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Environmental Notes

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Frequently Asked Air Questions (FAAQs): Synthetic Minor Permits, One-Time Doubling & Sham Permits

BY: SUSIE A. BRANCACCIO

Under the Clean Air Act, sources frequently must undergo "New Source Review" (NSR) permitting, which is a pre-construction permitting program. NSR establishes requirements for new or modified sources prior to initiating construction. The goal of NSR is to ensure that newly constructed or modified sources consider their air emissions and protect the air quality of the geographic area in which they are located. To that end, there are two types of NSR permits: PSD (prevention of significant deterioration) and NNSR (nonattainment new source review). PSD permits are for those sources located in areas that are attaining National Ambient Air Quality Standards (NAAQS), and therefore the permit is designed to prevent significant deterioration of air quality. Alternatively, NNSR permits are for those sources located in areas that are not achieving the NAAQS and are considered to be in non-attainment of air quality standards.

For purposes of this article, it is assumed a source is located in an area in attainment for the NAAQS, and therefore the source is subject to NSR PSD permitting.

When a new source undergoes NSR PSD permitting, the source is further classified, based on its potential to emit regulated NSR air pollutants, as either (1) a major source (>250 tpy or 100 tpy depending on source), (2) a minor source, or (3) a synthetic minor source. Moreover, existing sources may have to undergo NSR permitting as a major source when a modification occurs – and the triggers for that permitting depend on whether the existing source is classified as major source, a minor source, or a synthetic minor source.

The following FAAQs provide insight into synthetic minor sources, including information on what these sources are, what benefits can be derived from being permitted as a synthetic minor source, and how to avoid potential pitfalls for synthetic minor sources including sham permitting.

Q: What is a synthetic minor source?

A: A synthetic minor source is a source that accepts enforceable limits restricting its potential to emit NSR regulated air pollutants to a level below the threshold limits set for a major source under the Clean Air Act. The namesake "synthetic minor" refers to the fact that the source has the capacity to be a major source of emissions but is choosing to operate "synthetically" as a minor source.

Q: What is the difference between a synthetic minor source and a true minor source?

A: A true minor source has the potential to emit NSR regulated pollutants in amounts that are less than the major source thresholds. In other words, even without enforceable limits the source cannot exceed the major source thresholds—it is physically not able to do so. A synthetic minor source, on the other hand, is a source that otherwise has the potential to emit regulated NSR pollutants in amounts that are at or above the thresholds for major sources but has taken a restriction so that its potential to emit falls below those thresholds. In other words, in the absence of enforceable limits, a synthetic minor source would exceed the major source thresholds and otherwise be considered a major source.

Q: What are the "enforceable limits" synthetic minor sources use to limit their potential to emit?

A: Enforceable limits or enforceable restrictions are conditions in a permit that limit a source's potential to emit air emissions. These conditions generally fall into three categories.

- **Production Limits:** These are restrictions on the amount of final output that can be produced or manufactured at a source.
- **Emission Limits:** These are restrictions over a given period of time that limit the amount of pollutants that may be emitted from a source.
- **Operation Limits:** This is a catch-all category for all other restrictions on how a source will operate, including limits on hours of operation, amount of raw material consumed, or fuel allowed to be combusted. This category also includes conditions that outline what add-on controls must be installed and maintained at a source, and what its emission rate or efficiency is required to be.

It is important to note that these limitations must be both federally and practically enforceable. Federally enforceable essentially means that it is contained in a permit issued pursuant to an EPA-approved program or directly by the EPA or has been submitted to EPA as a revision to a State Implementation Plan (SIP). Practically enforceable relates to whether the EPA or a state agency can monitor compliance with those restrictions and determine if a source has been operating as a synthetic minor source or as a major source. For example, if a permit limits the hours of operation for a source, in order for that limit to be practically enforceable, the permit should also include separate recordkeeping requirements that log the hours in which the source was operating. As a result, the permitting agency will be able to check a source's compliance with the hours of operation restriction by reviewing the source's log of its hours.

Q: Do synthetic minor permits undergo public comment?

A: Synthetic minor permits should engage in a public comment period. In a 2021 EPA Inspector General Audit Report, the agency confirmed that synthetic minor source programs in each state must allow the public to participate in the permitting process. The Report further recommended that EPA work with all state, local, and tribal agencies that do not provide the opportunity for public comment on synthetic minor source permits, to assure opportunities for public participation occur—as required by law.

