/meetings/2009SolidWaste/Presentations/DELLINGER-Coal_Combustion.pdf).

Solid Waste

If the regulations remain unchanged, then coal ash will continue to be regulated as a nonhazardous waste under RCRA subtitle D, and its regulation will remain with the states. There are benefits to such a designation. First, if there is no change, then that means that there will be no costs to comply with “new” regulations. Second, geographical differences in topography and geology will be taken into consideration, eliminating compliance with unnecessary requirements. Third, coal ash will continue to be used as an additive and beneficial reuse material. On the other hand, the downside to continued regulation as a nonhazardous waste is, as it stands, that EPA cannot directly enforce the regulations; EPA cannot require a permit program under subtitle D; and finally, the limited financial assurance requirements under subtitle D may not be adequate to ensure responsibility (Staff of the General Accountability Office, *Coal Combustion Residue: Status of EPA’s Efforts to Regulate Disposal* (2009)). Nevertheless, even in the face of the negatives, the states and citizens alike can still resort to the cushion provided by RCRA citizen suits in the event a coal ash facility meets the level of posing an imminent and substantial endangerment (42 U.S.C. § 697).

Hybrid

There is commentary on a possible third alternative in terms of regulation. The U.S. Government Accountability Office’s report to Barbara Boxer made mention of two hybrid possibilities: First, coal combustion products would be considered a solid waste if certain conditions are met, but a hazardous waste if not. Second, coal combustion products maintained in wet form would be regulated as hazardous wastes and dry coal combustion products in landfills would be regulated as nonhazardous wastes (*Coal Combustion Residue: Status of EPA’s Efforts to Regulate Disposal* (2009)). The hybrid approach provides an effective solution to groundwater contamination issues addressed in EPA’s report published in October 2009. In that report, EPA

identifies the potential impacts of groundwater contaminated by coal combustion products on environmental and human health. More stringent regulation of wet ash (that has greater potential for leaching into the groundwater) makes sense if the goal is to prevent risk while not imposing too great a financial strain on those facilities that do not pose a risk to the groundwater (U.S. EPA, Steam Electric Power Generating Point Source Category: Final Detailed Study Report (Oct. 2009)).

Conclusion


The TVA disaster continues to prove one thing—environmental law seems to react most quickly to worst-case scenario issues. But in this case, it has transcended even that. Since fossil fuel burning is seen as a leading contributor to carbon dioxide emissions, any step that makes it easier or more convenient to utilities is seen by some as a bad thing. That may lead to overregulation of coal ash, but it may be that political will triumphs over science. No question that coal ash does not belong in a river, but the decisions that will be made in the next few years will create a completely new hazardous waste stream and accompanying management issues for states, local governments, and businesses.

(Editor’s Note: According to a statement from EPA on coal ash released on December 17, 2009, “EPA’s pending decision on regulating coal ash waste from power plants, expected this month, will be delayed for a short period due to the complexity of the analysis the agency is currently finishing.”)

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MANDATORY GREENHOUSE GAS REPORTING AND MUNICIPAL SOLID WASTE LANDFILLS

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On October 30, 2009, the U.S. Environmental Protection Agency (EPA) published its mandatory greenhouse gas (GHG) reporting rule in the *Federal Register* (74 Fed. Reg. 56,260–56,519). The rule became effective December 29, 2009.

This article focuses on requirements under the rule for municipal solid waste (MSW) landfills. If the rule applies to a specific MSW landfill, then certain other GHG emission sources (e.g., stationary fuel combustion sources) located at the same facility are also required to report. EPA believes there are 2,551 MSW landfills that will have to report under the rule.

MSW Landfill Applicability

The rule applies to MSW landfills (not industrial or construction and demolition debris landfills) that accepted waste after January 1, 1980, if they generate at least 25,000 metric tons of carbon dioxide equivalent (MTCO_{2e}) in certain GHGs per year (whether or not the landfill gas (LFG) is collected). Landfills on contiguous properties under common control must be included in the estimates (even if they have been closed for years).

MSW landfills must use a mathematical algorithm to estimate gas generation. The rule prescribes a specific model algorithm and coefficient values which are different than the AP-42 and New Source Performance Standards (NSPS) values. As such, facilities cannot rely on existing site gas models to determine applicability. Based on EPA’s screening tool:

- Closed landfills with less than 350,000 metric tons of waste in place will not be subject to the rule.
- All other MSW landfills that received waste after January 1, 1980, should conduct mathematical modeling to evaluate applicability.

