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## OnePoint Alert

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# More Limits on Attempts to Over-Regulate Legitimate Recycling under RCRA

*Nails-in-the-Coffin on Regulation of Recycling under RCRA*

By Bernard F. Hawkins, Jr.

A July 2, 2019 decision of the D.C. Circuit Court of Appeals held that EPA lacked jurisdiction over legitimate recycling of a hazardous secondary material even when the entity that generated the material being recycled paid a third party to recycle it. *California Communities v. EPA*, No. 18-1163 (July 2, 2019). The ruling built on a 2017 decision of the D.C. Circuit that emphasized that hazardous secondary materials that are legitimately recycled rather than discarded are not subject to regulation under the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act and the Hazardous and Solid Waste Amendments (commonly referred to collectively as "RCRA," 42 USCA §6901, et seq. (2019).

In *American Petroleum Institute v. EPA*, 862 F.3d 50 (D.C. Cir. 2017) (referred to as API III), the D.C. Circuit Court of Appeals addressed the definition of solid waste under RCRA in the context of recycling and limited jurisdiction to materials that have been discarded. Id. at 55. The Court confirmed factors that **cannot be used** to automatically conclude that hazardous secondary materials have been discarded and thus are subject to RCRA requirements.

The **interdiction of time** could not be equated to discard. Id. at 58. The Court also explained that something being **recycled, by being reclaimed**, cannot be said to be discarded. The Court invalidated burdens imposed on recyclers under the Verified Recycler Exclusion (VRE) of the 2015 Definition of Solid Waste (DSW) rule on the basis that it "**covers materials that might be labeled waste only because of a reclamation-equals-discard rule that EPA has all but conceded is overbroad. *Id*. at 1,708/3. This criterion therefore cannot stand as a means of identifying discard.**" Id. at 64 (emphasis added).

In *California Communities v. EPA*, decided last week, the D.C. Circuit considered a challenge to the reinstatement of the 2008 Transfer Based Exemption that replaced the vacated VRE from the 2015 DSW rule for recycling of hazardous secondary materials. The court reiterated many of the points set out in *API III* and addressed an additional primary question: does a generator's paying a reclaimer to accept a material for recycling automatically mean the material is discarded. After rejecting a number of procedural matters, the Court directly answered the question "no." The Court held that "this court's precedent effectively forecloses petitioners' plain-meaning contention that payment is determinative of 'discard.'" Id. at 16. "The court's precedent thus leaves no room to conclude that Congress directly resolved that "discarded material" must include hazardous secondary materials that a generator has paid a reclaimer to accept." Id. at 19.

The Court pointed out that "in RCRA Congress sought to address the 'ever-increasing problem of solid waste disposal by encouraging the search for and use of alternatives to existing methods of disposal (including recycling).'" Id. at 16-17 (citations to the Congressional Record omitted). It noted that Congress "aimed to encourage proper recycling and recovery of hazardous materials as an alternative to disposal, *see* 42 U.S.C. § 6902(a)(6)." Id at 20. The Court also noted that transfer of secondary materials to another site for recycling does not constitute "discard." The Court noted it has never held "that transfer to another firm or industry for recycling necessarily means materials are "discarded." Id. at 18. "[W]e have never said that RCRA compels the conclusion that material destined for recycling in another industry is necessarily 'discarded.'" Id. In addition, the Court noted that *API III* found that the threat that facilities might "over accumulate secondary materials without recycling them" was not a basis to assume these materials are "discarded." Id. at 19.

The primary emphasis of the *California Communities* Court (in harmony with other recent decisions, including *API III*) is that: "[t]his court has embraced the view that if materials never become part of the waste disposal problem, then they are not 'discarded' and need not be regulated under Subtitle C." Id. at 20. Whether or not the material becomes part of the waste disposal problem is the appropriate inquiry. EPA's regulations establish factors to be considered to determine whether hazardous secondary materials are legitimately recycled. See criteria at 40 CFR 260.43. "Further we conclude that EPA has provided a reasoned explanation for applying different standards to materials that are not yet part of the waste disposal problem RCRA addresses where they meet conditions EPA concluded were adequate for safe transfer and legitimate recycling." Id. at 3.

In conclusion, the Court's holding in *California Communities* clearly echoes the message of prior decisions of the D.C. Circuit Court of Appeals, including *API III*, that places strict limits on attempts to regulate the recycling of hazardous secondary materials. Materials being legitimately recycled are not part of the waste disposal problem, are not "discarded" and are beyond the permissible scope of regulation under RCRA.

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## Bernard F. Hawkins, Jr.

**Partner**

T 803.255.9581

bernie.hawkins@nelsonmullins.com