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U.S. Court of Appeals for the District of Columbia Circuit Issues Decision on Definition of Solid Waste

By Stephen C. Zumbrun and Frank L. Tamulonis*

The authors of this article discuss a recent decision by the U.S. Court of Appeals for the District of Columbia Circuit, which upheld, severed, and vacated portions of a 2015 Environmental Protection Agency final rule, Definition of Solid Waste.

In *American Petroleum Institute* ("*API*") *v. Environmental Protection Agency* ("EPA"),[1] the D.C. Circuit upheld, severed, and vacated portions of a 2015 EPA final rule, *Definition of Solid Waste*[2] (the "Final Rule"). As explained below, the court:

(1) Upheld "Factor 3" of the "legitimate recycling" test defined in the rule;

(2) Vacated "Factor 4" of the legitimate recycling test;

(3) Vacated the Verified Recycler Exclusion ("VRE"), thereby reinstating the Transfer Based Exclusion ("TBE") while retaining emergency preparedness requirements for generators and expanded containment requirements; and

(4) Held that the court did not have jurisdiction to review a deferred action by the EPA on containment and notification conditions for materials, products, or processes specifically excluded from the definition of "solid waste."

THE FINAL RULE

In the Final Rule, the EPA established criteria categorizing hazardous secondary materials as being legitimately "recycled" and therefore not regulated as solid waste under the Resource Conservation and Recovery Act ("RCRA"), and "sham recycling," *i.e.* "discarded" materials, which are regulated by RCRA. In defining "legitimate recycling," the EPA established four factors a company

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[1] 862 F.3d 50 (D.C. Cir. 2017).

[2] 80 Fed. Reg. 1,694, 1,738/3 (Jan. 13, 2015).

must satisfy to qualify, and replaced the Transfer Based Exclusion, which establishes when transferred materials are a solid waste, with the Verified Recycler Exclusion.[3]

The Final Rule also permitted spent catalysts to be eligible for exemptions and deferred a decision on whether to add conditions to 32 previously promulgated exclusions from the solid waste definition.[4]

THE CHALLENGES

Industry petitioners challenged the third factor ("Factor 3") and the fourth factor ("Factor 4") of the recycling test created by the Final Rule. Under Factor 3, a firm controlling the secondary material must "manage the hazardous secondary material as a valuable commodity." Under Factor 4, the product "must be comparable to a legitimate product or intermediate."[5]

THE COURT'S DECISION

The court upheld Factor 3, explaining that Factor 3 does not require anything beyond what could be expected of firms engaged in legitimate recycling: assuring that a material is "immediately identifiable."[6] The court, however, vacated Factor 4, reasoning that while the test would "ensnare some sham recycling," it was "not a reasonable tool for distinguishing products from wastes."[7]

Further, the court found that an exception established to prevent legitimate recycled products from being labeled "sham" did not save Factor 4.[8] That exception required a company to comply with documentation and other requirements to meet the standards for the exception; noncompliance would result in the process and materials being labeled sham recycling.[9] In discrediting the exception, the court noted that "paperwork is not alchemy; a legitimate product will not morph into waste if its producer fails to file a form. . . ."[10]

The court also vacated the VRE. The VRE is an exclusion for "reclamation," which for certain materials is generally treated as discarded unless subject to a

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[3] *Id.*

[4] *Id.*

[5] *API*; citing 40 C.F.R. § 260.43(a)(3)–(4).

[6] *Id.* at 4.

[7] *API*, quoting *Safe Food & Fertilizer v. E.P.A.*, 350 F.3d 1263, 1269 (D.C. Cir. 2003), *on reh'g in part*, 365 F.3d 46 (D.C. Cir. 2004).

[8] *Id.*

[9] *Id.*; *see also* 40 C.F.R. § 260.43(a)(4)(iii).

[10] *API*, and vacated Factor 4.

specific exclusion for a material or process.[11] The exclusion was originally known as the Transfer-Based Exclusion ("TBE"), where a generator could send materials to a reclaimer with a RCRA permit or the generator could send materials to a third party without a permit, as long as the generator made reasonable efforts to ensure that the reclaimer legitimately reclaims hazardous secondary material.[12]

In the Final Rule, TBE was replaced with the VRE, which differed from the TBE by requiring generators to meet emergency preparedness standards and to send their materials to reclaimers who have a RCRA permit or variance.[13]

In vacating the VRE, the court questioned why the VRE process needed administrative approval, but a generator that reclaimed materials in-house (instead of transferring to a third party) did not.[14] By vacating the VRE, the TBE was reinstated.[15] The court retained the emergency preparedness requirements for generators[16] and the expanded containment requirement[17] from the Final Rule, determining that these provisions were able to be severed because the court was without any "substantial doubt" that the EPA would have adopted the portions of the Final Rule on its own because they overcame "regulatory gaps" determined by the EPA.[18]

The court, however, also held that it could not sever the portion of the Final Rule that would have permitted spent catalyst generators to utilize the TBE.[19]

Finally, environmental petitioners challenged the deferred action of the EPA in applying containment and notification conditions to exclusions promulgated prior to 2008, but the court held that it lacked jurisdiction to review the deferred action of the EPA.[20]

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[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *See* 40 C.F.R. 261.4(a)(24)(v)(E).

[17] *See* 40 C.F.R. 261.4(a)(24)(v)(E).

[18] *API.*

[19] *Id.*

[20] *Id.*