



RESPONSE TO COMMENTS

PROPOSED REGULATORY AMENDMENT R161-24

November 18, 2024

RECYCLING OF HAZARDOUS (INCLUDING UNIVERSAL) WASTE

At the State Environmental Commission Meeting, 11/19/2024, the NDEP's Bureau of Sustainable Materials Management is proposing adoption of regulatory petition R161-24P. R161-24P proposes two things: 1) Update NDEP's "Adopt by Reference" of the federal Resource Conservation and Recovery Act (RCRA); and 2) Adoption of the Hazardous Secondary Materials (HSM) Exclusions at 40 CFR 261.4.

Nevada is an "Adopt by reference" State for the purposes of the federal RCRA. And our role in the recycling of hazardous (including universal) waste is to ensure both federal and State requirements are followed.

Under current federal and State requirements to recycle a hazardous waste, a facility can follow either of these regulatory paths:

- Apply for a Treatment, Storage, and Disposal Facilities (or TSDF) permit. This permit would allow the facility to store waste, treat the waste to remove the hazardous characteristics, produce materials from the treatment process that could be used in another process, and dispose of waste that cannot be recycled; or
- Apply for a state Written Determination (WD) for Recycling Authorization. This authorization would allow the facility to perform just-in-time recycling of the waste. And, like the TSDF permit, the materials resulting from the process could be used in another process. The facility must demonstrate that their process is legitimately recycling the waste as specified in federal requirements. The WD processes ensures recycling facilities follow federal requirements in addition to state requirements such as contingency planning and financial assurance.

We have evaluated and are proposing the adoption of the Hazardous Secondary Materials (HSM) Exclusions to create a third regulatory path for recycling of hazardous waste. HSM means a secondary material (e.g., spent material, by-product, or sludge) that, when discarded, would be identified as hazardous waste under 40 CFR part 261 (40 CFR 260.10). HSM may qualify for a regulatory exclusion from the definition of solid waste and RCRA Subtitle C regulations if they meet the EPA's criteria for legitimate recycling and are not speculatively accumulated.

The proposed regulations do not extend the HSM or other exclusions to materials generated outside of the United States. It is similar to other states that have not adopted the exclusions, wastes generated in those states are not afforded the exclusions.

When they are disposed of, most lithium-ion batteries are likely to be hazardous waste due to ignitability and reactivity; and, if not damaged, can be handled as a Universal Waste. Discarded solar panels may either be a solid or hazardous waste. And, if a hazardous waste, may be handled as a Universal Waste if the State where they are generated has, through the regulatory process, determined that they can be managed as Universal Waste (e.g., California and Hawaii).

US EPA Strategy in developing and implementing the Hazardous Secondary Materials Regulations was to facilitate and reduce the regulatory burden for facilities recycling or reclaiming valuable commodities that otherwise were hazardous waste. In requiring facilities to obtain Hazardous Waste Operating permits, the state is increasing the regulator burden for these facilities. This renders the state less competitive in the battery materials market and does not support the development of a circular economy for battery materials.

How does NDEP view companies receiving materials from out of the country, would HSM apply to these feedstock materials? Would this be limited based on ports of entry (Texas versus California)?

Can you outline how NDEP's proposed changes align with the Governor's desire to create a "Lithium Loop" in Nevada?

How does NDEP's proposed regulatory framework encourage recycling?

How does NDEP intend to promote recycling over disposal if it regulates recycling facilities in a similar manner as it does disposal facilities?

How does NDEP's proposed regulatory framework decrease the regulatory burden on NDEP? On industry?

What are NDEP's concerns regarding Li-battery material processing that are only addressed by a written determination and not by HSM or other currently available Federal or State regulations?

What distinction(s), if any, does NDEP make between treating hazardous wastes and processing hazardous materials?

In what ways, if any, does NDEP consider requirements for universal waste destination facilities to be more stringent than the requirements in 40 CFR 261.4(a)(24)? Please provide answers separately for Federal requirements and Nevada-specific requirements for destination facilities.

What additional regulatory provisions will a universal waste destination facility with just in time processing be required to meet if NDEP's proposed changes are fully adopted in Nevada? Which regulatory provisions will no longer apply?

Does the Potential Permit Status for universal waste on slide 7 indicate that a storage permit, treatment permit, and written determination are all required for anyone to recycle universal waste? If not, what is meant in this slide?

What other state(s) require a written determination, permit, or similar approval to recycle universal waste?

Slide 9 of your presentation, “Solid Waste” suggests that discarded material that “needs to be reclaimed before use” can only be solid waste. How does NDEP reconcile this with the definition of CCP and the exclusions in 40 CFR 261.4(a)(23), (24), and (27)?

