

# Definition of Solid Waste Final Rule

TDEC HWMP

EPA Office of Resource  
Conservation and Recovery

# Today's Objective

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To give an overview of the new Definition of Solid Waste (DSW) rule.

- Signed by EPA Administrator October 7, 2008
- Published in the Federal Register October 30, 2008

# Today's Agenda:

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1. Background & Context
2. Under Control of the Generator Exclusion
3. Transfer-Based Exclusion
4. Non-waste Determination Procedure
5. Legitimacy Provision
6. What Next...

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# Background & Context

## In this section...

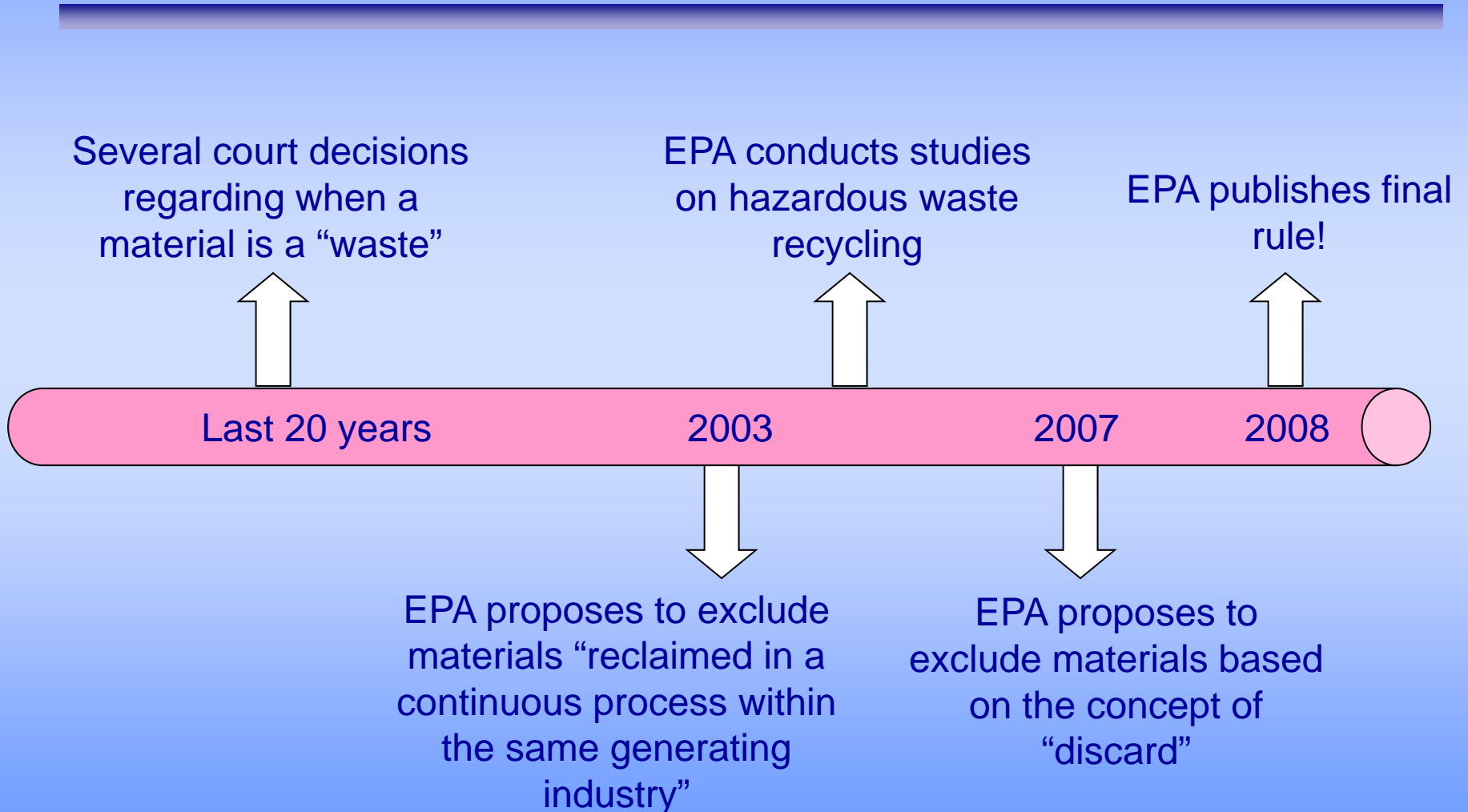
- Why did EPA develop the DSW rule?
- What is the (brief) history of this rule?
- What are the expected impacts of this rule?
- What materials are eligible for this rule?
- When can I start using the rule?
- What exactly is in the DSW rule?

