U.S. Court of Appeals: Petroleum Wastewaters Treated To Remove Valuable Oil Are Not Solid Wastes

The U.S. Court of Appeals for the District of Columbia Circuit has held that the United States Environmental Protection Agency (EPA) is not allowed to consider wastewaters from petroleum refining to be "solid wastes" because it did not show that those wastes were truly "discarded."

The court's decision combined challenges to several of EPA's regulatory decisions about the status of several petroleum-related wastes, and found that in most instances, EPA's decisions were allowed. However, where a waste is in a closed loop process to remove valuable product and return the product to a manufacturing process, EPA must fully justify its decision that the waste is still considered "discarded," and thus, a "solid waste."

In a series of rulemakings regarding certain petroleum and petrochemical wastes, EPA considered whether certain wastes from those industries were to be considered solid wastes or hazardous wastes under the Resource Conservation and Recovery Act (RCRA). The rules addressed refinery wastewaters, petrochemical recovered oil, certain petroleum refining catalysts, unleaded gasoline tank sediment and certain coke processing wastes. A trade association for the petroleum industry challenged EPA's decision to classify certain materials as "solid waste" or as hazardous wastes. Environmental groups challenged EPA's decision not to classify certain other wastes as hazardous wastes, and a decision to defer a rule to classify wind-blown petroleum coke fines as hazardous waste.

Wastewaters Processed to Recover Valuable Oil Are Not "Discarded"

Petitioners from the petroleum industry complained that petroleum refinery wastewaters are normally treated to recover oil before they are discharged, and should not be considered solid wastes until they leave the production process. The court analyzed EPA's use of the term "discarded" with respect to wastewaters. Under the RCRA regulations, a "solid waste" is a "discarded" material, subject to certain exclusions. If a "solid waste" has certain hazardous characteristics, it may then be considered a "hazardous waste," subject to stringent treatment, storage, and disposal rules.

The court had, in previous decisions, decided that "discarded" means to be "disposed of, abandoned, or thrown away." Moreover, earlier this year, the same court had decided that EPA was not allowed to consider certain mineral processing wastes destined for return to the manufacturing process to be "discarded" for purposes of RCRA regulation. *Ass'n of Battery Recyclers, Inc. v. EPA*, 208 F. 3d 1047 (D.C. Cir. 2000). Thus, the court examined why, in this case, EPA believed that wastewaters should be considered "discarded," even before they are processed to remove valuable oil that is then returned to the oil refining process.

Industry petitioners argued that EPA had not given any reason for its finding that the main purpose of wastewater "primary treatment" is to clean the wastewater prior to discharge rather than to recover valuable oil. The petroleum industry insisted that the main reason for primary treatment was to recover the oil. The task for the court was to decide which side was

correct. Although EPA is usually given deference in its findings, these findings must not be "arbitrary and capricious." According to the court, "the record must reflect that EPA engaged in reasoned decisionmaking to decide which characterization is appropriate."

In fact, the court observed that "the record is deficient in that regard." After noting that there are two purposes for wastewater treatment - recovering a useful product and cleaning wastewater to comply with water pollution control laws, EPA simply concluded, "clearly wastewater treatment is the main purpose" without further explanation. As the court noted, "a conclusion is not 'clear' or 'obvious' merely because one says so."

The court concluded that it was not at all clear why wastewater should be considered "discarded" merely because the decision to treat the wastewater was influenced by water pollution regulations. EPA, according to the court had failed to explain why it concluded that the compliance motivation should be assumed to predominate over the reclamation motivation. According to the petroleum industry, refiners recover up to 1,000 barrels of oil per day from wastewaters. The court failed to see why EPA believed this amount of recovered oil was not significant.

Thus, the court found EPA's finding "arbitrary and capricious" and sent the rule back to EPA to determine whether the intent of treating wastewater by the petroleum processors was primarily for pollution control or reclamation.

Recovered Oil Containing Hazardous Constituents Not Excluded From RCRA Regulation

The petrochemical processing industry generates "petrochemical recovered oil" that can be recycled into the petroleum refining process. EPA's new rules exclude from hazardous waste regulation petrochemical recovered oil only if it is hazardous as a result of being ignitable or containing benzene. (Benzene is a common component of petroleum.) Other contaminants in petrochemical recovered oil could cause the material to be a hazardous waste.

The industry group complained to the court that EPA should not be allowed to treat petrochemical recovered oil as hazardous waste because it is not "discarded" if it is being sent to a refinery for processing.

But the court acknowledged EPA's concern that, if petrochemical recovered oil contains extra materials that are both hazardous and are not beneficial to the refining process, then industry could improperly dispose of wastes by "adulteration." Adding hazardous materials that do not benefit oil to the oil refining process, according to EPA, is "sham recycling." The court agreed with EPA that the agency can regulate materials discarded through "sham recycling" and upheld EPA's limited exclusion of petrochemical recovered oil from RCRA regulation.

"Near Zero" Population Risk Still Risky Enough for Hazardous Waste Listing

The industry group complained that EPA was unreasonable in listing as hazardous waste spent petroleum catalyst wastes that would pose a significant health risk to exposed individuals

but pose a negligible risk to the general public. Industry argued that, because of the locations and natures of most disposal sites containing the spent petroleum catalyst wastes considered in these rulemakings, very few people would be exposed to the wastes.