Item 1 Page 3: Removal of 261.4(a)(23), 261.4(a)(24), and 261(a)(27) from the list of regulations that are specifically excluded in Nevada. Comstock appreciates the agency’s effort to expand and stimulate the economy of Nevada by helping to enable the recycling of complex electrification products. It is incredibly helpful to industry when they do not have to develop new and novel technologies to recycle every offtake stream to completion but, rather partner with another group that has technology and expertise in the areas that apply to the final reclamation of potential Hazardous Secondary Materials.

R161-24P – Regulatory Process and Timeline

The SEC meeting for regulation adoption is November 19, 2024.

What do timelines look like for HSM adoption in the state? When is it expected this will be finalized allowing companies to operate under the exclusion?

R161-24P – Adopt by Reference

In the updated aerosol cans rule, sections previously referencing Part 272 (Approved State Hazardous Waste Management Programs) have been revised to Part 270 (EPA Administered Permit Programs: The Hazardous Waste Permit Program). Part 272 is reserved specifically for Nevada’s hazardous waste program but is now considered an outdated reference. By referencing Part 270, we ensure alignment with current EPA-administered permit program requirements for hazardous waste.

There is no 40 CFR 260.12 in the July 1, 2022, version of the CFR.

Item 6 Page 10: As it relates to the adoption of Part 273 “Standards for universal waste management,” and the subsequent replacement of part 272 with part 270 in 16 instances (edits j: (1, 2, 4, 5, 6, 8, 9). Part 272 is the RCRA section of approved state hazardous waste management programs while section 270 is the section describing EPA administered hazardous waste permit programs. The outward appearance here is that NDEP is removing all references to the part 271 “Requirements for authorization of State

hazardous waste management programs” and part 272 “Approved State hazardous waste management programs.”

Is it the intention of NDEP to no longer recognize State waste programs authorized under 40 CFR part 272 and 273? No, please see the response to question 1 of this section.

We are most concerned about the potential unintended consequence of someone interpreting the extensive deletions in the current proposed changes to NAC 444.8618 through NAC 444.8633 as meaning that NDEP intends to no longer recognize other State waste programs. Based on the workshop Tuesday, we were relieved that this was not the intention of the changes/deletions but we strongly encourage that this be clarified in one manner or another, such that it is clear in NAC that Nevada continues to recognize other State waste program designations.

During our meeting you referenced 40 CFR 260.12. How does it apply to recycling facilities?

R161-24P – Hazardous Secondary Materials (HSM) Exclusions

Certification Options

[In Section 261.4 we had initially proposed to strike the certification option under the Generator Controlled Exclusion, relying on the tolling agreement option. However, after further review we believe both are reasonable options under the exclusions and applicable to our regulated industry.](#)

Incorporate by reference the following provision excluded from the LCB proposed adoption: 40 CFR 261.4(a)(23)(i)(B) - Management of hazardous secondary materials when they are generated and reclaimed at different facilities under common control.

Multiple companies within the state, specifically in Storey County, would envision having multiple facilities managing HSM under the Generator Controlled Separate Facility exclusion. Having this aspect of the regulation would be a business advantage to Nevada businesses. Would the state please expound on its rationale for not adopting 261.4(a)(23)(i)(B) with the proposed rules package?

On slide 4, what is the rationale for not adopting 40 CFR 261.4(a)(23)(i)(B)?

Why is NDEP unwilling to adopt the exclusions provided in 40 CFR 261.4(a)(23), (24), and (27) without exception or addition?

Item 2 Page 3: As it pertains to continuing to exclude 261.4(a)(23)(i)(B) from Nevada regulations. It appears that NDEP is suggesting removal of certification and recordkeeping language between the generator and reclaimer. Will NDEP have their own certification language and recordkeeping requirements or is this not going to be required?

Facilities that Recycle Recyclable Materials Without Storing Them Before they are Recycle

We had initially proposed to strike the requirements for owners or operators of facilities that recycle materials without storage in Sections 261.6 and 273.60. We were concerned with potential conflicts between federal and state requirements. However, including these sections will simply require facilities to comply with the most stringent requirements whether federal or state.

Incorporate by reference the following provision excluded from the LCB proposed adoption: 40 CFR 261.6(c)(2) – List of requirements for owners or operators of facilities that recycle recyclable materials without storing them before they are recycled.

On slide 4, what are the implications of removing 40 CFR 261.6(c)(2) for just in time processing facilities? Do other regulations become applicable by default?