## *Why did EPA develop the DSW rule?*

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- To encourage resource conservation by streamlining regulation of hazardous secondary materials that are reclaimed.
- Streamlining the regulations, while maintaining critical controls, will make recycling these materials not only safe, but also easier and more cost-efficient.

# *What is the (brief!) history of this rule?*



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***What studies did EPA conduct to support the rule?***

- Good Current Practices for Recycling Hazardous Secondary Materials (HSM)
- Environmental Problems Associated with Recycling HSM
- Potential Effects of Market Forces on Recycling HSM

## *What is the (brief!) history of this rule?*

### ***What did commenters say on the 2007 proposal?***

States	-Generally supportive, but wanted additional conditions.
Industry	-Generally positive, liked 2007 proposal much better than 2003. -Some argued against EPA's authority to impose any conditions.
Waste Management	-Commenters were split; some opposed proposal, some supported, but with additional conditions.
Environmental Groups	-Opposed 2007 proposal.

*\*Legal challenges to the final rule must be filed within 90 days of publication (RCRA section 6976).*

## *What are the expected impacts of the DSW rule?*

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- EPA's Regulatory Impact Analysis estimates:
  - 5,600 facilities and 1.5 million tons of hazardous waste will be affected annually, providing a cost savings of approximately \$95 million per year
  - Affected materials include 23,000 tons of new recycling.

## *What materials are eligible for the final rule?*

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Hazardous secondary materials sent for reclamation are eligible for this rule.

### ***Materials that are NOT eligible include:***

- *Materials recycled by 'use constituting disposal' and burning for energy recovery*
- *Inherently waste-like materials*
- *Materials already excluded from the definition of solid waste under 40 CFR 261.4*
- *Spent lead-acid batteries*
- *Spent petroleum catalysts (K171 and K172)*

## *When can I start using the rule?*

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- The federal rule was effective on December 29 (60 days from publication on October 30, 2008).
- However, the rule does not go into effect in an authorized state unless and until the state is authorized for the rule.

# *What exactly is in EPA's DSW final rule?*

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## ***Four major components of final rule:***

### ***1. Under the Control of the Generator Exclusion***

Self-implementing exclusion for materials generated and reclaimed under the control of the generator.

### ***2. Transfer-based Exclusion***

Self-implementing exclusion for materials generated and transferred to another company for reclamation.

### ***3. Non-waste Determination Procedure***

Materials that are non-wastes (determined through a petition process)

### ***4. "Legitimate" Recycling Provision***

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# Under Control of the Generator Exclusion

## In this section...

- What is the 'generator-controlled' exclusion?
- What is the notification?
- What is "contained"?

## *What is the generator-controlled exclusion?*

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- ***Includes hazardous secondary materials that are generated and reclaimed...***
  - at the same facility, which includes facilities leased by the generator and onsite contractors
  - by the same company (even at different facilities) if the reclaiming facility is controlled by the generator or if both the generating facility and the reclaiming facility are under common control
  - under certain toll manufacturing arrangements

## *What is the generator-controlled exclusion (cont.)?*

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- ***Under this exclusion, generators must:***
  - Legitimately recycle materials
  - Not speculatively accumulate materials
  - Submit notifications (using the Site ID form)
  - Ensure materials are “contained”
  - Reclaim materials within the United States

## *What is the notification?*

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- Facilities must send a notification prior to operating under the exclusion and by March 1 of each even numbered year thereafter to the Regional Administrator using the Site ID form (EPA Form 8700-12).
- Information submitted in the notifications enables EPA and states to:
  - (1) monitor compliance of facilities;
  - (2) compile credible information for the public;
  - (3) measure performance and impacts of the rulemaking; and,
  - (4) target future program efforts to achieve further increases in recycling.

