

## RCRA

### “A mind-numbing statute\*”

American Mining Congress v. EPA, [824 F.2d 1177](#), 1189 (D.C. Cir. 1987)

ELI

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# SUPERFUND vs. RCRA

Superfund – generally abandoned waste sites



RCRA – management of waste in operating facilities  
Aim is to avoid land disposal and Superfund



# Purpose

Cradle to grave regulatory scheme.



Avoid land disposal and minimize waste.

# Statistics On Hazardous Waste Generation and Management

- ❑ 25,584 facilities generate hazardous waste
- ❑ 1,058 facilities manage hazardous waste
- ❑ 35.1 millions of tons of hazardous waste generated
- ❑ 5 States (Texas, Louisiana, Ohio, Indiana, and Mississippi) generate 71% of all waste.

❑ Source: EPA 2017 Biennial Survey

# RCRA Subtitles

- Subtitle D (4001-4010) addresses **non-hazardous solid waste** requirements.
  - bans open dumping of waste, set minimum federal criteria for the operation of municipal waste (i.e. garbage) and industrial waste landfills, including design criteria, location restrictions, financial assurance, corrective action (cleanup), and closure requirement.
- Subtitle C (3001-3020) focuses on **hazardous solid waste**.
  - Solid waste includes **solids, liquids and gases** and must be **discarded** to be considered waste.

# How does it work?

- First, is it a waste, solid waste, hazardous waste?
- Second, if hazardous waste, then rules for generators, transporters, and treatment, storage and disposal facilities.
- Subtitle D – Solid Waste Regs
- Subtitle C – Hazardous Waste Regs
- Focus on waste minimization and proper handling and disposal of waste.

# The Big Picture Waste? Solid waste? Hazardous waste?

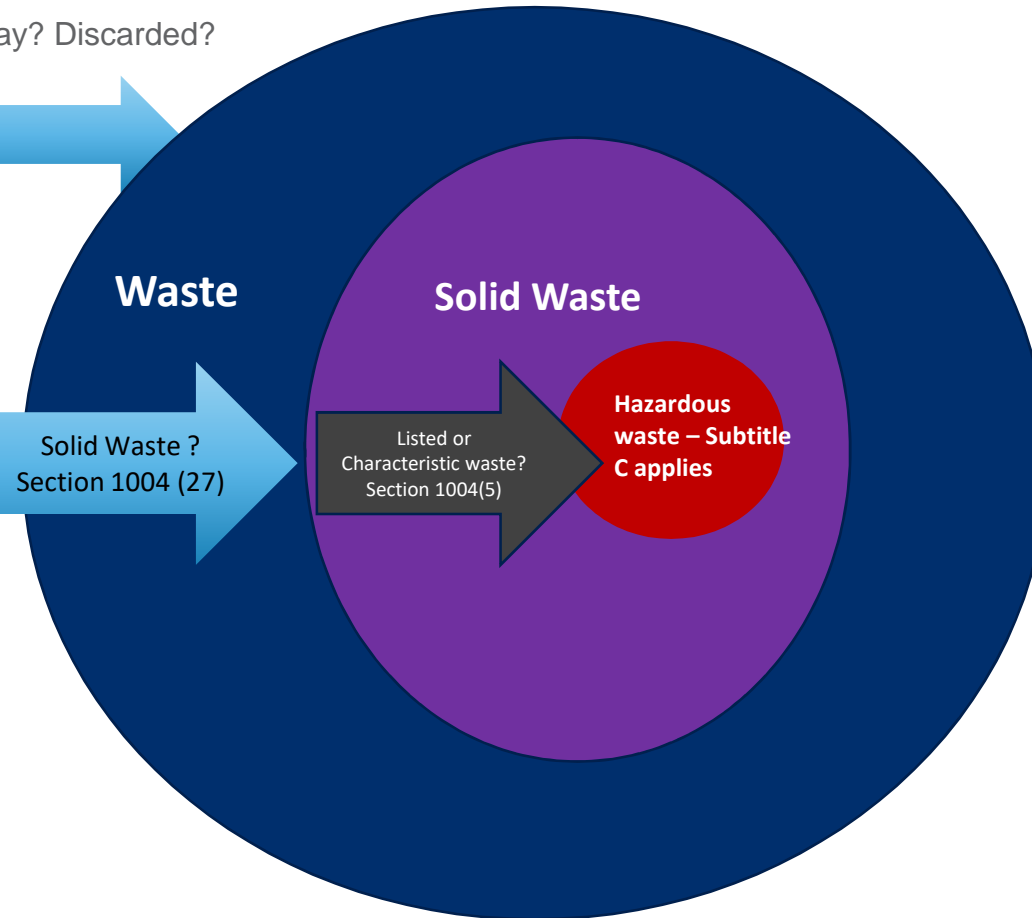
## Is it a waste?