EPA hazardous waste rules set forth criteria that the agency must use to determine whether a waste should be considered hazardous waste. These rules consider, among other things, "the nature and severity of the human health and environmental damage that has occurred from mismanagement of the waste." 40 C.F.R. § 261.11(a)(3)(ix). However, EPA has not established a rigid rule requiring a showing that *both* population health risks and individual health risks must be significant before a waste is considered hazardous.

Some of the wastes considered by EPA in the challenged rulemaking were found by EPA to pose "near zero" population risk, mainly because very few individuals would likely be exposed to the wastes. Individuals exposed to the wastes could still be harmed, however. Industry challengers contended that EPA should be required to weigh the low population risk against individual health risks to decide whether the hazard from the petroleum catalyst wastes is substantial enough to justify a hazardous waste designation.

But the court disagreed, and decided that although EPA considers population risk to be "one of many factors to be considered," EPA need not rely primarily on population risk. Thus, EPA was allowed to list materials as hazardous wastes "based primarily on the concern over risks to those individuals who are significantly exposed, even if there are relatively few of them."

Court Challenge Not Available to Environmental Petitioners Not Harmed by the Rule

Several environmental groups challenged EPA's decision not to list certain petroleum wastes as hazardous wastes. In particular, the groups complained that waste sediment from the bottoms of unleaded gasoline tanks should have been listed as hazardous waste. In addition, the groups wanted certain materials used to produce petroleum coke as well as coke product and coke fines, when they are released into the environment, to be listed as hazardous wastes. EPA had declined to list unleaded gasoline tank sediment as hazardous waste and decided to "defer" listing coke waste as hazardous waste.

Before the court would consider the environmentalists' appeal, the court was required to determine whether the groups had a right to sue EPA ("standing"). Assuming that a citizens group can legitimately claim that it represents the interests of its members in a lawsuit, the federal courts have established three requirements that must be met before a person has the right to challenge EPA rules:

1. The person has suffered an actual or threatened injury;

2. The conduct of the defendant is a cause of the person's injury; and

3. If the person wins the lawsuit, his injury will be corrected or compensated for.

The court considered the environmental groups' arguments that their members had been harmed by EPA's rules. Several members of the environmental groups claimed to have been harmed by the types of wastes that EPA had declined to regulate. Among the petitioners claiming to be harmed by unleaded gasoline tank sediment:

- One member claimed that she lived near a landfill that had received petroleum wastes. But although she could show that many kinds of petroleum wastes are routinely shipped to landfills like the one near her home, she failed to show that the specific type of waste complained of, unleaded gasoline tank sediment, had been shipped to the landfill near her, or that such shipments had harmed her.

- A second member claimed to live near a contaminated landfill that had also received various petroleum wastes, and that the contamination caused him to stop canoeing in nearby waters because of his concerns about the pollution. But although the nearby waters were contaminated by petroleum-derived chemicals, the canoeing enthusiast failed to show that the pollution was caused by unleaded gasoline tank sediment or that the landfill had actually received the waste.

- A third petitioner claimed that he owned land in two Texas counties where landfills accept industrial wastes. He complained that his property values would go down if these landfills continue to accept unleaded gasoline tank sediments. But this petitioner failed to show that any unleaded gasoline tank sediment had ever harmed him or his property.

Other petitioners claimed to be harmed by coke fines blowing from coke storage sites near where they live. EPA had declared that certain ingredients in coke would not be considered hazardous wastes. The petitioners complained that they regularly witnessed finely powdered coke blowing from these sites and were concerned about being harmed by the dusty powder.

But the petitioners did not know whether the allegedly harmful coke ingredients were used to produce the coke fines that the petitioners observed. The court observed that, at most, the petitioners were concerned that the use of the exempt ingredients could potentially be "unhealthy and environmentally unsound," but could not show that the petitioners were likely to be harmed by the facilities that they complained about.

Finally, the court addressed the environmentalists' complaint that EPA had decided to defer a decision to list coke product and fines released into the environment as hazardous waste. The court noted that only three types of lawsuits against EPA are allowed under RCRA: lawsuits against final rules, lawsuits against repeal of final rules, and lawsuits against denials of petitions to issue, amend or repeal rules or requirements. RCRA has no provision for lawsuits challenging a decision by EPA to defer, or essentially delay, issuing a new rule. Therefore, the environmentalists had no right to challenge EPA's decision to delay issuing a rule declaring coke fines to be hazardous waste.

In conclusion, the court ordered EPA to reexamine its rule labeling petroleum refining wastewaters as "solid waste," but found EPA's decision to limit the hazardous waste exclusion

for petrochemical recovered oil lawful. EPA's approach in basing a decision to list certain refinery wastes as hazardous waste despite negligible risk posed by the wastes to the general population is allowed when an individual exposed to the waste would suffer significant health risk. Environmental petitioners' complaints that EPA should have listed certain petroleum derived wastes as hazardous wastes could not be heard by the court because the petitioners had not shown that they suffered any harm as a result of EPA's decisions. Finally, EPA cannot be sued under RCRA for delaying a decision to list materials as hazardous wastes.

American Petroleum Institute v. EPA, 261 F.3d 50 (D.C. Cir. 2000).

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