## *What is the notification (cont.)?*

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### ***Notifications must include the following information:***

- (1) Name, address and EPA ID number (if applicable);
- (2) Name and telephone number of a contact person;
- (3) NAICS code;
- (4) Type of exclusion(s) the facility is claiming;
- (5) Whether the reclaimer/intermediate facility has financial assurance;
- (6) When the facility expects to begin managing materials;
- (7) A list of hazardous secondary materials to be managed;
- (8) Whether the materials will be managed in a land-based unit;
- (9) The quantity of materials to be managed annually; and
- (10) The certification (included in EPA form 8700-12) signed by an authorized representative.

## *What is “contained”?*

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- Generally, material is “contained” if it is placed in a unit that controls the movement of the material out of the unit and into the environment.
- Material that is released from the unit (e.g., through a spill) is considered a solid and hazardous waste unless it is immediately recovered.
- If a release is “significant” the material remaining in the unit could also be considered a solid and hazardous waste, depending on circumstances.

## *What is “contained” (cont.)?*

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- If the materials are not managed as valuable raw materials, the unit could be considered to be storing hazardous waste.
- “Significant” releases are not necessarily large in volume; small releases over time could also be considered significant under some circumstances.

## *What is “contained” (cont.)?*

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- Materials may be stored in both non-land-based units and land-based units.
- Land-based units are defined as an area where materials are placed in or on the land before recycling (e.g., surface impoundment or waste pile).
- Land-based units do not include land-based production units, which are used in the actual production of a product.

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# Transfer-Based Exclusion

## In this section...

- What is the transfer-based exclusion?
- What are reasonable efforts?
- What are intermediate facilities?
- What is financial assurance?
- What are the recordkeeping requirements?

# *What is the transfer-based exclusion?*

- ***Includes hazardous secondary materials that are generated and transferred to another person for reclamation.***
- ***Under this exclusion, generators must:***
  - Legitimately recycle materials
  - Not speculatively accumulate materials
  - Submit notifications (using the Site ID form)
  - Ensure materials are “contained”
  - Make “reasonable efforts” to evaluate the reclaimer and intermediate facility to determine that they will safely and legitimately recycle
  - Must perform contractual arrangements with intermediate facilities to ensure materials are sent to the reclamation facility
  - Maintain records of off-site shipments and confirmations of receipt
  - Provide notice and obtain consent for exports

## *What is the transfer-based exclusion (cont.)?*

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- ***Under this exclusion, reclaimers and intermediate facilities must:***
  - Legitimately recycle materials
  - Not speculatively accumulate materials
  - Submit notifications (using the Site ID form)
  - Ensure materials are “contained” and managed in a manner at least as protective as analogous raw materials
  - Manage recycling residuals safely
  - Maintain records of shipments and send confirmations of receipt to generator
  - Have financial assurance

## *What is reasonable efforts?*

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- Reasonable efforts requires generators to evaluate a reclaimer or intermediate facility to ensure that they intend to properly manage and legitimately recycle the material prior to shipping it to the facility.
- Generators must make reasonable efforts and document the evaluation every three years at a minimum. Documentation includes a certification statement.
- The minimum standard for reasonable efforts consists of five questions.
- Reasonable efforts is not required if a generator chooses to send his materials to a facility that will manage the material under a RCRA Part B permit or interim status standards.

## *What is reasonable efforts (cont.)?*

### ***Five questions must be affirmatively answered by the generator:***

1. Is the reclamation process legitimate?
2. Has the facility notified authorities and indicated that it has financial assurance?
3. Does publicly available information indicate that there are no formal enforcement actions taken against the facility in the previous three years and that the facility is not a “significant non-complier” with RCRA Subtitle C? If “no,” does the generator have “credible evidence” the material will be properly managed?
4. Does the facility have the equipment and trained personnel to safely recycle the material?
5. Does the facility have the required permits to manage residuals, have a contract to dispose of them at a permitted facility, or does the generator have “credible evidence” residuals will be safely managed?