Please confirm that just in time universal waste destination facilities are not subject to RCRA Part B / TSDF permitting except as provided in 40 CFR 261.6(c)(2).

Item 3 Page 3: As it pertains to continuing to exclude 261.6(c)(2) and 273.60(b), therefore not adopting the requirements for facilities that recycle, without prior storage additionally and specifically for universal waste (273.60(b)). Is this due to the fact that Nevada has specific Written Determination requirements in the NAC?

Confidentiality of Information

We had proposed to strike claims of business confidential information to ensure our staff has the information available to process these exclusions. However, we are not taking this action at this time to ensure we have additional time to understand the interaction between federal and state confidentiality requirements and will revisit this issue at a later date.

Incorporate by reference the following provision excluded from the LCB proposed adoption: 40 CFR 273.60(b) - The owner or operator of a destination facility that recycles a particular universal waste without storing that universal waste before it is recycled must comply with 40 CFR 261.6(c)(2).

40 CFR 260.2(b) - Any facility that is claiming an exemption or exclusion under 260 to 279, inclusive, may not assert a claim of business confidentiality of information to prove that exemption or exclusion.

Can the state clarify the confidentiality changes associated with HSM adoption, does this cover less confidentiality than the current Written Determination confidentiality agreements?

Item 4 Page 5 (2): The addition of language that “...any facility claiming an exemption or exclusion under 260-279, inclusive, may not assert a claim of business confidentiality

of information to prove that exemption or exclusion... ” 1) Does this mean that no information can be confidential or is there some leeway on what is required to prove an exclusion or exemption? 2) Can you provide a clarifying example?

In slide 5, what advantage does NDEP gain by requiring companies to make confidential business information available to the public? Why is this additional language needed in Nevada but not other states that have adopted HSM exclusions?

Written Determination and Adoption of Hazardous Secondary Materials (HSM) Exclusions

The adoption of LCB R161-24 will not change the viability or the continued implementation of the current Written Determination program. The Written Determination process is found in NAC 444.8455 and 444.84555; and enabling statutes at NRS 459.485 and 459.490.

For the HSM exclusion to apply, both the generating and receiving state are required to have adopted the HSM exclusions. In states that have not adopted the HSM exclusions, the generator would have had to conduct a waste determination per 40 CFR 262.11 on wastes being shipped out of the state. If the generator determined and managed the waste as a universal waste, a manifest would not be required. A Written Determination is required of any facilities that are recycling universal and hazardous waste if there is no onsite storage, and the facility can demonstrate legitimate recycling. A storage permit is required for the storage of hazardous waste. The 5-step process is still being generated and is dependent on the regulation adoption. It will follow information provided by Environmental Protection Agency based on the regulations that existed as of July 1, 2022.

Viability of the Written Determination, if LCB R161-24 is adopted.

How would companies receive feedstock materials from states which have not adopted HSM? For example, would this require companies to maintain a written determination to receive Universal and Hazardous Waste. Would that WD meet the 5-step process mentioned by NDEP BSMM?

Can the state describe the 5-step process of HSM adoption? What are the 5-steps and what are the expectations of facilities falling under the HSM exclusion to meet these steps?

What limitations does NDEP have on what it can require under a written determination?

What requirements in a written determination are not covered by other regulations?

What proposed changes to the applicability and/or requirements of written determinations has NDEP submitted to the LCB this session?

What is the “5 Step Process” referenced in slide 15?

Item 3 Page 3: As it pertains to continuing to exclude 261.6(c)(2) and 273.60(b), therefore not adopting the requirements for facilities that recycle, without prior storage additionally and specifically for universal waste (273.60(b)). Can you confirm that the provisions surrounding the Written Determination program in Nevada are not changing as it relates to prior material storage?

R161-24P – Exclusions from the Adoption of the HSM Exclusions

- **In section 261.4(a)(1)(ii), “, except as prohibited by §266.505 and Clean Water Act requirements at 40 CFR 403.5(b).” will be deleted.**
- **In section 261.4(a)(24)(v)(B)(3), “publicly available.” will be deleted.**

We are proposing the adoption of:

- Generator Controlled Exclusion – 261.4(a)(23) – HSM that is generated and legitimately reclaimed within the United States or its territories and under the control of the generator
- Transfer-Based Recycling Exclusion – 261.4(a)(24) – HSM that is generated and then transferred to another person for the purpose of reclamation
- Remanufacturing Exclusion – 261.4(a)(27) – HSM that is generated and then transferred to another person for the purpose of remanufacturing

The only sections we are excluding are 261.4(a)(1)(ii) which does not allow mixing of waste materials with the facilities’ wastewater as a means of disposal; and 261.4(a)(24)(v)(B)(3) which deletes the term “publicly available” as we have determined all facility records should be available to NDEP to demonstrate that the HSM exclusion conditions have been met and legitimate recycling is occurring.