Q: What are some advantages to being a synthetic minor source?

A: Overall, the permitting process for a synthetic minor source is less demanding than the permitting process for a major source. Moreover, because a NSR permit is required prior to construction, a synthetic minor permit may allow a source to initiate construction sooner—as major source permits require more of an exacting review process, so it takes longer for the issuing agency to finalize the permit.

In addition, major sources are subject to more stringent control measures, so a source may desire to be a synthetic minor source to avoid the costs of complying with those measures. Major PSD NSR sources are required to include best available control technology (BACT) measures in their operations. BACT determinations balance energy, environmental, and economic impacts and these determinations can require a source to undergo equipment modifications, incorporate new combustion techniques, or comply with various operational standards, design standards, or work practices. These BACT determinations must be

made for each regulated NSR pollutant that the source would have the potential to emit in "significant" amounts, and complying with BACT can be burdensome.

Q: Does a major modification at an existing synthetic minor source trigger major PSD NSR permitting?

A: No. A major modification is any physical change in or change in the method of operation of a major stationary source that would result in a "significant emissions increase" of any regulated NSR pollutant, and a "significant net emissions increase" of that pollutant. A major modification at an existing facility will require a source to undergo the more exacting NSR permitting process for major sources, and BACT may be required for those pollutants for which there is a "significant net emissions increase" of. Nevertheless, **only major sources can undergo major modifications;** consequently, a synthetic minor permittee could potentially increase its emissions of a pollutant in "significant" amounts while avoiding triggering major PSD NSR permitting.

Q: What happens when a minor synthetic source undergoes a modification and now has the potential to emit at major source levels?

A: Imagine an existing synthetic minor source has accepted limits to reduce its emissions of an NSR pollutant to 190 tons per year and has decided to expand its facility and add 65 tons per year to its potential to emit. Thus, the source is now expected to emit 255 tons per year of an NSR pollutant. While the source would be considered a "major source" if it was proposing a new facility with a potential to emit, it would not need to undergo major PSD NSR permitting for this proposed expansion. Critically, now that it is emitting at a major source level, the triggers for NSR PSD permitting are now the same triggers that apply to an existing major source. In other words, the next time this source undergoes a modification, it will be evaluated under the triggers for a major source – such as a major modification.

Q: When is major PSD NSR permitting triggered at a synthetic minor source?

A: While a major modification does not trigger major PSD NSR permitting at an existing synthetic minor source, there are other circumstances where a synthetic minor source will have to undergo the more exacting permitting process of a major source prior to modifying its facility. These circumstances include:

- **Major source size modification:** If a synthetic minor source undergoes a physical change that would constitute a major stationary source by itself (i.e., an emissions increase of 100 or 250 tons per year depending on the source type), this modification will require the synthetic minor permittee to undergo the major PSD NSR permitting process.
- **Relaxation of synthetic minor limits:** 40 CFR § 52.21(r)(4), sometimes referred to as the Source Obligation Rule, provides that when a source becomes a major source solely by virtue of a relaxation in any enforceable limitation, then the source must undergo PSD NSR major source permitting as if construction has not yet commenced at the source. For example, imagine a synthetic minor source has a limit on its hours of operation that keeps its emissions under major source thresholds. If that source seeks a modification that relaxes its hours of operation limit (increases the hours its permitted to operate) and the source's emissions now exceed major source thresholds, the synthetic minor source will have to undergo major source PSD NSR permitting.

These two scenarios provide some context to the discussion of one-time doubling below.

Q: What is one-time doubling?

A: One-time doubling refers to the concept that a minor source can undergo a modification and essentially double its emissions, without having to undergo major source permitting—so long as the increase is not the size of a major source itself (100 tpy or 250 tpy depending on source type). In practice, this means that a minor source with a potential to emit 200 tpy of a pollutant could increase its potential to emit to 400 tpy without undergoing major source permitting.

