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**TITLE 329 SOLID WASTE MANAGEMENT DIVISION****FIRST NOTICE OF COMMENT PERIOD**

LSA Document #20-23

**DEFINITION OF SOLID WASTE FOR HAZARDOUS WASTE MANAGEMENT****PURPOSE OF NOTICE**

The Indiana Department of Environmental Management (IDEM) is soliciting public comment on amendments to rules at [329 IAC 3.1](#) concerning updates to the identification of solid waste for the purposes of hazardous waste management and related hazardous waste requirements. IDEM seeks comment on the affected citations listed and any other provisions of Title 329 that may be affected by this rulemaking.

**CITATIONS AFFECTED:** [329 IAC 3.1](#).

**AUTHORITY:** [IC 4-22-2-21](#); [IC 13-14-8](#); [IC 13-19-3-1](#); [IC 13-22-2](#).

**SUBJECT MATTER AND BASIC PURPOSE OF RULEMAKING****Basic Purpose and Background**

IDEM is proposing amendments to [329 IAC 3.1](#) that update the identification of solid waste for the purposes of hazardous waste management to be no less stringent than the current federal definition of solid waste. The amendments also will add state-specific standards for the hazardous secondary materials transfer-based exclusion at 40 CFR 261.4(a)(24). The proposed amendments will address certain provisions of the federal definition of solid waste affected by a vacatur ordered by a federal court on July 7, 2017, and the subsequent United States Environmental Protection Agency (U.S. EPA) final rule published on May 30, 2018 (83 FR 24664). The rulemaking will include updates to the federal definition of solid waste that resulted from these actions and state-specific requirements for the solid waste exclusion at 40 CFR 261.4(a)(24) that are based on vacated provisions of the January 13, 2015, definition of solid waste federal rule (80 FR 1693). The state-specific requirements will improve the availability of information and reduce the risks from the management of hazardous secondary materials while not requiring a hazardous waste facility permit if the regulated entity meets certain conditions.

Because of recent actions at the federal level and a state statutory provision at [IC 13-14-9-8\(h\)](#), Indiana's current hazardous waste requirements are inconsistent with the federal definition of solid waste for purposes of hazardous waste management. The federal definition of solid waste underwent a significant update with a U.S. EPA final rule that was published in the Federal Register on January 13, 2015. In 2016, the Environmental Rules Board adopted a rulemaking that included the incorporation by reference of the 2015 definition of solid waste federal rule. However, on July 7, 2017, the United States Court of Appeals for the D.C. Circuit ordered the vacatur of certain provisions of the 2015 definition of solid waste federal rule. The main requirements affected were the definition of legitimate recycling at 40 CFR 260.43 and the verified recycler exclusion at 40 CFR 261.4(a)(24), which reverted back to the transfer-based exclusion included in the October 30, 2008, definition of solid waste federal rule (73 FR 64667). Like most authorized states, Indiana did not adopt the 2008 federal rule that defined solid waste for purposes of hazardous waste management because there were concerns about risks to human health and the environment from the management of hazardous secondary materials under the transfer-based exclusion contained in the 2008 federal rule.

The IDEM rule that included the 2015 definition of solid waste federal rule was promulgated using the abbreviated rulemaking process authorized under [IC 13-14-9-8](#) because the rulemaking was limited to the incorporation by reference of federal requirements and other technical amendments. However, a statutory provision at [IC 13-14-9-8\(h\)](#) voids a state rule adopted under [IC 13-14-9-8](#) authority if the corresponding federal rule that is being incorporated is vacated by a judicial action. As a result of the 2017 federal court order that vacated certain provisions of the 2015 definition of solid waste federal rule, the corresponding Indiana rules were voided and no longer enforceable. The situation created inconsistencies between the federal definition of solid waste and Indiana's hazardous waste requirements.

In response to the court order, U.S. EPA published a direct final rule on May 30, 2018, for the vacatur of certain provisions of the 2015 definition of solid waste federal rule. The final rule corrected the requirements affected by the federal court order and made other conforming changes to the rule language in 40 CFR 260 and 40 CFR 261. IDEM is proposing to incorporate by reference the updates to the federal definition of solid waste to make Indiana's rules no less stringent than the current analogous federal rules.

