

## United States Court of Appeals, District of Columbia Circuit (API v. EPA)

On July 7, 2017, the United States Court of Appeals, District of Columbia Circuit, issued an opinion and order which upheld in part and vacated in part the challenged agency rule. The Court ruled that Factor 4 of the “legitimacy test” is vacated insofar as it applies to all hazardous secondary materials via § 261.2(g) (sham recycling definition) and vacated parts of the Verified Recycler Exclusion.

Not yet mandated—EPA regulations are still effective

Petitions for re-hearing are due October 20, 2017

When the mandate will be issued by the Court is unknown.

What that final mandate will order is unknown (petitions for re-hearing are still being accepted).

Will there other legal actions taken after the mandate is issued?

At the Department’s request, the two rulemakings that were originally to become effective on August 7, 2017, have been stayed by the Joint Government Operations Committee for 75 days to enable the Underground Storage Tanks and Solid Waste Disposal Control Board to consider its options in response to the D. C. Court of Appeals’ opinion and order. The Joint Government Operations Committee is expecting the Department to reappear before them at their September meeting to review these rulemakings in light of the Board’s response. The two stayed rulemakings contain the following changes and the highlighted color key indicates the changes that are impacted by the Court’s opinion and order and the impact of the remaining amendments if they do not become effective.

Impacts program authorization

Less stringent

More stringent

Impacted by the Court opinion and order

The rulemaking referred to as 2015b includes:

- The minor changes EPA has identified when reviewing the regulations to supporting continuing authorization. These changes include:
  - Correcting a typographical error to the process description to K107;
  - To the Waste code K161 of the Table “Treatment Standards for Hazardous Wastes” in Rule 0400-12-01-.10, deleting the CAS number “137-30-4” in the third column to the right of “Dithiocarbamates (total) 10” and replacing it with “NA” so that it is consistent with the federal language.
- The 2015b rulemaking also makes additional housekeeping changes in order for Tennessee’s regulations to be consistent with EPA’s and surrounding states. These changes include:
  - Adding a common chemical name 1,1,1-Trichloroethane to the U226 list of commercial chemical products (We are adding 1,1,1-Trichloroethane for the regulated community’s convenience but the chemical was already listed as U226 under the names Ethane, 1,1,1-trichloro- and Methyl Chloroform and, therefore is not a new listing.);
  - Updating the regulatory language regarding the exclusion of comparable fuel and syngas fuel to be equivalent with EPA’s language (before the EPA exemption was ordered vacated by the Court of Appeals);
  - Correcting the introductory statements to Rule 0400-12-01-.10(1)(g)2(iv) so that it reads like the federal language; and
  - Adding a sentence to the certification statements to reference T.C.A. § 39-16-702(a)(4) as request by the Attorney General’s office.

The rulemaking referred to as 2015c is primarily designed to encourage the safe, beneficial reclamation of hazardous secondary materials by amending the current hazardous waste regulations in order to revise the definition of solid waste and related variances, which incorporates EPA’s October 30, 2008 revisions as amended by the January 13, 2015 revisions.

- The 2015c includes modifications:

- To the federal procedure for verifying reclaimers and intermediate facilities managing hazardous secondary materials to make the process easier to understand and follow. The verification of reclaimers is impacted by the D.C. Court of Appeals majority opinion and order.
  - Added several notes to bring clarity to these complex regulations.
- On April 8, 2015, in compliance with an order issued by the U.S. Court of Appeals, EPA deleted the regulations associated with the comparable fuels exclusion and the gasification exclusion. This rulemaking makes the complying revisions to prevent these rules from being less stringent than the federal rules.
- On April 17, 2015, EPA amended 40 CFR 261.4(b)(4) to include wastes generated primarily from processes that support the combustion of coal or other fossil fuels that are co-disposed with excluded fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels. This rulemaking proposed to amend subpart (1)(d)2(iv) of Rule 0400-12-01-.02 to include this federal amendment.
- Rule 0400-12-01-.01 is being amended to:
  - Add new definitions, such as: “analogous raw material,” “contained,” “hazardous secondary material,” “hazardous secondary material acceptance plan,” “hazardous secondary material generator,” “intermediate” (when used in the context of a chemical reaction), “intermediate facility,” “land-based unit,” “remanufacturing,” “verified intermediate facility” and “verified reclamation facility.”
  - Removing the definition for “gasification.”
  - Modify or add variances for non-waste determinations, variances from classification as a solid waste and verification determinations for a hazardous secondary material reclamation facility or intermediate facility.
  - Add a notification requirement for facilities managing hazardous secondary materials under a variance, verification, or the three new exclusions known as “reclamation under the control of the generator,” “transfer of hazardous secondary material to a verified reclaimer or verified intermediate facility” and the “remanufacturing exclusion.”
  - Codification of the criteria for making legitimate recycling determinations.

