LESS WASTE, MORE RECYCLING - THE D.C. CIRCUIT CLEANS UP EPA'S DEFINITION OF SOLID WASTE

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The U.S. Court of Appeals for the D.C. Circuit recently issued a decision that may be of interest to recyclers and others who generate or handle materials for recycling and reclamation. On July 7, 2017, in *American Petroleum Institute v. EPA*, D.C. Cir. Case No. 09-1038, a panel of the U.S. Court of Appeals for the D.C. Circuit partly upheld and partly reversed an update to EPA's Definition of Solid Waste rules for hazardous secondary materials that had revised standards for "legitimate" and "sham" recycling of those materials. As a result, businesses seeking to recycle materials may find it easier to do so, and those in the recycling business may see new or larger potential markets and opportunities.

BACKGROUND

The Resource Conservation and Recovery Act ("RCRA," 42 U.S.C 6901 et seq.) and its implementing regulations impose a number of restrictions, limitations, and conditions on any disposal of solid waste. However, in order to encourage recycling instead of disposal, RCRA regulations provide a number of exclusions and exemptions for recycled materials that allow recyclers to avoid the extra cost and difficulty of managing hazardous waste.

In 2008, the U.S. Environmental Protection Agency ("EPA") revised the regulatory definition of solid waste to create a larger exemption for hazardous secondary materials—those spent materials, byproducts, and sludges left over from industrial processes—that were being properly recycled. *See Revisions to the Definition of Solid Waste*, 73 Fed. Reg. 64,668 (Oct. 30, 2008) (the "2008 Rule"). This rule created several exemptions that allowed hazardous secondary materials to avoid RCRA regulation if they were subject to a recycling or reclamation process which qualified as "legitimate." The rule defined legitimacy with reference to several factors that focused on whether the generator managed the material as a valuable commodity, similar to a raw or virgin material. Both industry and environmental groups challenged the 2008 Rule and EPA agreed to rewrite it. The result of this effort was a Final Rule published on January 13, 2015 at 80 Fed. Reg. 1694 (the "2015 Rule").

THE COURT OF APPEALS' DECISION

The 2015 Rule was immediately challenged again by both industry and environmental petitioners in, resulting in July 7's 2-1 decision. The Court generally upheld the 2015 Rule but (i) vacated most of a legitimacy factor focusing on the amount of hazardous constituents in recycled materials compared to virgin or raw materials ("Factor 4"), and (ii) rolled back some new restrictions on third-party reclamation.

The Court rejected Factor 4 as applied generally, but upheld it with respect to certain specific exclusions. The Court found Factor 4 imprecise and overbroad, noting that EPA itself "recognized some of the shortcomings in these provisions," and considered the documentation and record-keeping provisions "draconian." The Court stated that "paperwork is not alchemy; a legitimate product will not morph into waste if its producer fails to file a form (or loses a copy two years later)," and held that EPA failed to justify this requirement in the regulatory record.

The Court largely vacated the new "Verified Recycler Exclusion" and restored the "Transfer-Based" exclusion, easing the 2015 Rules' restrictions on using third-party reclaimers. The Verified Recycler Exclusion required generators seeking to claim exemptions for reclaimed materials to use reclaimers with a RCRA permit, interim status, or a variance issued by EPA or state regulators. Under the Transfer-Based Exclusion, EPA exempted reclamation done by a third party with whom the generator had a contract where the generator made "reasonable efforts" to verify that the third party would legally and legitimately reclaim the materials. The Court held that EPA's presumption that reclaimed materials were discarded (and subject to regulation) was overbroad and would erroneously bring some reclaimed material under regulatory control. However, the Court left alone additional emergency preparedness requirements and a requirement that the material be contained.

The Court rejected a challenge to a statement in EPA's commentary to the 2015 Rule that off-specification commercial chemical products could be considered hazardous secondary material, as well as environmental groups' challenge to the treatment of 32 specific pre-2008 exclusions, finding that it did not have jurisdiction to hear those claims. One of the judges on the panel dissented from the portions of the order vacating segments of the rule, asserting that the Court failed to defer to EPA's judgment as required by prior case law.

WHAT IT MEANS

The upshot of the Court's opinion in *American Petroleum Institute v. EPA* is that (a) the vast majority of the 2015 Rule was upheld; (b) recycling that results in higher levels of hazardous constituents than in a virgin analogue will not be assumed to be disposal; and (c) generators are allowed to select reclaimers that they believe will legitimately handle the materials, even if the reclaimer does not have a RCRA approval document. This decision removes some of EPA's potential limitations on industry's ability to recycle, reclaim, and use materials without facing the costs and difficulties of managing hazardous waste. Interested companies are encouraged to contact their individual regulator or competent environmental counsel to assist with understanding how the D.C. Circuit's decision will affect their particular state's regulations in more detail.

In general, for businesses that generate materials that can be reclaimed and recycled rather than discarded, this decision should result in greater incentives and fewer barriers to recycling. It also suggests that courts will continue to recognize that EPA's approach—regulate material because it *might* be waste rather than because it *is* waste—is overbroad.

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