

Auto Dismantler Exemption/Solid Waste Permitting: Supreme Court of Oregon Addresses Applicability to Scrap Metal Recycling



Walter Wright, Jr.

wwright@mwlaw.com

(501) 688.8839

12/20/2023

The Supreme Court of Oregon (“S.Ct.”) addressed in a December 7th Opinion an issue involving the “Auto Dismantler Exemption” (“Exemption”) to the State of Oregon’s solid waste permitting program. See *PNW Metal Recycling, Inc. v. Oregon Department of Environmental Quality*, 371 Or. 673.

The question involved whether the Oregon Department of Environmental Quality (“DEQ”) improperly interpreted the Exemption to exclude its application to scrap metal recyclers that acquire both scrap automobiles as well as other metal items.

The Oregon solid waste management statute requires that “disposal sites obtain a solid waste disposal permit from DEQ.” However, the statute exempts automobile dismantlers from the necessity of obtaining such permit.

DEQ is stated to have, until 2018, allowed scrap metal recyclers acquiring scrap automobiles to utilize the Exemption. However, scrap metal recyclers may acquire both automobiles and scrap metal for purposes of processing and sale as commodities.

In late 2018 DEQ stated that two scrap metal facilities would not be allowed to operate without a solid waste disposal permit. In other words, they were deemed to be ineligible for the previously referenced Exemption. The basis for disallowance was the acceptance of non-vehicular scrap materials in addition to automobiles.

DEQ had previously interpreted the Exemption to apply to an entire facility if it had a dismantler certificate from the Oregon Department of Transportation. The agency subsequently determined that the Exemption only applied to the dismantling operations within each facility.

The scrap facilities (i.e., “Petitioners”) argued that DEQ was reinterpreting the relevant statutory provision by the imposition of a “rule” within the meaning of the Oregon Administrative Procedures Act (“OAPA”). Consequently, they stated that DEQ:

- Does not have rulemaking authority on the subject
- Did not conduct required formal rulemaking procedures

The Oregon Court of Appeals (“Court of Appeals”) noted that DEQ’s actions were evidenced by two principal sources which included:

- An internal memorandum discussing a fire at an automobile dismantling facility (unrelated to Petitioners) and its analysis of:
- Potential gaps in environmental regulation of automobile dismantlers
- Potential actions to fill those gaps
- Prior practice of interpreting the Exemption to apply to an entire facility
- Statements made by DEQ staff at a meeting between agency representatives and a Petitioner acknowledging that the Exemption applied if an automobile dismantler certificate had been obtained

The Court of Appeals characterized the issue as whether the new DEQ interpretation constituted a rule as defined by the OAPA.

The Court of Appeals held that DEQ's decision to change its interpretation was:

. . . a new exercise of agency discretion[,] which must be promulgated as a rule to be valid.

Therefore, the Court of Appeals concluded the rule was invalid because of the failure to comply with the OAPA.

DEQ sought review before the S.Ct.

The state agency argued that the internal decision to adopt a new interpretation of a statute is not by itself a rule.

The S.Ct. reverses the Court of Appeals.

The S.Ct. concludes that DEQ's internal decision to adopt a new interpretation of the auto-dismantler Exemption was not a "rule." It rejects the Petitioners' contention that DEQ's decision to change its interpretation of the Exemption was a discretionary policy choice that could only be made through rulemaking. It states:

. . . Implicit in that argument is the assumption that, if an agency's action makes "policy" or is otherwise consistent with the definition of rule in ORS 183.310(9), then that action must occur through rulemaking procedures. That assumption is contrary to our case law . . . the APA provides that agency announcements of policy may also occur in contested cases. But the APA does not determine when one of those mechanisms or the other must be used. In several cases, this court has explained that agencies must use rulemaking in certain circumstances; when that is so, however, it is not because the APA requires it. Whether an agency must use rulemaking in a particular situation is a function of the agency's substantive authority as defined by its enabling statutes.

The S.Ct. notes that an agency's interpretive decision is not itself a rule. However, it states that a generally applicable expression of a decision could potentially constitute a rule. In this instance DEQ is deemed to have not communicated its decision to anyone but Petitioners. The revised interpretation of the exemption and the stated intention to require that the Petitioners obtain a permit are characterized as:

. . . precursors to DEQ's initiation of an enforcement action that may lead to a contested case proceeding.

Further, the S.Ct. notes that judicial review of a final order in a contested case would provide the Petitioners the opportunity to argue against DEQ's revised interpretation of the statute. Additional alternatives cited by the S.Ct. include:

- The possibility of demonstrating that the solid waste disposal statutes reflect a legislative intent that the agency promulgates rules in advance of adjudication (i.e., that rulemaking is a required path for adopting an interpretation of this Exemption).
- Utilize ORS 183.410 which would provide the Petitioners the opportunity to request a declaratory ruling from DEQ as to the applicability of the Exemption.

The failure of the Petitioners to identify a rule results in the S.Ct. vacating the Court of Appeals decision and dismissing judicial review.

A copy of the Opinion can be downloaded [here](#).