Did someone throw it away? Discarded?

Yes = waste

Whoever  
decided to  
throw it away  
is the  
“Generator”

Manifest system



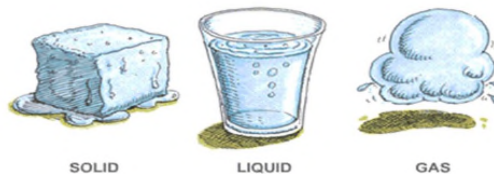
# Statutory Definition of “Solid Waste”

- “any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and **other discarded material**, including solid, liquid, semisolid, or contained gaseous material, resulting from industrial, commercial, mining, and agricultural operations and from community activities”

- 42 USC 6903(27)

- **Solid Waste Exclusions – domestic sewage, NPDES permit and others (See §261.4 Exclusions.)**

Solids, Liquids, and  
Gases





# Regulatory Definition of Solid Waste

## 40 CFR §261.2 Definition of solid waste.

(a)(1) A ***solid waste*** is any discarded material that is not excluded under §261.4(a) or that is not excluded by a variance granted under §§260.30 and 260.31 or that is not excluded by a non-waste determination under §§260.30 and 260.34.

(2)(i) A **discarded material** is any material which is:

(A) **Abandoned**, as explained in paragraph (b) of this section; . . .  
.(there are others)

# Regulatory Definition of “Abandoned”

40 CFR 261.2(b) Materials are solid waste if they are abandoned by being:

- (1) Disposed of; or
- (2) Burned or incinerated; or
- (3) Accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned or incinerated ( longer than 90 DAYS); or
- (4) Sham recycled – not really recycled.



# Certain Recycled Materials Excluded from Definition of Solid Waste – 40 CFR 261.2(e)

- **Waste Used as an Ingredient:** If a material is directly used as an ingredient in a production process without first being reclaimed, then that material is not a solid waste.
- **Waste Used as a Product Substitute:** If a material is directly used as an effective substitute for a commercial product (without first being reclaimed), it is exempt from the definition of solid waste.
- **Wastes Returned to the Production Process:** When a material is returned directly to the production process (without first being reclaimed) for use as a feedstock or raw material, it is not a solid waste.
- **YOU CAN AVOID RCRA REGULATION IF THE WASTE IS PROPERLY RECYCLED.**
  - Lots of litigation around this issue
  - Note the focus of the recycling here is putting it back in process

