

Recent Decision Strikes Down Parts of Sham Recycling Rules



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A new opinion changes the actions required to take advantage of EPA's recycling exemption to Resource Conservation and Recovery Act (RCRA) reporting. EPA's RCRA regulations impose a costly and burdensome program on industry to control the disposal of hazardous waste. Under RCRA, if a material meets EPA's definition of "solid waste," it may be subject to stringent disposal requirements if it is also identified as a hazardous waste. One way to avoid the disposal of hazardous waste under RCRA is to recycle the material in question.

While recycling is often an economical and environmentally friendly option for many businesses, EPA has a history of scrutinizing the materials businesses recycle in order to prevent so-called "sham recycling." In 2008, EPA proposed a sham recycling rule that went into effect in July 2015. See 40 CFR § 260.43. The sham recycling rule originally excluded hazardous secondary materials from the definition of solid waste in two circumstances: first, if the company that generated the materials controlled the recycling of those materials; and second, if the generator transferred the materials to an off-site recycler it had audited to ensure compliance with proper recycling practices ("Transfer Based Exclusion"). To qualify for either exemption, the manufacturer had to recycle the materials "legitimately," a term EPA defined by reference to certain "legitimacy factors." EPA adopted this legitimacy requirement to distinguish "true" recycling from "sham" recycling in which companies claim to reuse materials they in fact discard. The 2015 rules, however, replaced the Transfer Based Exclusion with the more stringent "Verified Recycler Exclusion" that required EPA permitting of recyclers. On July 7, 2017, the U.S. District Court for the District

of Columbia rejected the application of the one of the legitimacy factors and reinstated the Transfer Based Exclusion.

Legitimacy Factors

Under its regulations, EPA considered four factors to determine whether otherwise solid was, in fact, a sham:

1. Legitimate recycling must involve a hazardous secondary material that provides a useful contribution to the recycling process or to a product or intermediate of the recycling process.
2. The recycling process must produce a valuable product or intermediate.
3. The generator and the recycler must manage the hazardous secondary material as a valuable commodity when it is under their control.
4. The product of the recycling process must be comparable to a legitimate product or intermediate.

To establish the recycling of a particular material was legitimate and not a sham, businesses had to prevail on all four factors. Industry groups did not object to factors 1 and 2 regarding the premise that recycling should involve the production of “valuable” materials that provide a “useful contribution” to the recycling process. However, industry groups pursued a legal challenge to factors 3 and 4, which they viewed as unnecessary over-regulation.

The court ultimately upheld factor 3, concluding that managing materials to be recycled as a valuable commodity “does not on its face appear to ask for anything beyond what could be expected of firms engaged in legitimate recycling.”

The court, however, decided to strike factor 4. The purpose of factor 4 was an attempt by EPA to prevent recyclers from loading products with hazardous secondary materials that “provide no recognizable benefit to the product,” Final Rule, 80 Fed. Reg. at 1,722/1, and are simply “along for the ride,” *id.* at 1,726/2. The court took issue with EPA’s “along for the ride” metaphor noting the record contained “examples of hazardous secondary materials that are beneficially recycled into valuable products (recognized as such by EPA), even though those products contain hazardous constituents that do not, in themselves, contribute to the value of the final product.”

Based on the court’s finding that factor 4 was unreasonable, it is no longer a mandatory consideration in determining the legitimacy of recycled material. Even in the absence of factor 4, a business must still be prepared to demonstrate the legitimacy of its recycling.

Verified Recycler Exclusion

The court also restored the “Transfer Based Exclusion,” which the Obama administration replaced with the “Verified Recycler Exclusion.” Under the Transfer Based Exclusion, the manufacturer offloading the materials could send the materials

to a recycler possessing a RCRA permit (or interim status). 40 C.F.R. § 261.4(a)(24)(v)(B) (2011). Alternatively, the generator could send materials to a recycler that lacked such a permit or status, if the generator had made “reasonable efforts to ensure that [the chosen] reclaimer intends to properly and legitimately reclaim the hazardous secondary material and not discard it.” *Id.* The “reasonable efforts” involved investigating and “affirmatively answer[ing]” specific questions that the regulation posed about the reclaimer. *Id.* These questions asked if the reclaimer:

1. Was employing a legitimate recycling process;
2. Had notified regulators of its operations and its financial stability;
3. Had not been the subject of recent enforcement actions;
4. Had adequate skill and equipment to perform the recycling safely; and
5. Had adequate processes for disposing of any residual wastes generated during the recycling.

The Verified Recycler Exclusion made two significant changes to the Transfer Based Exclusion. First, the new exclusion required the generator to meet special “emergency preparedness” standards in its custody of the materials before shipment. See 40 C.F.R. § 261.4(a)(24)(v)(E) (referring to standards at § 261.400 *et seq.*). Second, the Verified Recycler Exclusion eliminated the “reasonable efforts” option afforded by the Transfer Based Exclusion and required that generators send their secondary materials to reclaimers who have a RCRA permit (or interim status). According to the court, this framework made it so that “all spent materials, listed byproducts, and listed sludges being reclaimed are subject to full RCRA control unless affirmatively excluded.”

Based on concerns that EPA was creating an impermissible permitting scheme, the court decided to vacate the Verified Recycler Exclusion except for its emergency preparedness provisions and its expanded containment requirement, ultimately reinstating the Transfer Based Exclusion.

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