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Waste Not, Want Not: EPA's Impending National Recycling Strategy

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EPA hopes to issue its final National Recycling Strategy (NRS) this November, according to recent statements by acting director of EPA's Resource Conservation and Sustainability Division, Office of Land and Emergency Management Nena Shaw at the American Bar Association's Fall Conference. Previously, EPA indicated it intended to finalize the NRS in the spring of 2021 with an implementation roadmap out in the fall of 2021. To date, the agency has yet to release its final NRS.

The latest impetuses for EPA action on the recycling front have been a December 18, 2020, US Government Accountability Office (GAO) report on recycling and the enactment of the Save our Seas 2.0 Act (SOS 2.0 or Act) on the same day. In its report, GAO recommended ways for EPA to make progress on its national recycling strategy. SOS 2.0 calls for materials management action by EPA, with a focus on plastic waste. Specifically, Section 301 of SOS 2.0 called on EPA to, within one year of the Act's enactment, develop a strategy to improve post-consumer materials management and infrastructure for the purpose of reducing plastic waste and other post-consumer materials in waterways and oceans.

EPA had proposed a draft National Recycling Strategy in October 2020 under the prior administration. The draft contained "strategic objectives and actions needed to create a stronger, more resilient, and cost-effective US municipal solid waste recycling system." To that end, the draft strategy set forth three objectives: 1) reduce contamination; 2) increase processing efficiency, and 3) improve recycling markets. The agency took comment on the draft NRS until December 4, 2020. With regard to the improvement of recycling markets, EPA, through its draft NRS, sought to "improve domestic markets for recyclable materials and products and better integrate recycled materials into product and packaging designs" in order to, in part, offset the global economic impact of the "decrease in available markets for recyclable materials." By the date of the release of the draft NRS, 186 foreign state parties, not including the United States, had acceded to amendments of the Basel Convention that imposed new restrictions on the exportation of plastic waste effective January 1, 2021.

EPA's recycling framework, which preceded the draft NRS, highlighted some of America's recycling challenges contributing to decreasing recycling rates. EPA pointed to confusion about what materials can be recycled, existing recycling infrastructure not keeping pace with a changing recyclables stream, a lack of consideration of optimal end-of-life management when producing new materials and

products, and contamination of the recycling stream causing equipment failures and production line stoppages. EPA also cited increased processing costs and lower recyclable market prices as part of the problem.

EPA's draft NRS drew criticism from GAO. A December 2020 GAO report on recycling found that the draft NRS "did not align with desirable characteristics for effective national strategies." According to GAO, EPA's draft NRS did not identify necessary resources, clarify the roles and responsibilities of participating entities, or articulate how EPA will implement the strategy and integrate the activities with existing programs and activities. In its report, GAO echoed the recycling challenges set out in EPA's framework, adding low recycling collection rates and limited availability of information to inform decision-making on recycling as key issues. GAO specifically concluded that EPA had not met the statutory requirements of the Resource Conservation and Recovery Act (RCRA), which serve to aid Congress and other decision-makers in making informed policy resolutions on recycling.

RCRA § 6985(a) requires EPA "to conduct studies and develop recommendations for administrative or legislative action" in seven different areas, spanning from the economics of mining waste management practices to the recovery of materials and energy from solid waste. GAO found deficiencies in EPA's implementation of RCRA § 6985(a)(6) and RCRA § 6895(a)(7) in particular. RCRA § 6985(a)(6) requires studies and the development of recommendations on the effect of existing public policies on subsidies, economic and tax incentives and disincentives, and the effect of modification or elimination of such policies, upon reuse, recycling, and conservation, which GAO abridged to a "study of the effect of existing policies." RCRA § 6895(a)(7) covers disposal costs, calling for the agency to assess "the necessity and method of imposing disposal or other charges on packaging, containers, vehicles, and other manufactured goods, which charges would reflect the cost of final disposal, the value of recoverable components of the item, and any social costs associated with non-recycling or uncontrolled disposal of such items." GAO equated the study and recommendation requirements of RCRA § 6985(a)(7) to a "study of Extended Producer Responsibility (EPR) requirements." GAO prompted the agency to study and develop recommendations regarding existing recycling policies and EPR requirements, respectively.