IDEM also is proposing requirements based on provisions previously located at 40 CFR 260.31(d)(1)-(5) in the 2015 definition of solid waste federal rule that apply to a reclamation facility or intermediate facility that manages hazardous secondary materials under the transfer-based exclusion at 40 CFR 261.4(a)(24). The commissioner may grant a variance from classifying hazardous secondary materials as a solid waste if a

reclamation facility or intermediate facility meets these additional conditions. The purpose of these additional state-specific conditions to the exclusion at 40 CFR 261.4(a)(24) is to add what IDEM considers to be vital and necessary requirements for availability of information and environmental protection that are lacking in the transfer-based exclusion after the court-ordered vacatur and subsequent U.S. EPA direct final rule. These particular requirements were an important aspect of the 2015 definition of solid waste federal rule that contributed to IDEM's and most states' preference for the 2015 rule over the 2008 rule.

This rulemaking primarily will affect persons and entities involved in the management of hazardous secondary materials that pursue the transfer-based exclusion at 40 CFR 261.4(a)(24). Those affected may include hazardous secondary material generators, transporters, intermediate facilities, and reclamation facilities.

IDEM seeks comment on the affected citations listed, including suggestions for specific language, any other provisions of Title 329 that may be affected by this rulemaking, and alternative ways to achieve the purpose of the rulemaking.

#### **Alternatives to Be Considered Within the Rulemaking**

Alternative 1. Adopt the updates to the identification of solid waste for the purposes of hazardous waste management at 40 CFR 260 and 40 CFR 261 and additional state-specific requirements for the transfer-based exclusion at 40 CFR 261.4(a)(24) based on vacated portions of the 2015 definition of solid waste federal rule that were previously located at 40 CFR 260.31(d)(1)-(5).

- Is this alternative an incorporation of federal standards, either by reference or full text incorporation? Yes.
- Is this alternative imposed by federal law or is there a comparable federal law? Yes, this alternative is imposed by federal rules found at 40 CFR 260 and 40 CFR 261.
- If it is a federal requirement, is it different from federal law? Yes.
- If it is different, describe the differences. The proposed state-specific requirements are based on portions of the 2015 definition of solid waste federal rule that were later vacated in a 2017 federal court order. The proposed state-specific changes previously were located at 40 CFR 260.31(d)(1)-(5).

Alternative 2. Adopt the updates to the identification of solid waste for the purposes of hazardous waste management at 40 CFR 260 and 40 CFR 261 without including additional state-specific requirements.

- Is this alternative an incorporation of federal standards, either by reference or full text incorporation? Yes.
- Is this alternative imposed by federal law or is there a comparable federal law? Yes, this alternative is imposed by federal rules found at 40 CFR 260 and 40 CFR 261.
- If it is a federal requirement, is it different from federal law? No.
- If it is different, describe the differences. Not applicable.

Alternative 3. Do not amend existing rules.

- Is this alternative an incorporation of federal standards, either by reference or full text incorporation? No.
- Is this alternative imposed by federal law or is there a comparable federal law? No.
- If it is a federal requirement, is it different from federal law? Not applicable.
- If it is different, describe the differences. Not applicable.

#### **Applicable Federal Law**

Because IDEM administers an authorized state hazardous waste program, various federal laws and regulations are applicable to the administration of the program and the hazardous waste rules that IDEM must adopt. 42 U.S.C. 6926 contains federal statutory requirements and 40 CFR 271 contains more detailed regulatory requirements for authorized state hazardous waste programs. As an authorized state, Indiana must adopt and maintain hazardous waste rules that are equivalent to and no less stringent than the federal hazardous waste rules at 40 CFR 260 through 40 CFR 270, 40 CFR 273, and 40 CFR 279.

