Definition of Solid Waste/RCRA: U.S. Court of Appeals for D.C. Circuit Addresses Petition for Rehearing/Challenges to 2015 Revisions

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The United States Court of Appeals, District of Columbia Circuit ("Court"), addressed in a March 6th Opinion petitions for Panel Rehearing of a July 7, 2017 decision addressing the Resource Conservation and Recovery Act ("RCRA") definition of "solid waste." See *American Petroleum Institute v. EPA* No. 09-1038.

The focus of the July 7, 2017, Opinion was the United States Environmental Protection Agency's ("EPA") 2015 revisions to this definition. See *API v. EPA, 862 F.3d 50* (D.C. Cir. 2017).

The July 7th decision had vacated portions of the revisions challenged by the American Petroleum Institute and other organizations.

Hazardous wastes are subject to a variety of RCRA Subtitle C generation, transport, 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 from community activities . . .

Almost since the original enactment of the RCRA Subtitle C regulations, EPA, industry, environmental groups, etc. have argued in both 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.

Both industry (arguing unlawful regulation of certain materials) and environmental groups (arguing the rule is not sufficiently protective of public health) challenged revisions published in 2008. 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.

The revisions published in 2015 amended several recycling-related provisions associated with the definition of solid waste. A number of industry and environmental groups again challenged the agency's 2015 attempt to address the definition. In its July 7th decision, it dismissed the environmental groups' petition. However, it granted the industry groups' petition and vacated two parts of the revisions described as:

- Factor 4 of the legitimacy test
- Verified recycler exclusion

The July 7th Opinion invited the parties to consider briefing whether one of the vacated components of the 2015 rule should instead be severed and affirmed. Certain parties filed petitions for rehearing and the D.C. Circuit states it is modifying its 2017 decision in three ways:

1. Severs and affirms EPA's removal of the spent catalyst bar from the vacated portions of the "Verified Recycler Exclusion";
2. Vacates Factor 4 in its entirety; and
3. Clarifies the regulatory regime that replaces the now-vacated Factor 4

A copy of the decision can be downloaded here.