There has been some controversy over whether one-time doubling is permitted at a synthetic minor source or if it is only allowed at true minor sources. There have been several reasons proffered on why synthetic minor sources cannot double their emissions like true minor sources. First, the regulations do not explicitly identify when a modification at a synthetic minor source triggers PSD NSR major source permitting. Synthetic minor sources do not fit in either bucket (true minor

source vs. major source) perfectly. Consequently, it's not entirely clear if the major source size modification applies to synthetic minor sources. The regulation states it applies to all sources that do not otherwise qualify as a major source—but technically synthetic minor sources do have the potential to emit as a major source but for the enforceable limits they agree to in their permit. Second, is the argument that the Source Obligation Rule governs modifications at synthetic minor sources – and if a synthetic minor source is doubling its emissions, it seems likely that it is relaxing the limits it previously agreed to, and thereby running afoul of the Source Obligation Rule.

It does not appear a synthetic minor permittee has yet to be successfully prevented from one-time doubling for either of these reasons. The EPA recently addressed this issue in response to a Petition relating to the permitting of the Salt River Project Agricultural Improvement and Power District Coolidge Generation Station (9/11/2024). EPA noted that major NSR permitting is not triggered by a modification of an existing minor source—whether true or synthetic—unless the modification would constitute a major source by itself. Further, EPA added that a minor source is not a major source—"regardless of whether it is a true minor source due to its natural, unrestricted physical or operational design or a synthetic minor source due to enforceable restrictions."

EPA also noted that the Source Obligation Rule is merely an additional, separate type of major NSR permitting trigger, which exists independent of the triggers for minor sources and major sources. Nevertheless, EPA emphasized that a large increase in emissions does not necessarily run afoul of the Source Obligation Rule—so long as the increases in emissions are tied to new equipment or new sources of emissions and no relaxation on the existing limitations is occurring.

Ultimately, it appears that one-time doubling is still an option for a synthetic minor source, unless and until EPA adopts additional regulations or guidance governing this issue or the question of applicability comes before a court.

Q: What is sham permitting?

A: EPA has historically been concerned about the issue of a source improperly seeking and receiving a synthetic minor permit, constructing its facility subject to less demanding permitting requirements, and shortly thereafter relaxing its permit limits and actually operating at major source levels of pollution. EPA refers to such synthetic minor permits as "sham permits."

One of the primary concerns relating to sham permitting are the practical pollution control consequences of constructing under a synthetic minor permit and then changing your operations to those of a major source shortly thereafter. When developing BACT at a major source, economics and need are also considered. And as a general rule, it is more expensive to retrofit existing equipment with pollution control measures than to install new equipment with better pollution control measures. In other words, old plants are treated "more leniently" than ones not yet constructed. Consequently, even if a synthetic minor source that becomes a major source goes through the major PSD NSR permitting at a later time, it may be allowed to install less stringent pollution control technologies than it would have if it had originally sought a major source permit from the very beginning. In other words, a relaxed synthetic minor permittee that is now a major source might get benefits, such as quicker permitting timelines coupled with laxer control technology, solely based on its decision to become a synthetic minor source in the first instance.

Sham permitting is not intended to penalize sources that accept emissions limitations in pursuit of legitimate business purposes and in good faith later seek a relaxation of those limitations. Nevertheless, synthetic minor sources should be cognizant of what sham permitting is, the factors agencies will consider when evaluating a potential sham permit, and ensure that they intend to genuinely operate (viably) as synthetic minor sources for a period of time prior to undergoing expansion or increasing their output, throughput, or hours of operation, so as to avoid enforcement. Potential enforcement actions for a sham permit includes injunctive relief, civil penalties, and criminal sanctions dating all the way back to the beginning of the actual construction.

Q: Is an agency required to review sham permitting concerns at the initial permitting stage?

A: When a new source first seeks a synthetic minor source from an agency, it is unlikely that an agency is required to review for sham permitting issues in the first instance—unless state law specifically states it is required to do. In 2021, the Minnesota Supreme Court considered this question when a synthetic minor source was challenged on sham permitting grounds, as the

permittee's own report anticipated operating at higher throughput levels at some point in the future. The court noted that EPA's enforcement of sham permits is "entirely retrospective." In particular, the court highlighted that EPA previously noted that it would seek remedies "where it believes it could show to *the satisfaction of a court* that a source . . . *had obtained* a minor source permit with the purpose of obtaining, *after construction*, a major source permit, so as to evade preconstruction review." The court added that, additionally, nowhere in the primary EPA guidance document governing synthetic minor sources does it direct that a permitting agency must investigate sham permitting at the synthetic minor source application stage. The court also highlighted that the guidance document suggested that states may wish to adopt more stringent review procedures, meaning that an agency "could, if it so desired, investigate sham permitting during the synthetic minor source permit application process, but it is not required [federally] to do so." For the court's full analysis, *See In re Issuance of Air Emissions Permit No. 13700345-101 for PolyMet Mining, Inc.*, 955 N.W.2d 258, 268 (Minn. 2021).