For this rulemaking, IDEM plans to incorporate by reference updates to the federal hazardous waste rules that were included in a U.S. EPA final rule published on May 30, 2018. This U.S. EPA final rule was published as a response to the vacatur ordered by the United States Court of Appeals for the D.C. Circuit on July 7, 2017. The main changes in the final rule include updates to requirements in 40 CFR 260 and 40 CFR 261 for the management of hazardous secondary materials. IDEM proposes the incorporation by reference of these updated federal requirements to maintain equivalency with the federal hazardous waste program.

#### **Potential Fiscal Impact**

Potential Fiscal Impact of Alternative 1. By proposing to adopt the updates to the identification of solid waste for the purposes of hazardous waste management, this alternative will offer potential cost savings to regulated entities that pursue the available exclusions to the definition of solid waste. Qualifying for the exclusion at 40 CFR 261.4(a)(24) will allow a regulated entity to manage the waste without applying for a hazardous waste facility permit, which ranges in cost from \$23,800 to \$40,600 for a new permit. In addition, a regulated entity that meets the available exclusions will have lower annual operating and compliance fees than a facility with a hazardous waste permit.

While the exclusion from requiring a hazardous waste facility permit allows for cost savings, the additional state-specific requirements of this alternative based on requirements formerly located at 40 CFR 260.31(d)(1)-(5) may have a potential fiscal impact. The proposed state-specific provisions will require a reclamation facility or intermediate facility to comply with the emergency preparedness and response requirements at 40 CFR 261,

Subpart M. Based on the Regulatory Impact Analysis conducted by U.S. EPA for the 2015 definition of solid waste federal rule, the compliance costs for the emergency preparedness and response requirements range from \$1,000 to \$4,000 per facility, depending upon the amount of hazardous secondary material managed by the facility. However, if the facility currently has a hazardous waste facility permit, then the facility will not incur additional costs because the facility already must meet equivalent emergency preparedness and response requirements.

IDEM anticipates that the other proposed state-specific requirements will not have a fiscal impact. Some of the requirements do not incur compliance costs and other requirements are similar to existing provisions of the exclusion at 40 CFR 261.4(a)(24). In fact, because a reclamation facility or intermediate facility must obtain a variance from IDEM to manage the hazardous secondary material, the generators of the hazardous secondary material may have reduced administrative costs to verify that the receiving facility meets the provisions of the exclusion at 40 CFR 261.4(a)(24)(v). The information that the generator is required to verify and maintain will be more readily available, as IDEM will require the receiving facility to provide the information to obtain a variance.

Potential Fiscal Impact of Alternative 2. By proposing to adopt the updates to the identification of solid waste for the purposes of hazardous waste management without additional changes, this alternative will offer potential cost savings to regulated entities that pursue the available exclusions to the definition of solid waste. Qualifying for the exclusion at 40 CFR 261.4(a)(24) will allow a regulated entity to manage the waste without applying for a hazardous waste facility permit, which ranges in cost from \$23,800 to \$40,600 for a new permit. In addition, a regulated entity that meets the available exclusions will have lower annual operating and compliance fees than a facility with a hazardous waste permit.

Potential Fiscal Impact of Alternative 3. This alternative does not propose any amendments to the existing rules and does not have a fiscal impact compared to the existing rules. However, by not updating Indiana's hazardous waste requirements to be equivalent with the federal definition of solid waste, the potential cost savings of \$23,800 to \$40,600 for managing hazardous secondary materials without a hazardous waste facility permit is not available to regulated entities.

#### **Small Business Assistance Information**

IDEM established a compliance and technical assistance program (CTAP) under [IC 13-28-3](#). The program provides assistance to small businesses and information regarding compliance with environmental regulations. In accordance with [IC 13-28-3](#) and [IC 13-28-5](#), there is a small business assistance program ombudsman to provide a point of contact for small businesses affected by environmental regulations. Information on CTAP and other resources available can be found at:

[www.in.gov/idem/ctap](http://www.in.gov/idem/ctap)

For purposes of [IC 4-22-2-28.1](#), small businesses affected by this rulemaking may contact the Small Business Regulatory Coordinator:

