

Definition of Solid Waste/Resource Conservation and Recovery Act: D.C. Circuit Court of Appeals Addresses Industry Challenge to 2015 Revisions



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

07/19/2017

The United States Court of Appeals District of Columbia Circuit (“Court”), addressed in a July 7th opinion the Resource Conservation and Recovery Act (“RCRA”) definition of “solid waste.” See *American Petroleum Institute, et al. v. Environmental Protection Agency* 2017 WL 2883867.

The focus of the opinion was the United States Environmental Protection Agency’s (“EPA”) 2015 revisions to this definition.

The Court vacated portions of the rule challenged by the American Petroleum Institute and other industry organizations. See 80 Fed. Reg. 1,694/1 for the rule and associated preamble (“Rule”).

Hazardous wastes are subject to a variety of RCRA Subtitle C generation, transportation, treatment, storage, or disposal requirements. Materials outside the scope of the term are not regulated as RCRA hazardous wastes (i.e., a material must first be “solid waste” before it can potentially constitute a “hazardous waste”). Therefore, there is a significant incentive for facilities to fit within the available exceptions to the term “solid waste.”

The definition of solid waste is a key RCRA jurisdictional term. The solid waste definition includes:

... any garbage or refuse, sludge from a wastewater treatment plant, water supply treatment plant, or air pollution control facility and other discarded material resulting from industrial, commercial, mining, and agricultural operations and from community activities (emphasis added).

Almost since the original enactment of the RCRA Subtitle C regulations EPA, industry, environmental groups, etc., have argued in both the courts and rulemakings as to the appropriate scope of materials that should be encompassed by the term solid waste. Therefore, EPA has struggled to draw a line between what constitutes a discarded material (in) and what is a useful product (not discarded – out). Industry groups have argued that EPA’s interpretation of the definition improperly encompasses certain reuse of materials while environmental groups have asserted that the agency permits activities that constitute sham recycling.

The rule EPA published in 2015 revised several recycling-related provisions associated with the definition of solid waste. The previous most recent agency attempt to address this definitional issue occurred in 2008 .

Like with the 2015 rule, both industry (arguing unlawfully regulates certain materials) and environmental groups (arguing not sufficiently protective of public health) challenged the 2008 effort. A settlement with the Sierra Club resulted in a commitment by EPA to propose a new rule. This effort eventually led to the 2015 revisions.

A number of industry and environmental groups again challenged the agency's 2015 attempt to address the definition (obviously for different reasons). In its July 14th decision the Court dismissed the environmental group petition. However, it granted the industry group petition and vacated two portions of the rule described as:

1. Factor 4 of the Legitimacy Test
2. Verified Recycler Exclusion

The 2015 rule codifies an EPA effort to draw a distinction between legitimate and sham recycling. The recycling of hazardous secondary materials must meet a legitimacy test. Failure means they are labeled as "sham" and therefore subject to the Subtitle C RCRA regulations.

The rule's legitimacy test for a particular material contains four factors. All four must be met to avoid the sham classification. Factor 4 requires that the product of the recycling process be comparable to a legitimate product or intermediate. This determination may vary in certain ways depending on whether it involves an analogous product or intermediate.

EPA argued that Factor 4 is an effort to prevent recyclers from placing hazardous secondary materials into products despite the fact they have no recognizable benefit (i.e., they are simply "along for the ride").

The Court held that Factor 4 too broadly encompassed materials which may not be truly hazardous and/or imposed overly harsh procedures to demonstrate whether significant environmental risk is present. Factor 4 was therefore vacated in its entirety with one exception. That exception involved aspects of the rule where it and other legitimacy factors had been written into specific exclusions.

The Verified Recycler Exclusion excludes reclamation of materials which have been transferred to and reclaimed by a third party from the definition of solid waste. However, such exclusion is dependent upon a third party reclaimer possessing a RCRA permit (or variance). Further, the generator is required to attain emergency preparedness standards prior to shipment.

The Court vacated significant portions of this exclusion. It then reinstated the 2008 version of this exclusion. This provision allowed for the transfer of hazardous secondary materials to third parties if reasonable efforts were made to ensure that the materials will be properly handled. Certain emergency preparedness procedures and containment requirements of the Verified Recycler Exclusion were left intact by the Court.

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