Q: What evidence is considered in determining if a source has obtained a sham permit?

A: When a minor synthetic source decides to seek a major source permit, an agency will look to various factors to determine if the initial permit was a sham. Some of the evidence the agency will look to includes whether the facility would not be economically viable for any appreciable period of time if it were restricted to emitting at minor levels, how a project's projected level of operation was portrayed to lending institutions, and if the facility applies for a major source and minor source permit around the same time—the closer the two permitting actions are, the more suspicious the permitting agency will be.

Exceptional Events Part of North Carolina Particulate Air Quality Attainment Designation

BY: CARRICK BROOKE-DAVIDSON

Effective May 2024, EPA tightened the annual health-based National Ambient Air Quality Standard (NAAQS) for fine particulate matter (PM2.5) from 12.0 µg/m3 to 9.0 µg/m3. This change was made after a review of the available scientific evidence, technical information, and advice of an independent scientific panel. EPA indicates that lowering the standard will result in significant public health benefits, advance the economy, and improve quality of life.

All areas of North Carolina are in attainment with the previous PM2.5 annual standard (12.0 µg/m3). Based on certified monitoring data from 2021-2023, 19 out of 21 monitoring sites in North Carolina are also meeting the new standard. The 2023 data shows two monitoring sites in the state were slightly above the new standard, which North Carolina believes is due to influences of Canadian wildfire smoke. These sites are in Mecklenburg and Davidson counties. Without the influence from Canadian wildfire smoke, North Carolina contends none of North Carolina's monitors would have exceeded the new standard in 2023.

The North Carolina Department of Environmental Division of Air Quality (DAQ) has recommended that EPA designate all of North Carolina as in attainment with the revised PM2.5 standard, because the Canadian wildfires were exceptional events outside of the state's control. This would allow DAQ to focus on pollution reduction strategies that are within its control to ensure ongoing attainment with the revised standard. To support that recommendation, the state prepared an Exceptional Events Demonstration that shows that for both the Davidson and Mecklenburg counties' monitors, Canadian wildfire smoke negatively impacted air quality data. Because this exceptional event was outside the control of the state, a small number of days in June and July 2024 can be removed from the calculation when determining compliance with the revised PM2.5 standard if EPA approves the Exceptional Events Demonstration. Exceptional Events Demonstrations are authorized under the Clean Air Act and EPA governs how states can use these provisions.

When a new air quality standard is announced, the designation process as defined by federal rule takes two years to complete. If the air quality in a geographic area meets or is cleaner than the national standard, it is called an attainment area (designated "attainment/unclassifiable"). Areas not meeting the standard are designated as "nonattainment." The process includes state input and public comment opportunities.

On February 6, 2025, DAQ submitted to EPA designation

recommendations based on certified monitoring data (2021-2023) and other factors, as applicable. EPA will review these recommendations, look at the current monitoring data available at that time (2022-2024), and then make the final designations by February 6, 2026.

EPA has said it will consider impacts from wildfire smoke when making designations if the state submits an exceptional event demonstration for the dates impacted by wildfire smoke for all affected monitors. EPA's Exceptional Events rule establishes criteria and procedures for use in determining if air quality monitoring data has been influenced by exceptional events such as wildfire smoke. DEQ is reviewing its monitoring data from 2023 in preparation for submitting an Exceptional Events demonstration to EPA for the two monitoring sites above 9.0 µg/m3.

Per EPA, attainment/nonattainment designations will likely be based on PM2.5 monitoring data collected from 2022-2024. Until all 2024 data is collected and reviewed, it is too early to know which, if any, areas of North Carolina may be in nonattainment with the new standard. Keeping PM2.5 levels low in 2024 will be critical for attaining the new standard.