Angela Taylor  
IDEM Small Business Regulatory Coordinator/CTAP Small Business Liaison  
IGCN 1316  
100 North Senate Avenue  
Indianapolis, IN 46204-2251  
(317) 233-0572 or (800) 988-7901  
[ctap@idem.in.gov](mailto:ctap@idem.in.gov)

For purposes of [IC 4-22-2-28.1](#), the Small Business Ombudsman designated by [IC 5-28-17-6](#) is:

Katelyn Colclazier  
Small Business Ombudsman  
Indiana Economic Development Corporation  
One North Capitol, Suite 700  
Indianapolis, IN 46204  
(317) 431-1560  
[kcolclazier@iedc.in.gov](mailto:kcolclazier@iedc.in.gov)

Resources available to regulated entities through the small business ombudsman include the ombudsman's duties stated in [IC 5-28-17-6](#), specifically [IC 5-28-17-6\(9\)](#), investigating and attempting to resolve any matter regarding compliance by a small business with a law, rule, or policy administered by a state agency, either as a party to a proceeding or as a mediator.

The Small Business Assistance Program Ombudsman is:

Erin Moorhous  
IDEM Small Business Assistance Program Ombudsman/Business, Agricultural, and Legislative Liaison  
IGCN 1301  
100 North Senate Avenue  
Indianapolis, IN 46204-2251  
(317) 232-8921 or (800) 451-6027  
[emoorhou@idem.in.gov](mailto:emoorhou@idem.in.gov)

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### Public Participation and Work Group Information

An external work group will be established to discuss issues involved in this rulemaking. The work group will consist of IDEM staff and a cross-section of stakeholders. IDEM plans to begin work group meetings after the publication of this First Notice of Comment Period based on the responses received during the comment period and any contact made to IDEM by interested parties that wish to participate in the work group.

If you wish to provide comments to the work group on the rulemaking, attend meetings, or have suggestions related to the work group process, please contact Dan Watts, Rules Development Branch, Office of Legal Counsel at (317) 234-5345 or (800) 451-6027 (in Indiana). Please provide your name, phone number, and e-mail address, if applicable, where you can be contacted. The public is also encouraged to submit comments and questions to members of the work group who represent their particular interests in the rulemaking.

### REQUEST FOR PUBLIC COMMENTS

At this time, IDEM solicits the following:

- (1) The submission of alternative ways to achieve the purpose of the rule.
- (2) The submission of suggestions for the development of draft rule language.

Comments may be submitted in one of the following ways:

- (1) By mail or common carrier to the following address:

LSA Document #20-23 Definition of Solid Waste for Hazardous Waste Management  
Dan Watts  
Rules Development Branch  
Office of Legal Counsel  
Indiana Department of Environmental Management  
Indiana Government Center North  
100 North Senate Avenue  
Indianapolis, IN 46204-2251

- (2) By facsimile to (317) 233-5970. Please confirm the timely receipt of faxed comments by calling the Rules Development Branch at (317) 232-8922.

- (3) By electronic mail to [dwatts1@idem.in.gov](mailto:dwatts1@idem.in.gov). To confirm timely delivery of submitted comments, please request a document receipt when sending the electronic mail. **PLEASE NOTE: Electronic mail comments will NOT be considered part of the official written comment period unless they are sent to the address indicated in this notice.**

- (4) Hand delivered to the receptionist on duty at the thirteenth floor reception desk, Office of Legal Counsel, Indiana Government Center North, 100 North Senate Avenue, Indianapolis, Indiana.

Regardless of the delivery method used, in order to properly identify each comment with the rulemaking action it is intended to address, each comment document must clearly specify the LSA document number of the rulemaking.

### COMMENT PERIOD DEADLINE

All comments must be postmarked, faxed, or time stamped not later than March 20, 2020. Hand-delivered comments must be delivered to the appropriate office by 4:45 p.m. on the above-listed deadline date.

Additional information regarding this action may be obtained from Dan Watts, Rules Development Branch, Office of Legal Counsel, (317) 234-5345 or (800) 451-6027 (in Indiana).

Christine Pedersen, Section Chief  
Rules Development Branch  
Office of Legal Counsel

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An [html](#) version of this document.