# Is It Real or Sham Recycling?

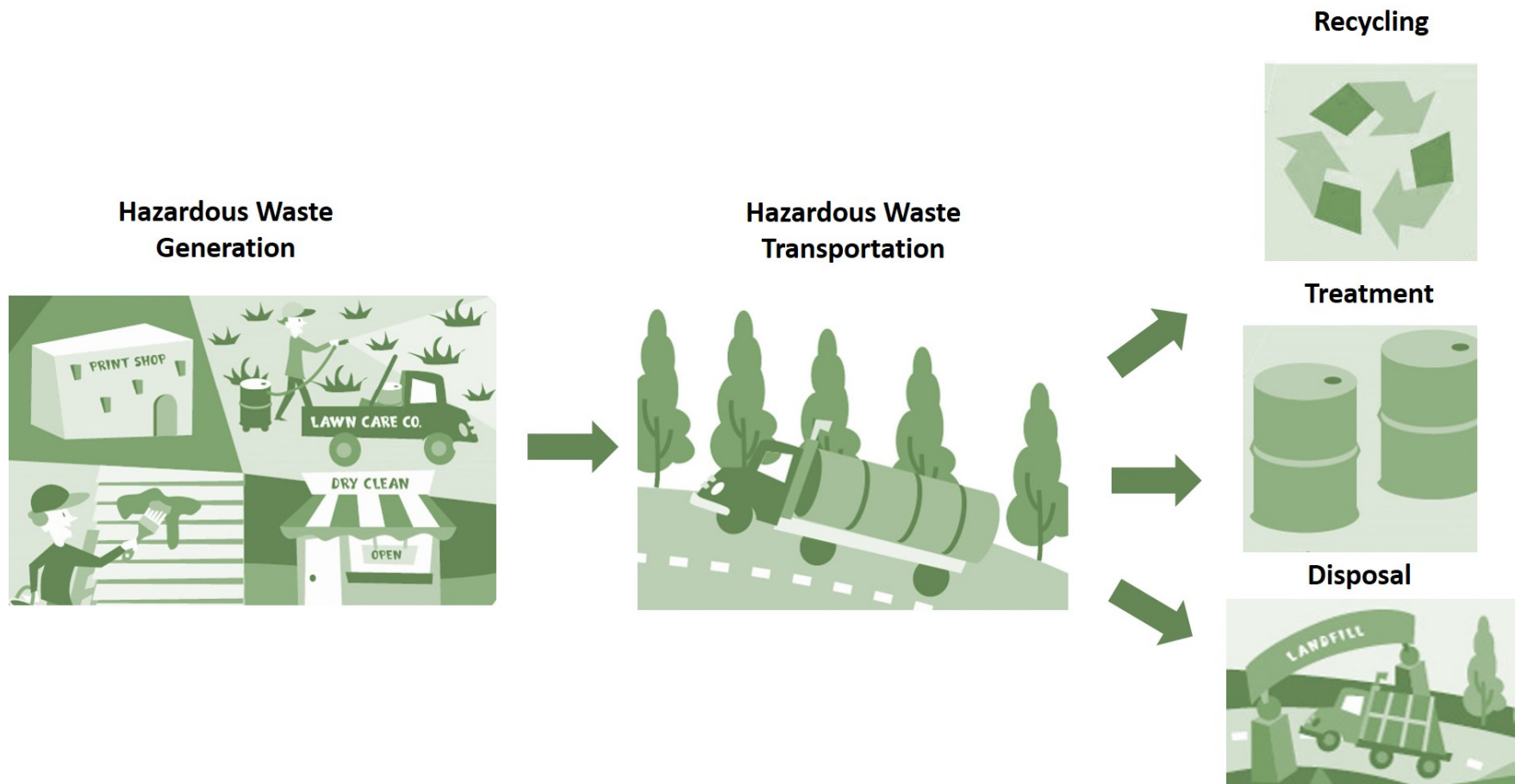
- Elements of real recycling:

- (1) useful contribution to recycling process;
- (2) recycling process must create valuable product
- (3) must manage hazardous secondary material like valuable product
- (4) product must be comparable to legit product (eg lots more lead? Not good).

Other considerations in making this determination include whether the secondary material is effective for the claimed use, if the secondary material is used in excess of the amount necessary, and whether or not the facility has maintained records of the recycling transactions.

- **Generator Controlled exclusion** – excludes hazardous secondary materials that are recycled under control of generator.
- **Transfer based exclusion** – required generators to satisfy themselves that sending facilities to real recycler and not sham recycler.