PM2.5 NAAQS Designation Process	
Milestone	**NC Submittal Date**
Final Rule for 2024 Revised Primary Annual PM2.5 NAAQS (2/7/2024)	
Initial Notification of Exceptional Events Demonstration ("EE Demo") to EPA (1/1/2025)	9/11/2024
Designation recommendations to EPA (2/7/2025)	12/26/2024
EE Demo submitted to EPA (2/7/2025)	2/6/2025
EE Demo for 2024 Monitoring Data (9/30/2025)	Not applicable
EPA notifies State regarding modifications to State's recommendations based on certified monitoring data for 2022-2024 (120-day letter) (10/9/2025)	TBD
EPA initiates 30-day comment period for public review of State recommendations and EPA's intended modifications (Mid-Oct. thru Mid-Nov. 2025)	TBD
States submit additional information, if any, to respond to EPA's modification of State's designation recommendations (Mid-Dec. 2025)	TBD
EPA promulgates final 2024 PM2.5 NAAQS area designations (2/6/2026)	TBD

Source: NC Department of Environmental Quality

EPA recently announced that it is going to reconsider the PM2.5 NAAQS. Any change in the standard will have to go through the formal rulemaking process, including the assembly of an administrative record and notice and public comment. It is unclear at this time how this development will affect the above regulatory timeline.

Clean Water Act: The End of "End-Result" Permitting

BY: WILLIAM D. "BILL" KURIGER

The Supreme Court of the United States' recent Clean Water Act decision in *City of San Francisco v. EPA* has sent shockwaves through the environmental community by prohibiting EPA and state agencies' common practice of including permit conditions that require an "end-result" without providing means to achieve it.

As a result of the decision, "end-result" permit conditions are invalid and unenforceable. Permittees operating under such provisions no longer may be penalized for causing exceedances of water quality standards unless EPA has carefully described the conditions necessary to prevent exceedances of these standards. Moreover, permittees now hold a stronger permit shield defense which cannot be undermined by noncompliance with "end-result" conditions.

The *San Francisco* case stems from a 2019 NPDES permit renewal for San Francisco's wastewater and stormwater treatment facility. As part of the renewal the State of California added two problematic provisions:

1. A prohibition on any discharge that "contributes to a violation of any applicable water quality standard;" and
2. A requirement that the facility cannot perform treatment or make a discharge that "creates pollution, contamination, or nuisance as defined by" a California state law.

Justice Alito's opinion refers to these as "end-result" provisions because they condition compliance not on taking any specific action, but rather on the ultimate water quality after actions are taken.

San Francisco challenged these provisions on two grounds. First, San Francisco argued all permit

limitations must meet the Clean Water Act definition of "effluent limitation," which the "end-result" provisions cannot do. The Court was not persuaded by this argument, finding the Clean Water Act plainly envisions other types of limitations, such as narrative criteria frequently included in permits.

Second, San Francisco argued the Clean Water Act does not authorize EPA or a state to impose NPDES permit requirements that condition compliance upon whether receiving waters meet applicable water quality standards. The Supreme Court proceeded with a textual analysis of the Clean Water Act provision authorizing permit conditions:

> In order to carry out the objective of this chapter there shall be achieved—. . . not later than July 1, 1977, any more stringent **limitation**, including those **necessary to meet** water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to **implement** any applicable water quality standard established pursuant to this chapter.

To understand the scope of this provision, the Court turned to dictionary definitions of ambiguous terms used therein. Beginning with "limitation," the Court focused on a definition stating "restriction. . . imposed from without." The Court reasoned this mandated agencies to require a restriction, not a result. Where California required "End-Results," it required the permittee to develop its own plan (*i.e.,* restrictions) to achieve the end-result. Because the permittee developed its own restrictions, they were restrictions "from within" and therefore not "limitations" in compliance with the Clean Water Act.

Next, the Court analyzed "implement" under the dictionary definition, "taking of actions that are designed to give practical effect to and ensure of actual fulfillment by concrete measures." Therefore, the Court reasoned, the Act's instruction to "implement any applicable water quality standard" could not be satisfied by merely stating the desired end-result. Instead, the agency must "ensure" actual fulfillment of the end-result by "concrete measures."