Generally, EPR policies compel a waste management cycle that involves producer takeback and recycling of products at the end of their useful lives. Under EPR policies, certain manufacturers form stewardships to facilitate the reuse, recycling, or recovery of their products at the end of the product's useful life. The EPR concept is not new in the US; companies have employed voluntary product stewardship programs for some time. GAO's focus on EPR requirements stemmed from GAO's interviews of stakeholders. In order to formulate its report, GAO surveyed nonfederal stakeholders about, inter alia, how recycling impacts their organizational goals and their views on state and local government recycling policies, such as single-use plastic bans, minimum recycled content requirements, and EPR requirements, and whether such policies would be beneficial at a national level. Several states have EPR laws policies for specific products, such as carpet, mattresses, paint, etc., and at least two states have passed EPR laws on product packaging to date.

Since EPR requirements effectively require producers, rather than states and municipalities, to finance the cost of recycling or proper disposal of products and packaging, one study asked whether producers subject to existing EPR policies for packaging policies simply pass on the increased recycling costs to consumers through product pricing. For instance, Maine's stewardship program for packaging exempts producers under certain gross revenue thresholds and assesses fees based on packaging volume and waste management costs; producer costs are not a direct percentage of sales or sale price, leaving open the potential for producers to recapture recycling costs in product pricing. The study compared prices of goods in Canadian provinces with EPR requirements in effect and

those without EPR requirements. The research did not find a clear correlation between product price and the presence of EPR policies. The study did not look at product prices before and after implementation of an EPR requirement. Another study suggested assessing after-the-fact cost impacts of EPR legislation would be difficult to isolate and attribute due to the sheer number of variables affecting prices of goods across localities. That study modeled total annual costs of producer obligations under EPR legislation, concluding that producers could respond to EPR fees in a number of ways, including passing those costs through to consumers for absorption. The studies raise the question: who pays for the cost of disposal and who *should* pay for the cost of disposal?

In the late 1990s, EPA decidedly declined to introduce a federal EPR policy, notwithstanding growing trends in other countries to adopt such policies. Instead, EPA favored what it coined as Extended *Product* (rather than producer) Responsibility. In comparison to EPR requirements, Extended *Product* Responsibility recognizes life-cycle impacts and looks to greening the supply chain. According to EPA, the product emphasis acknowledges lasting and substantial environmental improvements in product systems can only occur with participation from *all* actors in the product chain—suppliers, designers, manufacturers, distributors, retailers, customers, remanufacturers, etc. In a subsequent vision statement of projections for 2020, EPA articulated a "cradle-to-cradle" materials management goal that focused more on continuous use, i.e., minimize raw materials, extend product life spans, maximize recycling and conversion, etc. EPA's current Sustainable Materials Management approach carries forward the life cycle and reuse perspectives, seeking to reduce environmental impacts, conserve resources, and reduce costs.

What Will the Final National Recycling Strategy Look Like?

In its comments on that GAO report, EPA agreed with GAO's assessments of areas for improving the recycling stream and indicated that federal assistance is needed to help address "the challenges that the United States faces in recycling the current material stream." Accordingly, the agency intends to conduct studies and analyses of different state and local policies that could address recycling challenges in order to fulfill its RCRA § 6985(a) study requirements. To help curb recycling stream contamination and eliminate consumer confusion, California passed a new law restricting the use of certain recycling symbols on packaging of materials that are not recyclable under programs serving a majority percentage of the state's population.

EPA also indicated that, in its final NRS, it would identify resources and investments needed and balance risk reduction with costs. The agency will also clarify the roles and responsibilities and articulate how it will implement the final NRS and integrate new activities into existing programs and policies.

President Biden's proposed FY 2022 budget for EPA signals for advancements in recycling programs. The budget includes $10.2 million and 43.4 FTE (full-time equivalent employment) in the RCRA Waste Minimization and Recycling Program to better support the sustainable management of resources, including managing materials that sustainably promote economic growth and reduce environmental impacts. EPA's FY 2021 budget proposed $4.2 million with 5.0 FTE for the same program in comparison. The FY 2022 budget also includes a $10 million Solid Waste Infrastructure for Recycling pilot grant program to build innovation in the recycling industry. According to EPA, such funding will help address climate change mitigation through investment in US recycling and solid waste infrastructure—the outdated infrastructure which the agency cited as a contributing factor to declining recycling rates.

Closely related to the NRS is the National Recycling Goal. On November 17, 2020, EPA announced

the overall national recycling goal of **increasing the US recycling rate to 50% by 2030.** The current national recycling rate is 32%. EPA is looking at potential amendments to the way it measures recycling rates.

As indicated in the draft NRS's calls for market development workshops and ongoing engagement, EPA has future plans to engage stakeholders on improving the US recycling system, which should allow for additional nonfederal input prior to administrative or legislative recommendations.

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