# Subtitle C



# Responsibilities on generators, transporters, and treatment, storage, and disposal facilities.

- Parties affected. RCRA imposes responsibilities on generators and transporters of hazardous wastes as well as facilities that treat, store, or otherwise dispose of hazardous wastes.
- Generators. A generator is defined in RCRA regulations as “any person, by site, whose act or process produces hazardous waste identified or listed in part 261 of this chapter or whose act first causes a hazardous waste to become subject to regulation.” 40 C.F.R. § 260.10. Generators are subject to recordkeeping, reporting, labeling, and storage requirements. Generators must also initiate the use of a manifest to track hazardous waste transport. 90 day speculative accumulation rule.
- Transporters. Transporters are also subject to recordkeeping, labeling, manifest requirements. No need to choose the site.
- Treatment, storage, and disposal. Complex standards govern how a facility may engage in the treatment, storage, and disposal (“TSD”) of hazardous wastes. Significantly, recycling of a hazardous waste could be considered treatment subject to the regulatory requirements.

# What is a hazardous waste? Statutory Definition

RCRA defines a hazardous waste as:

- The term “**hazardous waste**” means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—
  - (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
  - (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.
- RCRA § 1004(5).



# What is a hazardous waste? Regulatory Definition

- **Characteristic waste** - **ignitability, corrosivity, reactivity, and toxicity.**
  - burden on the generator of a waste material to determine whether it possesses one of these characteristics. 40 C.F.R. § 262.11.
- **Listed waste** – they are listed.
  - EPA places each waste on the list into one of four categories -- F, K, P, and U. P wastes are acutely hazardous; U wastes are non-acutely hazardous; and F and K wastes are various mixtures and combinations of wastes types.





# New – Pharmaceutical Hazardous Waste Regulations

- New rule for managing hazardous waste pharmaceuticals
  - Generated or managed by health care facilities (include retail pharmacies and hospitals) and “reverse distributors” (unsold product)
  - Sewer ban

# Why does it matter if you are in or out of Subtitle C?

- Very onerous regulation of facility – every step of the way.
- Subtitle C regulations for the generation, transportation, and treatment, storage, or disposal of hazardous wastes
- Also comprehensive regulations for the technical standards for the design and operation of TSDFs.



# Helpful Resources

- Do an advanced search of [yosemite.epa.gov](https://www.yosemite.epa.gov)
- RCRA Unraveled

# Other Important RCRA Provisions

- Beyond the regulatory regime for handling hazardous waste, RCRA has enforcement provisions.



# Corrective Action – 3004(u)

## What if you have a release?

3004(u) requires corrective action of all releases of hazardous waste or constituents from any solid waste management unit at a TSD facility regardless of time waste placed in the unit.

3004(v) requires corrective action beyond facility boundary where necessary to protect human health and the environment

EPA or state can order corrective action. EPA policy is that if state handles matter under RCRA corrective action, site will not be put on NPL (Superfund)

# Enforcement – Section 3008

## Civil enforcement

Injunctive relief

Maximum civil penalty for violations of hazardous waste storage, management, and disposal requirements \$72,718 per day, per violation.

## Criminal enforcement

Includes violations of the RCRA regs, or lying on forms

Ordinary penalties are 2 years / \$50K (double for subsequent penalties)

For knowing endangerment, 15 years / \$250K

# Citizen Suits – Section 7002

- For permit violations
- Also for imminent and substantial endangerments, even with no violation of statute or regulations
- Requires notice to EPA, state, and violator – 60 days for violations, 90 days for endangerments. But 7002(a)(2)(A) and (b)(1)(A) waive the requirement of advance notice for violations of the regs.
- Action barred if EPA or State is already prosecuting
- Also provides for actions against EPA for failure to undertake a mandatory duty (7002(a)(2)), after 60 days notice (7002(c))
- Court can award costs and attorneys fees (7002(e))

# Imminent Hazard – Section 7003

- Essentially a codification of nuisance law
- Very broad – overrides all the rest of RCRA
- Solid waste or hazardous waste
- Past or present handling, transport, etc.
- May present imminent and substantial endangerment – interpreted broadly
- Suit against any person who has contributed or is contributed
- Injunctive relief available