Landfills that generate approximately 270 standard cubic feet per minute (scfm) of LFG (at 50 percent methane) in 2010 per the rule's gas generation model will be subject to the rule.

MSW landfills with gas collection systems must use a second mathematical algorithm to estimate gas generation, and use whichever estimate is higher to determine if the rule applies. EPA's screening tool says a landfill collecting 900 metric tons of methane (about 185 scfm of LFG at 50 percent methane) will be subject to the rule, but those who collect gas (for any purpose) may wish to perform additional calculations.

For computing emissions, the rule requires use of a conservative 10 percent factor to account for methane oxidation as LFG crosses a landfill cover.

GCCS Monitoring Requirements

In addition to using EPA model to estimate gas generation, landfills that have gas collection and control systems (GCCS) must perform an alternative estimate of collection efficiency and GHG emissions. Specific gas monitoring requirements include:

- Waste disposal amounts (scale house)
- Continuous gas flow monitoring
- Gas flow correction for temperature, pressure, and moisture
- Methane monitoring, continuous or at least weekly.

The flow measurement must be corrected to standard conditions; thus pressure and temperature must be measured or incorporated by the flow meter. Flow and methane content must either be measured continuously; or flow must be measured continuously and totalized weekly combined with weekly methane concentration measurement. All measurements must be taken using the equipment and methods dictated by the rule, and must be measured on a consistent basis (e.g., methane content and gas flow both on a wet weight, or both on a dry weight, basis).

Many landfills with GCCS were unable to comply with these requirements by January 1, due to the lead time required to install continuous flow measuring equipment and/or to arrange for at least weekly monitoring of methane content. EPA will permit other "best available" monitoring techniques to be used on a temporary basis (until March 31, 2010), and may allow use of such techniques after March 31 if a facility requests and qualifies for an extension. However, requests for extensions are due to the agency by January 28, 2010.

EPA will be issuing additional guidance in the coming weeks regarding monitoring equipment, and may permit use of other kinds of methane content and flow measurement devices.

Stationary Combustion Units

MSW landfills that are subject to the reporting rule must also report emissions of various GHGs from stationary fuel combustion sources located at the facility, such as boilers, combustion turbines, engines, incinerators, and process heaters. There is no "de minimis" provision for stationary fuel combustion sources, so even small comfort heaters and water heaters are subject if they are in industrial use. However, stationary fuel combustion sources exclusively used for emergency response or backup are not subject to the rule. Emissions from flares, portable combustion sources, and mobile combustion sources are not included in this portion of the rule.

The rule requires quantification of methane, carbon dioxide, and nitrous oxide emissions from applicable sources. The rule includes separate requirements under the stationary combustion section for monitoring, testing, and reporting based on four "tiers" of sources. Generally, emissions from biomass-fueled sources (e.g., LFG) will likely fall under the tier 2 requirements, and from other combustion sources at landfills will likely fall under the tier 1 requirements.

Tier 1 will involve the use of default GHG emission factors and heating values for the fuel type. Fuel consumption rates must be monitored, and procedures must be documented to ensure the accuracy of the fuel

volumes. Tier 2 also will involve the use of default GHG emission factors, but will involve measured higher heating values.

LFG to Energy (LFGE) Plants

Third-party LFGE facilities not under common control with the landfill may also be subject to the stationary combustion source portion of the rule if the aggregate heat input capacity (not actual fuel flow rates) of their combustion units equals or exceeds 30 million Btu/hr, and they are dual-fueled with a traditional fossil fuel such as natural gas. For purposes of determining if such facilities exceed the GHG emissions threshold of 25,000 MTCO₂e required for the rule to apply to such facilities, CO₂ emissions from combustion of LFG are not considered, but if the facility is otherwise subject to the rule, then GHG emissions associated with combustion of LFG must be included in the reports.

MSW Landfills Must Report

MSW landfills subject to the rule must report the following information, with the first reports due for calendar year 2010 by March 31, 2011:

- Landfill operations (open/closed/year)
- Waste disposal calculations
- Waste composition (if available)
- Modeling parameters used
- Methane data
- Landfill area, cover types by area, and oxidation fractions used
- LFG modeling results
- Emissions from stationary combustion units.