## *What are intermediate facilities?*

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- Intermediate facilities are facilities that store (but do not generate or reclaim) materials for more than 10 days.
- Intermediate facilities do not include transfer facilities, which hold materials during the normal course of transportation for less than 10 days.
- Intermediate facilities must comply with the same conditions as a reclaimer (e.g., notification, financial assurance, recordkeeping).
- Generators must perform reasonable efforts on each intermediate facility and must perform contractual arrangements to ensure that the materials are sent to the reclamation facility chosen by the generator.

# *What is “financial assurance”?*

- Financial assurance is the mechanism by which facilities ensure they will not abandon the materials in the event they cease operations or otherwise cannot recycle the materials.
- Financial assurance required under DSW is very similar to that required for interim status facilities, with some modifications:
  - The terminology has been changed to reflect the nature of the materials (e.g., “hazardous secondary materials” instead of “hazardous waste”)
  - The regulations have been revised to allow a unit at the end of its operating life to be released from financial assurance, if all hazardous secondary materials have been removed.
  - There is no requirement for post-closure financial assurance, because post-closure is only intended to apply to waste management units designed to maintain waste in place after the unit closes (e.g., in a landfill).

## *What is “financial assurance” (cont.)?*

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- The basic steps include:
  - Facility develops a cost estimate on the amount of financial assurance that is required, based on the potential cost of closing the facility and disposing of any hazardous secondary material as hazardous waste.
  - Facility obtains and submits financial assurance using the same types of financial instruments available for interim status facilities (i.e., trust funds, payment surety bonds, letters of credit, insurance, or a financial test and corporate guarantee.)
  - A facility that already has financial assurance under RCRA part 264 or 265 may work with the State to determine if its current financial assurance is equivalent to that required for the exclusion.

## *What is “financial assurance” (cont.)?*

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- The basic steps include (cont.):
  - At least 180 days prior to ending operations under the exclusion, the facility submits a plan for removing the materials and decontaminating the unit to the Regional Administrator.
  - The Regional Administrator will notify a facility that financial assurance is no longer required once he receives certification from a qualified professional engineer that all materials have been removed and the units are properly decontaminated.

## *What are the recordkeeping requirements?*

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- In addition to notification and documentation and certification of reasonable efforts...
  - Facilities must maintain for three years records of all off-site shipments sent and received at the facility.
  - Reclaimers must send and generators must maintain for three years confirmations of receipt.
  - Generators must obtain notice and consent for exports and must file annual reports of materials exported to foreign reclaimers.

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# Non-Waste Determination Procedure

## In this section...

- What materials are eligible for a non-waste determination?
- What is the process for obtaining a non-waste determination?

# What materials are eligible for a non-waste determination?

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- ***Includes hazardous secondary materials that are...***
  - reclaimed in a continuous industrial process; or
  - indistinguishable in all relevant aspects from a product or intermediate
- Materials recycled by ‘use constituting disposal’ and burning for energy recovery are not eligible for a non-waste determination.

# What is the process for obtaining a non-waste determination?

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- To obtain a non-waste determination, facilities must:
  - Legitimately recycle materials
  - Demonstrate that the hazardous secondary material meets eligibility criteria
  - Submit application to EPA or authorized state
- Regulatory authorities may also stipulate conditions as part of the non-waste determination.

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# Legitimate Recycling Provision

## In this section...

- What is the legitimate recycling provision?
- What does it mean to meet the mandatory factors?
- What does it mean to meet (or not meet) the non-mandatory factors?

## *What is the legitimate recycling provision?*

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- The legitimate recycling provision is a condition of the new DSW exclusions and non-waste determinations.
- Is equivalent to the existing policy for legitimate recycling.

## *What is the legitimate recycling provision (cont.)?*

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- ***Two mandatory factors***

- Materials must provide useful contribution to the recycling process or to a product or intermediate
- Recycling must produce valuable product or intermediate

- ***Two factors must be considered***

- Materials must be managed as valuable commodities
- Products of recycling must not contain significantly higher levels of hazardous constituents than are in analogous products

# *What does it mean to meet the mandatory factors?*

- ***Persons must address the mandatory factors:***
  - **Material provides a useful contribution to the recycling process or a product or intermediate if it:**
    - Contributes valuable ingredients;
    - Replaces a catalyst or carrier in the recycling process;
    - Is a source of a valuable constituent recovered;
    - Is recovered or regenerated; **OR**
    - Is used as an effective substitute for a commercial product
  - **Recycling produces a valuable product or intermediate if it is:**
    - Sold to a third party; **OR**
    - Used by the recycler or generator as an effective substitute for a commercial product or as an ingredient or intermediate