The Court's analysis of "necessary to meet" is similar. The Court found the phrase is most naturally understood to mean a provision that sets out actions that must be taken to meet the objective, rather than a restatement of the objective. Therefore, stating an end-result must be met is not "necessary to meet" that end-result.

The Court analogized "necessary to meet" and "implement" to a principal telling teachers to "implement" a plan "necessary to meet" test score standards. The principal would not be satisfied if the teachers "implemented" their plan by telling students they must pass the tests. Instead, the principal would expect concrete measures designed to ensure test score standards are actually fulfilled. That is what the Clean Water Act requires of EPA and the States.

Moving away from the dictionary, the Court also reviewed the history of water pollution legislation. The Court found the Clean Water Act deliberately avoided the former Water Pollution Control Act's (WPCA) "after-the-fact" structure which penalized violators only after pollution occurred. The Court reasoned the "end-result" provisions at issue effectively reinstituted the WPCA scheme the Clean Water Act was designed to avoid.

The Court also noted that "end-result" provisions render the permit shield a nullity because a permittee could comply with every actual "limitation" in their permit yet face enforcement for a drop in water quality in receiving waters. Permittees can now rest assured that compliance with the actual limitations of their permits will protect them from enforcement, even if water quality drops below standards.

Finally, the Court recognized "end-result" provisions create a "multi-discharger problem" because agencies must look backwards to determine who was responsible for the drop in water quality underlying enforcement. Noting this issue was prominent under the WPCA, the Court was unwilling to find the CWA forces agencies to

"unscramble the polluted eggs after the fact."

The Court rounded out its opinion with a clear statement: "Determining what steps a permittee must take to ensure that water quality standards are met is the EPA's responsibility, and Congress has given it the tools it needed to make that determination. If the EPA does what the CWA demands, water quality will not suffer."

As a result of this opinion, "end-result" provisions are invalid, unenforceable, and no longer may be included in Clean Water Act permits. This decision substantially increases EPA's burden to develop and implement actual limitations which instruct permittees on how to ensure water quality standards are maintained. Some have speculated this may mean increased wait times on permit applications and more denials from agencies. If EPA is given sufficient resources to develop instructive limitations, it is unclear whether that fear will come to fruition. What is clear, however, is that modern courts will hold EPA to a strict interpretation of the Clean Water Act.

***City and Cty. of San Francisco v. E.P.A.*, 604 U.S. ----, 145 S.Ct. 704 (March 4, 2025)**

Drumming Up a Change? EPA's Review of the RCRA "Empties" Rule and Its Impact on Generators and the Drum Reconditioning Industry

BY: RYAN W. TRAIL

EPA recently initiated a rulemaking process aimed at reviewing how empty industrial drums are regulated under the Resource Conservation and Recovery Act (RCRA). This is a move which could have significant implications for businesses generating, managing, or reconditioning used containers. In late 2023, EPA issued an Advanced Notice of Proposed Rulemaking (ANPRM) seeking public comments from industry stakeholders on potential regulatory and/or non-regulatory options to address what EPA sees as unacceptable risks associated with reconditioning of RCRA empty drums.

The ANPRM stems from a 2022 EPA Drum Reconditioner Damage Case Report, which highlighted environmental, health and safety incidents linked to drum reconditioning facilities across the country. While EPA is considering regulatory changes, the likelihood of actual rulemaking remains uncertain, particularly in light of this Administration's directive to limit new regulations and guidance.

The Current RCRA Empties Rule: A Regulatory Baseline

Under 40 CFR § 261.7, containers that once held hazardous waste are considered "RCRA empty" and no longer subject to RCRA regulations if they meet specific criteria:

- All wastes must have been removed to the extent possible using "practices commonly employed" to remove wastes from the particular type of container (i.e., pouring, pumping, aspirating); and
- No more than 2.5 centimeters (one inch) of residue may remain on the bottom of the container; or
- Either no more than 3 percent by weight of the total capacity of the container may remain in the container if the container is less than or equal to 119 gallons in size; or
- No more than 0.3 percent by weight of the total capacity of the container may remain in the container if the container is greater than 119 gallons in size.

This standard has long provided a clear and practical framework for generators of empty containers, such as manufacturers, chemical processors, and industrial facilities. Once a drum meets the RCRA-empty criteria, it can be sent for reuse or disposal without being classified as hazardous waste.

The ANPRM: A Push for Stricter Controls?

