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RCRA's Definition of Solid Waste – The DC Circuit Brings Clarity to a Core Element of RCRA

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The United States Court of Appeals for the District of Columbia Circuit has upheld the Transfer-Based Exclusion in EPA's final rule *Revisions to the Definition of Solid Waste*, 73 Fed. Reg. 64,668, 64,669 (Oct. 30, 2008). The decision will allow certain material transferred from a waste generator to a third-party reclaimer to be treated as legitimately recycled, rather than “discarded” and therefore subject to full regulation as hazardous waste under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k (“RCRA”). Under this ruling, generators and third-party recyclers who transfer certain hazardous secondary materials for reuse will not have to comply with RCRA's most stringent and costly handling requirements. This alert provides an overview of the D.C. Circuit's decision and practical implications for businesses.

Overview of the Decision

The petitioners in *Cal. Communities Against Toxics, et. al., v. EPA*, No. 18-1163 (D.C. Cir. Jul. 2, 2019), argued unsuccessfully that the rule's Transfer-Based Exclusion is insufficiently protective of human health and the environment, that it exceeds EPA's statutory authority under RCRA, and that EPA has not provided a reasoned explanation for treating hazardous waste differently based on whether it is sent to a reclaimer instead of a treatment, storage, or disposal facility. The D.C. Circuit held that EPA did not act contrary to RCRA in adopting the Transfer-Based Exclusion because (1) hazardous secondary materials are not necessarily “discarded” each time they are transferred from a generator to a reclaimer, and (2) EPA provided a reasoned explanation for applying different standards to materials not yet part of the nation's waste disposal stream where certain conditions for safe transfer and legitimate recycling had been met.

Practical Implications

The Transfer-Based Exclusion in EPA's 2008 rule deals with “reclamation,” a type of recycling that occurs when hazardous secondary materials, including byproducts, spent materials, and sludges, are regenerated or processed to recover a usable product. Generators of hazardous secondary materials can avoid RCRA Subtitle C regulation by either controlling the recycling, or by transferring the materials to a legitimate off-site reclaimer. Under this exclusion, generators, transporters and reclaimers must meet certain Transfer Conditions and Legitimacy Factors to ensure that hazardous materials are transferred securely and are actually and properly recycled.

The Transfer Conditions require that:

- Intermediate facilities cannot hold any material in storage for longer than 10 days (prohibiting abandonment);
- Generators, intermediate facilities and reclaimers must maintain records of shipments and receipts;
- Reclamation facilities must reclaim at least 75% of hazardous secondary materials obtained over a calendar year; and
- Materials must be managed in a manner at least as protective as analogous raw materials, and residuals must be regulated under RCRA, including under Subtitle C if they are “discarded.”

The Legitimacy Factors require that:

- The hazardous secondary material provides a useful contribution to the recycling process;
- The recycling process produce a valuable product or intermediate; and
- The generator and recycler manage the material as a valuable commodity when it is in their control.

The court in *Cal. Communities Against Toxics* found that EPA lacks authority under RCRA Subtitle C to regulate materials “destined for beneficial reuse or recycling in a continuous process by the generating industry itself” because RCRA only authorizes the regulation of materials truly “discarded.” Importantly, the decision clarifies that a generator’s payment to a reclaimer to accept hazardous secondary materials does not necessarily indicate that the material is “discarded.” Instead, based on market forces, payment may simply indicate that a generator seeks alternatives to costly Subtitle C requirements and is willing to pay less than Subtitle C compliance costs in order to recycle materials.

The decision resolves an issue that has been litigated for several decades—that is, whether RCRA allows for and even encourages the recycling of certain hazardous secondary materials. The bottom line is that if materials never become part of the waste disposal problem that RCRA was designed to address, then they are not “discarded” and cannot be regulated under RCRA Subtitle C. The practical implications from the ruling are that numerous industries that handle RCRA-regulated materials may now recycle, instead of dispose of, certain hazardous secondary materials provided they meet the Rule’s stringent conditions. The decision and its analysis and conclusions related to key RCRA concepts like discard, legitimate recycling, and beneficial reuse also will be important for other RCRA-regulated operations, whether taking advantage of the transfer-based exclusion or not.

Please feel free to reach out to any of the authors of this client alert or any other attorneys in our Environment, Energy, and Natural Resources practice group for assistance in assessing the impact of this RCRA decision on your business.