Why is NDEP unwilling to adopt the exclusions provided in 40 CFR 261.4(a)(23), (24), and (27) without exception or addition?

Item 5 Page 6 (3): Deletion of “publicly available” from 261.4(a)(24)(v)(B) (3). This is the removal of “publicly available” from the provisions describing the due diligence requirements that a HSM generator must complete when determining if the reclaimer, where they intend to send the HSM, has a violation history or is a significant non-complier. This information should be publicly available on the EPA ECHO website. However, it may take months to a year for inspection findings and violation reports to be issued. Will NDEP be requiring additional or different due diligence steps in this process?

What is meant by the change from “publicly available information” to information”?

PERMITTING

Reciprocity

The proposed regulation petition R161-24P does not change the current implementation of NAC 444.8565. Wastes managed as universal waste in other states may be managed as universal waste in Nevada until they reach the destination facility as which time they are managed as hazardous waste.

Item 6 Page 10: As it relates to the adoption of Part 273 “Standards for universal waste management,” and the subsequent replacement of part 272 with part 270 in 16 instances (edits j: (1, 2, 4, 5, 6, 8, 9). Part 272 is the RCRA section of approved state hazardous waste management programs while section 270 is the section describing EPA administered hazardous waste permit programs. The outward appearance here is that NDEP is removing all references to the part 271 “Requirements for authorization of State hazardous waste management programs” and part 272 “Approved State hazardous waste management programs.” 1) Will this change effect Nevada’s acknowledgment of universal waste solar panels that arrive from other states and will these panels continue to carry the originating State waste program classification of universal waste upon arrival in Nevada even though those State waste programs were authorized via parts 272 and 273 of RCRA? 2) How does NDEP suggest the clarification and ongoing recognition of State universal waste solar panels generated under these State waste programs and accepted in Nevada for recycling. 3) How does NAC 444.8565(2)(b) effect the carryover classification of universal waste solar panels from RCRA authorized State waste programs? 4) Can NDEP confirm that universal waste solar panels designated under the California State waste program will still be classified as universal waste when brought to facilities in Nevada for recycling?

Materials Recovery Facility (MRF)

Facilities that bring in waste materials that are solid wastes are required to obtain a MRF approval/permit before processing the materials (NAC 444.7474 to 444.74779).

NAC 444.7474 – Storage and Processing would require a Materials Recovery Facility (MRF) approval/permit.

Schedule of Compliance (SOC) Items

We will review existing schedule of compliance items in regard to the potential adoption of R161-24P and make revisions as applicable.

Per the discussion on October 15, 2024, how does the HSM adoption affect SOC item for applying for a Part B TSDf permit?

Cost

We would need additional information to provide a more accurate response. Generally, outside of 40 CFR 279 (Used Oil), ‘processing’ is a form of treatment, and the cost of a treatment permit is \$50,000. See 40 CFR 260.10 (Definitions for Treatment).

In slide 12, how much does a permit for a unit that processes material cost as opposed to a permit “for treatment”?

Timelines

We are available to meet with facilities on permitting requirements and timelines; and engage in a discussion for opportunities for efficiency of the permitting process.

In what ways will NDEP ensure that a facility required to obtain a RCRA Part B permit will not have modification requests take 120 or more days for a response (e.g., approve, deny, require Class 3 request procedures), as otherwise allowed by 40 CFR 270.42(b)(6)(ii)?

LEGITIMATE RECYCLING

40 CFR 260.43 – Recycling of hazardous secondary materials for the purpose of the exclusions or exemptions from the hazardous waste regulations must be legitimate. Hazardous secondary material that is not legitimately recycled is discarded material and is a solid waste. In determining if their recycling is legitimate, persons must address all the requirements of this paragraph and must consider the requirements of paragraph (b) of this section.

We are available to meet with facilities on site-specific applicability determinations of these requirements.

Interpretation and implementation of 40 CFR 260.43(a)(1-2).

INHERENTLY WASTE LIKE

Per 40 CFR 261.2(d) Inherently Waste-Like Materials – The following materials are solid wastes when they are recycled in any manner... Please also refer to RCRA Online (RO) 14957, until the recycling process is complete, it would remain a solid waste that may be regulated under state and local solid waste requirements.