Furthermore, if the MSW landfill facility has a GCCS, the following information must be reported:

- Flow of collected LFG
- Methane content of LFG
- Temperature and pressure data for LFG
- Description of control device(s) both on- and off-site
- Control device operating hours
- Description of GCCS, landfill areas, and waste depths

- Computed methane volume captured
- Computed methane generated (corrected for oxidation using EPA model)
- Computed methane generated (corrected for oxidation using LFG recovery flow and collection efficiency)
- Methane emissions, method 1 (modeling)
- Methane emissions, method 2 (gas captured and estimated collection efficiency).

Key Dates

The rule requires development of a written GHG monitoring plan, which EPA has said must be in place by April 1, the same date on which monitoring using the methods specified by the rule must commence unless a petition to use alternative methods is approved. Reports for calendar year 2010 emissions are due by March 31, 2011.

Affected facilities should determine if they might be subject to the rule and to plan accordingly-for many facilities, it will be too late to comply with the rule if steps are not taken before April 1 to begin the required monitoring, testing, and record keeping.

Other key dates include:

- December 29, 2009: Effective date of the rule.
- January 28, 2010: Deadline to request extension of grace period to use best available monitoring methods through calendar year 2010.
- January 30, 2011: Deadline to designate authorized representative and alternate authorized representative for facility.

Resources

1. Applicability tools: <http://www.epa.gov/climatechange/emissions/GHG-calculator/categories.html>.
2. EPA rule Web site: <http://www.epa.gov/climatechange/emissions/ghgrulemaking.html>.

3. Information sheets for each of the source categories covered in the rule: http://www.epa.gov/climatechange/emissions/ghg_infosheets.html.
4. Mandatory greenhouse gas reporting rule training opportunities offered by EPA: <http://www.epa.gov/climatechange/emissions/training.html>.

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DEFINING “SOLID WASTE” UNDER RCRA: THE LONG WAIT CONTINUES

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Introduction

After a long and arduous journey through the Environmental Protection Agency’s (EPA’s) Office of Solid Waste and the courts that spanned over two decades, EPA published its Rule (Rule) revising the regulatory definition of “solid waste” under the Resource Conservation and Recovery Act (RCRA) on October 30, 2008 and effective as of December 29, 2008. But just 30 days after the Rule’s effective date, the Sierra Club filed a petition for review with the D.C. Circuit and EPA, asking to repeal and stay the implementation of the Rule. The petitions asserted the Rule was unlawful, increased threats to human health and the environment without commensurate benefits, had disproportionate impacts to minority or low income communities, and adverse impacts on children’s health. A coalition of industry associations responded to the petitions, resulting in a joint meeting with EPA and ultimately in public meetings and a comment period that closed in August 2009.

While this recent challenge has sparked further discussion and debate, EPA does not intend to repeal

the Rule, but may modify it based on input from over 300 parties in the most recent comment period. This article provides a summary of the key elements of the Rule, areas of disagreement, and a look at what’s ahead.

Overview of the Rule

EPA’s objective for the Rule is to promote safe and legitimate recovery and recycling of certain hazardous secondary materials (e.g., spent materials, sludge, or byproducts) (Materials), which would be accomplished by excluding them from regulation as “solid waste” and thus “hazardous waste.” EPA estimates that 5,600 facilities in 280 industries, primarily in the manufacturing sector, could benefit from the Rule.

Conditional Exclusions from the Definition of Solid Waste

Under the Rule as adopted, no formal agency determination is required to manage Materials outside of the traditional hazardous waste regulatory process. Rather, the Rule provides two self-implementing exclusions from the definition of solid waste: one for Materials recycled under the control of the generator (*generator-controlled exclusion*) and one for Materials transferred to and recycled by a separate reclaiming facility (*transfer-based exclusion*).

Under the generator-controlled exclusion, a generator may recycle Materials on-site or at an off-site facility under the generator’s control. All Materials must be “legitimately” reclaimed in the United States and not accumulated speculatively. Generators must notify EPA (or the authorized state) prior to operating under the exclusion.

The transfer-based exclusion permits a generator to transfer Materials to an unrelated entity for legitimate recycling and reclamation. Conditions for this exclusion are similar to the generator-controlled exclusion described above. Generators must undertake “reasonable efforts” to ensure the Materials will be properly managed and legitimately recycled at the selected transfer facility. Generators must document and certify this due diligence.

Criteria for “Legitimate Recycling”

For years, EPA has expressed the need to distinguish between “legitimate” recycling activities and those activities that are merely “sham” recycling. The Rule provides helpful details about what recycling activities are considered legitimate or authentic, and what constitutes sham or fake recycling. The concept of legitimacy as set forth in the Rule does not differ significantly from its long-standing policies on legitimate recycling.