Rule 0400-12-01-.02 is being modified to:

- Add notes to clarify the meaning of certain regulations.
- Add to the definition of solid waste a statement that sham recycling is considered discarding a secondary material making it a solid waste and, if hazardous, a hazardous waste.
- Delete the specific exclusions for petroleum tank bottom waters being legitimately reclaimed in order to eliminate potential conflicts in the administration of the regulations, because a note is being added to the regulations clarifying that non-listed off-specification commercial chemical products or manufacturing articles that exhibit a characteristic of hazardous waste are not solid waste when legitimately reclaimed, except when they are recycled in ways that differ from their normal manner of use. (Retains conditions that are unnecessary and more stringent than needed.)
- Modify subpart (4)(d)1(xii) by removing the reference to gasification in that subpart.
- The exclusion for comparable fuels or comparable syngas fuels at subpart (4)(d)1(xvi) and at (6)(a) is being deleted and reserved to be consistent with the federal rules.
- Add conditions for exclusion for hazardous secondary materials generated and legitimately reclaimed under the control of the generator.
- Add conditions for exclusion for hazardous secondary material that is generated and then transferred to a verified reclamation facility for the purpose of reclamation.
- Add conditions for exclusion for hazardous secondary materials that is generated and then transferred to another person for the purpose of remanufacturing.
- Adding the wastes generated primarily from processes that support the combustion of coal or other fossil fuels that are co-disposed with excluded fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels to subpart (1)(d)2(iv). (Wastes which are not hazardous waste.)

- Add the financial assurance requirements that apply to owners or operators of verified reclamation facilities and verified intermediate facilities managing hazardous secondary materials.
- Add the container management standards that apply to persons operating under the remanufacturing exclusion.
- Add the tank management standards that apply to person excluded under the remanufacturing exclusion.
- Add the emergency preparedness and response requirements that apply to persons legitimately reclaimed hazardous secondary materials under the control of the generator and to verified reclamation facilities and verified intermediate facilities.
- Add the air emission standards applicable to persons operating under the remanufacturing exclusion.

Rule 0400-12-01-.03(12)(m)5(i) is being amended at the request of EPA so that, as amended, it will read like the federal regulations.

Rules 0400-12-01-.05, 0400-12-01-.06, 0400-12-01-.08 and 0400-12-01-.09 are being modified to update cross references impacted by modifications to Rules 0400-12-01-.01 and 0400-12-01-.02.

Rule 0400-12-01-.07 is being amended to designate that owners or operators of permitted facilities may modify their permits as a class 1 with approval modification to either remove permit conditions applicable to a unit that will become subject to one of the exclusion being added to Rule 0400-12-01-.02 for legitimately recycling hazardous secondary materials; or to extend an expiration date of a permit issued to a facility at which all units are excluded under provisions added to Rule 0400-12-01-.02 for the legitimate recycling of hazardous secondary materials.

#### Options:

- Withdraw the pending rulemakings and initiate a new rulemaking once EPA publishes its revisions.
  - Pros:
    - None of the legitimacy factors are codified.
    - Rulemaking starts over from the beginning this time without impacted rules.
  - Cons:
    - Rulemaking starts over and waits until EPA revises the federal rule, which will not happen until the Court's opinion and ruling is final and all potential appeals decided.
    - The benefits contained in these rulemakings will not be realized until nine months to a year after EPA publishes its revised rules.
    - Current state rules continue to be more stringent in places and less stringent in other places as identified above.
    - Updating program authorization delayed until sometime after revised regulations are effective.
- Allow the pending rules to become effective contingent upon the Director issuing an Enforcement Moratorium to remain effective until EPA publishes its revisions and the state rules are amended accordingly.
  - Pros:
    - Rules become effective on October 21, 2017, with the enforcement moratorium in place.
    - All the benefits of the current rulemaking will be effective which will bring the rules more in line with federal rules (minimizes most of the more and less stringent portions of the rules).
    - Allows the Department to complete the applications to update program authorization.
    - Enforcement Moratorium prevents applying factor 4 to existing exemptions.

- Makes more exemptions available on October 21, 2017.
  - Cons:
    - Until current rules are amended based upon EPA's revisions, the Enforcement Moratorium prevents off-site transfers in Tennessee, unless transferred to a HW permitted facility with a permit that address the hazardous secondary materials.
- Board places an additional 75-day stay on the effective date of these rules (filing date Friday, October 20, 2017).
  - Pros:
    - Delays the effective date to allow more discussion of the first two options, and delays a decision until the December meeting of the Board, but it is doubtful there will a resolution on the federal level by January 3, 2018.
    - Delay will have no impact, if the Board's response is to withdraw the rulemakings at the December meeting and wait for EPA's response when the issue is finally decided.
  - Cons:
    - The potential benefits of the second option are delayed by another 75 days, if the second option is the Board's response.
    - There is no accurate way to predict when EPA's response will be published because legal remedies have not been exhausted.