## *What does it mean to meet (or not meet) the non-mandatory factors?*

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- ***Persons must consider the non-mandatory factors:***
  - Materials must be managed as valuable commodities; and
  - Products of recycling must not contain significantly higher levels of hazardous constituents.
- If the recycling does not meet one of the non-mandatory factors, the recycler should be prepared to explain why the recycling is still legitimate, for example, by considering the protectiveness of the storage methods, exposure from and bioavailability of toxics in the products, and other relevant considerations in evaluating legitimacy.

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# Comparing the Rule

## In this section...

- How does the DSW rule compare to the Subtitle C requirements for generators?
- How does the DSW rule compare to the Subtitle C requirements for reclaimers?

## *How does the final rule compare to the 2007 proposal?*

<b>Topic</b>	<b>2007 Proposed Rule</b>	<b>2008 Final Rule</b>
<b>Intermediate Facilities</b>	Prohibited use of intermediate facilities.	Allows use of intermediate facilities, provided certain conditions are met.
<b>Financial Assurance</b>	Required compliance with 40 CFR 264 Subpart H.	Requires compliance with new 40 CFR 261 Subpart H, which modifies financial assurance for hazardous secondary materials.
<b>Non-waste Determinations</b>	Proposed (3) types of non-waste determinations.	-Finalizes (2) types of non-waste determinations. -Requires facilities to re-apply in the event of a change.
<b>Legitimacy</b>	Codified legitimacy criteria apply to all hazardous waste recycling.	Codified legitimacy provision applies to new DSW exclusions and non-waste determinations and is substantively the same as existing policy. Existing policy continues to apply to other recycling.

## *How does the DSW rule compare to the existing Subtitle C regulations for Reclaimers?*

Subtitle C Regulation Requirements	DSW Exclusion Requirements
- Must obtain Subtitle C permit	-----
- Waste analysis plan	-----
- Security measures	-----
- Financial assurance	- Financial assurance (modified)
- Personnel training	-----
- Must have emergency coordinator, and have emergency and contingency plan.	-----
- Manifest requirements	-----
- Recordkeeping: <ul style="list-style-type: none"> <li>o Operating record</li> <li>o Biennial report</li> <li>o Import notification</li> </ul>	- Recordkeeping: <ul style="list-style-type: none"> <li>o Notifications</li> <li>o Records of off-site shipments &amp; confirmations of receipt</li> <li>o Three-year record retention</li> </ul>
- Specific design standards for tanks, containers, containment buildings, surface impoundments and inspection requirements.	- Hazardous secondary materials must be contained and managed in a manner at least as protective as analogous raw materials.

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# What Now...

## In this section...

- When can I start using the rule?
- Sierra Club Challenges to the rule
- Adopting the rule in Tennessee
- Getting additional information

*When can I start using the rule?*

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## ***To reiterate...***

- The federal rule was effective on December 29, 2008 (60 days from publication).
- However, the rule does not go into effect in an authorized state unless and until the state is authorized for the rule.

# Sierra Club Challenges

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- Sierra Club's Petition for Review of the DSW Rule

Filed in the U.S. Court of Appeals for the District of Columbia Circuit on 1/28/2009

- *Petition for Reconsideration of "Revisions to the Definition of Solid Waste," 73 Fed. Reg. 64,668 (Oct. 30, 2008,) and Request for Stay*

Submitted to EPA Administrator Lisa Jackson on 1/29/2009

# Tennessee and the DSW Rule

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- Watching challenges to the Federal Rule
- Concerns on impact to regulatory programs
- Discussions with regulated community and other interested parties
- Draft rule later this year

## *For additional information*

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- Visit the TDEC webpage:  
<http://state.tn.us/environment/>
- Call the TN HWMP 615-532-0780
- Visit the EPA DSW webpage :  
<http://www.epa.gov/epawaste/hazard/dsw/index.htm>

**end of presentation**