April 24, 2018

Anne L. Idsal, Regional Administrator
U.S. Environmental Protection Agency
Region 6
1445 Ross Avenue, Suite 1200
Mail Code: 6RA
Dallas, TX 75202-2733

Re: Verified recycler exclusion under Louisiana's delegated RCRA Subtitle C hazardous waste program

Dear Administrator Idsal:

This letter is submitted by the Louisiana Chemical Association (LCA) and the Louisiana Mid-Continent Oil and Gas Association (LMOGA) and relates to Louisiana's hazardous waste program.[1] As discussed below, regulators and the regulated community in Louisiana,[2] seek written confirmation from the U.S. Environmental Protection Agency (EPA) that the verified recycler exclusion[3] adopted by Louisiana in response to EPA's 2015 definition of solid waste (DSW) rule:[4]

- remains effective under the state's hazardous waste program without additional action by EPA or the Louisiana Department of Environmental Quality (LDEQ); and
- in-state use of the verified recycler exclusion currently promulgated in Louisiana's hazardous waste regulations is acceptable to EPA and will not jeopardize the state's RCRA Subtitle C hazardous waste program delegation.

Background

EPA adopted the 2015 DSW rule to "encourage reclamation in a way that does not result in increased risk to human health and the environment from discarded hazardous secondary material."[5] EPA strongly encouraged states to adopt the 2015 DSW rule.[6] And as of June 30, 2017, at least 16 states, including Louisiana, Texas, and Oklahoma, had adopted the entire rule, including its verified recycler exclusion.[7,8]

Under the verified recycler exclusion, hazardous secondary material is excluded from the definition of solid waste, and thus is not subject to regulation as a hazardous waste, if it is reclaimed by a third party reclaimer that has a RCRA permit (or interim status) or that has been approved as a verified recycler (via variance) by EPA or a qualified state.[9] EPA considers the verified recycler exclusion to be more stringent than the transfer based exclusion, which the verified recycler exclusion replaced.[10,11]

The D.C. Circuit apparently agrees, as the D.C. Circuit recently held that EPA exceeded its authority under RCRA when adopting the verified recycler exclusion.[12] As a result, the D.C. Circuit vacated the federal verified recycler exclusion, except for its emergency preparedness and response requirements and its expanded containment requirements, and reinstated the federal transfer based exclusion.[13]

Issue

The D.C. Circuit's decision has resulted in a considerable amount of confusion and uncertainty in states, such as Louisiana, with delegated RCRA Subtitle C hazardous waste programs, that have already adopted the 2015 DSW rule's verified recycler exclusion and would like to retain that exclusion. These states do not have the transfer based exclusion in their hazardous waste programs. Moreover, these states can no longer rely on EPA's inclusion of the verified recycler exclusion in the federal hazardous waste program as the basis for inclusion of the verified recycler exclusion in the states' hazardous waste programs.

As a result, some state regulators are hesitant to grant the required variance to prospective verified recyclers, prospective verified recyclers are hesitant to submit variance requests to state regulators and invest in new or modified recycling facilities, and generators of hazardous secondary material are forced to incinerate or dispose of such material in landfills rather than sending it offsite for legitimate reclamation. This situation clearly is not one that fosters recycling, which was the purpose of the verified recycler exclusion (and the transfer based exclusion as well).[14]

LCA and LMOGA member companies annually generate thousands of tons of hazardous secondary material. This material could be reclaimed by qualified third-party recyclers located in Louisiana if all concerned – LDEQ, LCA/LMOGA member companies, and the recyclers – were confident in the verified recycler exclusion under which that recycling would occur. For the reasons noted above, absent certainty in the manner that EPA views the verified recycler exclusion, the desired reclamation likely will not occur and this material will continue to be disposed of by incineration or landfill.[15]

Request

LCA and LMOGA, on behalf of their respective members, respectfully request that as soon as practical, EPA officially recognize and confirm that the verified recycler exclusion, as adopted in Louisiana, remains effective under Louisiana's hazardous waste program, without additional action by EPA or the State of Louisiana, <u>and</u> in-state use of the verified recycler exclusion pursuant to LDEQ's promulgated hazardous waste regulations is acceptable to EPA and will not jeopardize Louisiana's RCRA Subtitle C hazardous waste program delegation.

Should you have any questions regarding this request or require additional information or any action by LCA or LMOGA, please do not hesitate to contact Henry T. Graham, Jr., Vice

President and General Counsel of LCA, at 225.344.2609; henry@lca.org, and Nathan McBride, Manager of Environmental Affairs of LMOGA, at 225.387.3205; nathan.mcbride@lmoga.com. Thank you for your timely attention to this request.