To make an affirmative legitimacy determination, generators must satisfy two mandatory recycling requirements and consider two additional factors.

1. The Materials provide a “useful contribution to the recycling process,” such as by providing a valuable ingredient for a product or an effective substitute for a commercial product. (Mandatory requirement #1)
2. A valuable product or intermediate must be made from the recycling process. (Mandatory requirement #2)
3. Prior to entering the recycling process, Materials must be managed in the same manner as other valuable materials. (Consideration #1)
4. The concentrations of hazardous constituents found in the recycled end product should be commensurate with concentrations of hazardous constituents in analogous products in order to determine if toxics are going “along for the ride” in the recycled product. (Consideration #2)

Non-waste Determinations by Agency

The Rule establishes a voluntary process in which generators can seek a formal determination from EPA or an authorized state agency that eligible Materials are not a solid waste. If this determination is granted, the generator is freed from the limitations and conditions specified in the rule (unless otherwise explicitly required in the formal determination). EPA views this

determination process as equivalent to the current process for obtaining a solid waste variance under RCRA.

Areas for Possible Future Regulatory Refinement

In its May 27, 2009 Notice, EPA invited feedback on four specific “issues for discussion.” The Notice also welcomed comments on other changes to the Rule. The comment period closed on August 13, 2009. The four issues for discussion included:

1. Definition of “contained”: For exclusions, the Materials must be “contained” or placed in a unit that controls the movement of the hazardous secondary materials out of the unit. EPA did not define the term “contained” or articulate specific performance or storage standards. In light of the comments, EPA will reconsider proposing a definition of “contained” or setting performance standards.
2. Notification: A generator who wishes to take advantage of the exclusions must notify EPA or its authorized state in advance. However, under the rule, failure to make this notification would *not* affect the excluded status of the Materials, although it would be a violation of the notification requirements. Because notification would clearly signal a generator’s intent to recycle, EPA is now considering making the notification a condition of the exclusion.
3. Definition of legitimacy: Concern has been expressed that all four legitimacy factors should be mandatory, not just two. EPA will be considering an implementation approach where all four factors must be met.
4. Transfer-based exclusion: Commentators expressed concern that a third-party recycler may not have the same incentives as the generator to manage the Materials as a useful product. EPA will consider several alternative approaches, including limiting the scope of the exclusion or an outright repeal of this exclusion.

What's Ahead

Since the close of the comment period on August 13, 2009, EPA has been digesting the 300+ written comments. EPA plans to “carefully consider all information provided by stakeholders,” and publish a tentative decision in the Federal Register for public comment. In addition, Mathy Stanislaus, EPA’s new assistant administrator for the Office of Solid Waste and Emergency Response, has recently gone on record to say that EPA “will be conducting an environmental justice analysis of the Rule before deciding how to move forward.” One thing is certain—the road ahead will take this rulemaking effort into its third decade.

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BIOSOLIDS AND THE DORMANT COMMERCE CLAUSE

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The Ninth Circuit’s decision in *City of Los Angeles v. Kern County Water Agency*, 581 F.3d 841 (9th Cir. 2009) is the most recent appellate court decision addressing the constitutionality of restrictions on the flow of solid waste. In *Kern County*, the Ninth Circuit considered a dormant Commerce Clause challenge to Kern County’s voter-adopted ordinance that banned the land application of biosolids (treated sludge) within unincorporated areas of the county.

While the ordinance applied to all biosolids—whether generated in-county, out-of-county, or out-of-state—the ordinance was overtly intended to prevent the importation of biosolids from Los Angeles. A group, including out-of-county—but *in-state*—generators of biosolids, challenged the ordinance on several grounds. Under the dormant Commerce Clause, the plaintiffs argued that the ordinance discriminated against

interstate commerce and was therefore subject to strict constitutional scrutiny. The district court agreed and struck down the ban, finding ordinances that discriminate against interstate commerce must face “a virtually per se rule of invalidity.”