It was discussed regarding legitimate recycling that the definition of black mass being "inherently waste like" is in conflict with definitions in 40 CFR 261.2(d)1-3. Black mass generated from the treatment of Universal or Hazardous waste batteries will therefore be managed as HSM and be processed following 261.4(a)(23)(i)(A) and 261.4(a)(23)(i)(C).

In slides 20 - 23, what is NDEP's basis to presume materials are not usable product and inherently waste like?

SPENT MATERIALS VS DISCARDED MATERIALS

A spent material is a type of discarded material.

Please also refer to 40 CFR § 261.2 - Definition of solid waste.

Does NDEP draw any distinction between spent material and discarded material? If yes, what is the distinction?

Where does NDEP's definition that "discarded material is anything that comes out of a manufacturing facility other than products used for their intended purpose" in slide 6 come from?

THERMAL TREATMENT

Per 40 CFR 260.10 – Thermal treatment means the treatment of hazardous waste in a device which uses elevated temperatures as the primary means to change the chemical, physical, or biological character or composition of the hazardous waste. Examples of thermal treatment processes are incineration, molten salt, pyrolysis, calcination, wet air oxidation, and microwave discharge.

In slide 12, how does NDEP define "Thermal Processing"? If there is a regulatory definition, please provide a citation.

COMMERCIAL CHEMICAL PRODUCT

Commercial Chemical Product (CCP) exclusions are very narrow. Information provided to us to date by facilities has not demonstrated that CCP exclusions can be broadly applied to our recycling facilities. It is the generator and recycling facility's responsibility to demonstrate that the exclusion has been met (see 40 CFR 261.2 and RCRA Online (RO) 11726). A facility claiming a CCP exclusions would need to demonstrate legitimate recycling.

Classification of Commercial Chemical Product.

Slide 8 of your presentation, "Commercial Chemical Product (CCP)" acknowledges CCP "at the manufacturing facility that created it." Does this mean that NDEP does not believe materials can be CCP if they are sent to another facility for legitimate reclamation? If not, what is the regulatory basis for this position?

What is NDEP's basis that CCP "[d]oes not appear to apply to batteries being processed"?

Based on Slide 8, is NDEP saying that CCP cannot be accepted for reclamation by anyone but the generator?

MIXED MATERIAL PATHWAYS

Excluded hazardous secondary materials cannot be commingled with regulated hazardous waste and still maintain the exclusion from the definition of solid waste. The same unit can be used to manage hazardous waste and excluded hazardous waste, provided that the hazardous waste and associated residues are removed from the unit before processing the excluded hazardous secondary materials. Please reference RCRA Online (RO) 14812, 14813, and 14818; and the RCRA HSM Checklist from July 2024.

Universal Waste is a subset of Hazardous Waste. Managing hazardous waste under the universal waste regulations streamlines the generation and transportation of hazardous waste.

Can NDEP better define the regulatory requirements associated with the mixing of materials statement made in the presentation? Our understanding of the state's position is that the most stringent requirements apply to mixed feedstock streams (Universal / HazWaste / HSM).

What benefits does NDEP's proposed framework provide to recycling facilities that receive materials with various classifications (e.g., HSM, CCP, and universal waste)?

Slide 7 of your presentation, "Discarded Material Pathways" identifies identical Potential Permit Status for Hazardous Waste and Universal Waste. What, if any, differences are there in the pathway for Universal Waste from that of Hazardous Waste?

What is the regulatory basis (i.e., citation(s)) for NDEP's claim that all materials received by a recycler or reclaimer must be managed under the same classification and strictest regulatory framework throughout the entire facility?

What is the regulatory basis (i.e., citation(s)) for NDEP's claim that only one classification of material can be processed within a production unit at any one time?

How is "Material Pathway" defined in slide 18?

In slide 18, what is the regulatory language from EPA that NDEP relies on to define what mixing is (e.g., two pallets with different classifications next to each other, combining of materials to the point they can't be separated/distinguished, something else)?

To what extent does NDEP rely on USEPA's February 11, 2011, supplemental guidance to Veolia and Safety-Kleen in deriving its positions for Questions 33 and 34?

DAMAGED, DEFECTIVE, OR RECALLED (DDR) BATTERIES

A handler of universal waste may only manage broken or damaged hazardous waste batteries as universal wastes if the breakage or damage does not constitute a breach in an individual cell

casing. The disassembly of a battery pack into individual modules or cells with no damage done to the cell casing does not make a battery damaged or defective.

Does NDEP consider all DDR batteries to be hazardous waste, even if they are not leaking (e.g., batteries that are DDR because they fail to hold sufficient charge, making them less of an environmental or safety issue)? If yes, provide the regulatory basis for this position.