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cc: Chuck Carr Brown, Ph.D., LDEQ Secretary
Steve Gilrein, EPA Region 6
Elliott Vega, LDEQ Assistant Secretary

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[1] LCA is an industry trade association that has 63 member companies with over 100 chemical manufacturing plant sites in Louisiana. LMOGA is an industry trade association representing individuals and companies that together produce, transport, refine, and market crude oil, natural gas, and petroleum products in Louisiana. LMOGA members operate sixteen refineries and numerous production facilities, natural gas plants, compressor stations, and product terminals throughout Louisiana.

[2] Louisiana has a delegated hazardous waste program. *See,* 40 CFR 272.951.

[3] 40 CFR 261.4(a)(24).

[4] 80 Fed. Reg. 1694 (January 13, 2015), effective July 13, 2015.

[5] *Id.*

[6] *See,* https://www.epa.gov/hw/where-2015-definition-solid-waste-rule-effect (at March 29, 2018).

[7] *See,* https://www.epa.gov/hw/where-2015-definition-solid-waste-rule-effect#AdoptAuthorize (at March 29, 2018).

[8] The Louisiana Department of Environmental Quality (LDEQ) adopted the full 2015 DSW rule and those portions of EPA's 2008 DSW Rule (73 Fed. Reg. 64668 (October 30, 2008)) that remained effective. Log No. HW118, 43 La. Reg. 1151 (June 20, 2017). Louisiana's version of the verified recycler exclusion can be found at LAC 33:V.105.D.1.y.

[9] 40 CFR 261.4(a)(24) and LAC 33:V.105.D.1.y. Various other requirements also apply to the verified recycler exclusion: (a) the hazardous secondary material must be managed in a unit that meets the definition of "contained" while with the generator; (b) the verified recycler must manage the material in a manner that is at least as protective as that employed for analogous raw material and must be contained; (c) residuals from reclamation processes have be properly managed and may be hazardous waste (if characteristic or listed themselves); (d) the material

cannot be speculatively accumulated; (e) the material must not otherwise be subject to material-specific management conditions; (f) notice must be provided to the regulatory authority prior to operating under the verified recycler exclusion and every even numbered year thereafter); (g) the generator must document that reclamation is legitimate as provided in 40 CFR 260.43; (h) the generator must meet the emergency preparedness and response conditions (40 CFR Part 261, Subpart M); (i) financial assurance must be provided by the verified recycler (*see,* 40 CFR Part 261, Subpart H); and the generator and verified recycler are subject to recordkeeping requirements. *Id.*

[10] *See,* https://www.epa.gov/hw/where-2015-definition-solid-waste-rule-effect (at March 29, 2018), where EPA states:

> "Note that one state (Idaho) is currently authorized for a 2008 version of the DSW rule that includes exclusions similar to the 2015 exclusions found at 40 CFR 261.4(a)(23) and (24). *Because these 2008 DSW exclusions are less stringent than their 2015 counterparts, Idaho will need to revise its program to meet the 2015 standards.* Until they complete this process, the 2008 rule will remain in effect in that state."

Emphasis added. In other words, Idaho will need to revise its regulations to, among other things, replace the transfer based exclusion with the verified recycler exclusion.

[11] EPA promulgated the transfer based exclusion in the 2008 DSW Rule. Like the verified recycler exclusion, the transfer based exclusion excluded from the definition of solid waste hazardous secondary materials transferred to another person for reclamation. But, unlike the verified recycler exclusion (which requires a variance from the regulatory authority if the reclaimer does not have a RCRA permit or interim status), the transfer based exclusion was more self-implementing. For the transfer based exclusion to apply, if the reclaimer did not have a RCRA permit or interim status, the generator only had to: "make reasonable efforts to ensure that each reclaimer intends to properly and legitimately reclaim the hazardous secondary material and not discard it and that each reclaimer will manage the hazardous secondary material in a manner that is protective of human health and the environment." Former 40 CFR 261.4(a)(24), as promulgated in 2008 DSW rule. (Of course, there are various other differences between the verified recycler exclusion and transfer based exclusion as well.)

[12] *American Petroleum Institute v. EPA,* 862 F.3d 50 (D.C. Cir. 2017), *modified on rehearing,* 888 F.3d 918 (D.C. Cir. 2018).

[13] *Id.*

[14] Although not the subject of this request, another issue that EPA must address is the differing programs among the states for third-party reclamation of hazardous secondary materials. How does EPA envision the handling of out-of-state reclamation of hazardous secondary materials? What should happen when a generator in a state with the verified recycler exclusion desires to send its hazardous secondary material for reclamation by a third-party recycler located in a state with the transfer based exclusion? And vice versa, what should happen when a generator in a state with the transfer based exclusion desires to send its hazardous secondary material for reclamation by a third-party recycler located in a state with the verified recycler exclusion?

[15] LCA and LMOGA acknowledge that reclamation may occur under the transfer based exclusion; however, very few states have adopted the transfer based exclusion (no states in EPA Region 6 have adopted the transfer based exclusion).