The 2022 EPA Damage Case Report identified many cases where reconditioning facilities received drums with residual hazardous waste, leading to soil and water contamination and employee injuries. In response, the 2023 ANPRM presents regulatory and non-regulatory options for addressing the risks associated with RCRA empty drums.

Suggested regulatory changes applicable to drum generators include the following:

- Reducing the "one-inch" regulatory limit for defining RCRA empty;

- Requiring rinsing for all containers prior to being considered RCRA empty; and
- Requiring certification of empty drums prior to shipment, employee training, and labeling and documentation of hazards posed by drum residues.

Potential regulatory changes applicable to drum reconditioners include:

- Requiring SOPs for screening drums prior to acceptance, designated non-RCRA empty container storage areas, rejected shipment procedures, discrepancy reports, and container management plans;
- Requiring waste analysis plans for characterizing rinsate; and
- Requiring reconditioners to conduct inspections and maintain inventory of all drums.

Critics of the proposed measures have argued that such regulatory changes would dramatically increase compliance burdens on generators, increase operational costs, and potentially increase overall risk associated with hazardous waste residues.

Public Comments: Industry Trends

The public comment period on the ANPRM revealed common concerns amongst industry regarding potential changes to RCRA empty regulation. First, industry comments favored non-regulatory options over regulatory ones. Because EPA cited to no record of significant noncompliance with the "empties" rule by generators, and because the 2022 Damage Case Report focus solely on issues at drum reconditioners, commentors agreed the more appropriate response is issuance on EPA Guidance directed specifically to the drum reconditioning industry.

Next, commentors generally opposed reduction of the "one-inch" regulatory limit for defining RCRA empty containers. Commentors note the one-inch measurement is standard, easily identifiable, and enforceable (i.e., no confusion). Generators and drum reconditioners not complying with the one-inch limit are currently subject to enforcement and EPA should focus efforts on compliance. According to these commentors, requiring generators to remove additional waste could actually increase the risk of releases.

Finally, commentors opposed requirements for rinsing all containers prior to being considered empty. Here again, they argue, such a requirement increases the risk of releases at the generator (mixing hazardous wastes and rinse waters) and increases risks to health and safety of employees. Further, they point to Publicly Owned Treatment Works (POTW) ordinances that prohibit disposal of hazardous waste, which could result in rinsate being solidified and disposed of in hazardous waste landfills at great expense.

Rulemaking vs. Guidance: What's Likely to Happen?

While EPA is reviewing public comments, the likelihood of a formal rule change is low. President Trump's 10-to-1 Regulatory Executive Order, which requires agencies to identify 10 existing regulations to be repealed for every 1 new regulation, may significantly limit EPA's ability to amend the RCRA empties rule or even issue industry guidance on the issue (the 10-to-1 EO specifically applies to "guidance" as well). However, given that EPA is not required to engage in the public rulemaking process to issue agency guidance, the agency may attempt to draft policy documents, fact sheets, or guidance aimed at clarifying best practices for drum reconditioners.

For generators of RCRA empty drums, it is advisable to stay engaged in the rulemaking process and monitor EPA's action. Whether through formal regulation or agency guidance, changes in how RCRA empty drums are managed and regulated could significantly impact compliance obligations and costs.

Used Drum Management and Reconditioning Advance Notice of Proposed Rulemaking, 88 Fed. Reg. 54537 (Aug. 11, 2023)

Contact Us: We find ways to help you move forward.

Ethan Ware
Partner & Chair
803.567.4610

Carrick Brooke-Davidson
Partner
919.981.4027

Jessie King
Partner
803.567.4602

Channing Martin
Partner
804.420.6422

Mona O'Bryant
Partner
919.981.4091

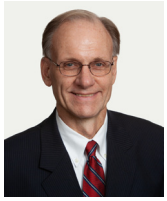
Speaker Pollard
Partner
804.420.6537

Sean Sullivan
Partner
919.981.4312

John Tamasitis
Partner
803.567.4617

Ryan Trail
Partner
803.567.4605

Dick Willis
Partner
803.567.4611



Amos Dawson
Of Counsel
919.981.4010

Susie Brancaccio
Associate
919.981.4041

Tanner Brantley
Associate
804.420.6071

Bill Kuriger
Associate
803.567.4608