The Ninth Circuit, however, reversed. As it had done in several prior solid waste decisions, the court dismissed the dormant Commerce Clause challenge based on a lack of “prudential standing,” even though the challengers had constitutional standing. See *Individuals for Responsible Government, Inc. v. Washoe County*, 110 F.3d 699, 703-04 (9th Cir. 1997); *On the Green Apartments LLC v. City of Tacoma*, 241 F.3d 1235, 1240 (9th Cir. 2001). Of paramount interest to the court was its view that challengers’ interests were “purely *intrastate*” and no one presented an injury to an interest related to the *interstate* waste market: “Nothing in [the ordinance] hampers the recyclers’ ability to ship waste out of state. Likewise, no recycler claims to apply out-of-state wastes to land in Kern County.” *Kern County*, at 848. Without some sort of interstate interest, the challengers did not have prudential standing to seek dormant Commerce Clause protection for their interest in “ship[ping] waste from one portion of California to another.” *Id.* at 847.

While the Ninth Circuit’s dismissal based on prudential standing might seem less significant than a ruling directly applying traditional dormant Commerce Clause analysis, the *Kern County* case is significant. Under the decision, even though the flow of solid waste is considered an article of interstate commerce, local governments can effectively shield their waste bans from dormant Commerce Clause strict scrutiny if no plaintiff exists with an interest related to the interstate waste market.

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Waste & Resource Recovery Committee Law Office Sustainability Checklist

The Waste & Resource Recovery (W&RR) Committee of the ABA's Section of Environment, Energy, and Resources recognizes the ABA's and the Section's commitment to fostering sustainability throughout our personal and professional lives. In much of what we do, this commitment can be writ large. But it also needs to trickle down to the little things that we do in our day-to-day office lives. Accordingly, the W&RR Committee has prepared the following checklist for you to use in fostering a "sustainability culture" in your office. We encourage you to adopt and implement some or all of these strategies.

Please mark all strategies that are being implemented now or that will be implemented ("To-Do").

Reduce Paper Waste

Now To-Do

- Assure that at least approximately 90% of all office paper ("mixed office paper") has at least 30% post-consumer recycled content.
- Purchase other office products (file folders, note pads, envelopes) with at least 30% post-consumer recycled content.
- Institute double-sided copying and printing for at least 75% of all drafts and internal documents.
- Use printers with an automatic duplex option or 2-pages per sheet formatting.
- Narrow margins (3/4 inch or less) on documents and templates to conserve paper unless prohibited by courts or agencies.
- Use letter-sized paper, files, and pouches instead of legal-sized.
- Reuse one-sided non-confidential paper documents for drafts or notepads.
- Route faxes electronically; maximize the use of e-communications in lieu of paper documents.
- Use paperless court and agency filing procedures.
- Eliminate duplicate newspaper and magazine subscriptions.
- Remove names from unwanted mailing lists.

Recycling and Reuse

- Recycle the following to the extent practicable:

Now To-Do

- Mixed office paper
- Cardboard
- Aluminum cans
- Glass bottles
- Plastic bags
- Tyvek® envelopes
- Printer cartridges
- Batteries
- Fluorescent lamps
- Cell phones
- Sell or donate old office equipment, furniture, and supplies that cannot be reused internally.
- Buy recycled printer and copier cartridges.
- Establish a reuse center for binders, file folders, packing and mailing materials, and other items.

Resource Conservation

Now To-Do

- Reduce use of plastic water bottles by using filtered tap water.
- Use durable plates, cups, glasses, and utensils in the kitchen and conference rooms.
- Require caterers or lunch vendors to eliminate disposable utensils and non-recyclable containers.
- Buy "Fair trade" coffee and other "Fair trade" products.

Energy Conservation

- Reduce energy use by purchasing personal computers and other electrical devices bearing the Energy Star certification label from the US Department of Energy.
- Turn off lights, computers, and other equipment at the end of the workday and when not likely to be in use.
- Install lighting timers or motion detectors for turning lights off outside of work hours.
- Use power-down settings or devices for electronic equipment outside office hours.
- Set computer monitors to power down after no more than 30 minutes of inactivity.
- Review and encourage office building management's use of energy-efficient lighting, heating, ventilating, and air conditioning systems.
- Conduct and implement an energy-saving audit of the office, where cost-effective.

Transportation

- Subsidize or encourage use of car-pooling, energy-efficient vehicles, car-sharing programs (e.g., FlexCar, I-Go, Zipcar), mass transit, or bikes.
- Identify and use local taxi services with hybrid or fuel-efficient fleets.
- Set rental car preferences to fuel-efficient or economy cars.
- Use teleconferencing and other means to avoid unnecessary travel.

Firm or Company Name: _____

Office Location: _____

Date of Assessment: _____