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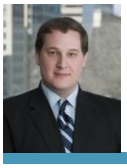

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D.C. Circuit Invalidates Part of the RCRA Definition of "Solid Waste," Altering the Regulatory Framework for Recycling of Hazardous Secondary Materials

On July 7, 2017, the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit" or the "Court") issued a decision invalidating two key elements of the regulatory definition of solid waste under the Resource Conservation and Recovery Act ("RCRA"), as amended by the U.S. Environmental Protection Agency ("EPA" or the "Agency") in 2015, and rejecting efforts to impose additional conditions on existing exclusions in the hazardous waste program. *See American Petroleum Institute v. EPA*, 2017 WL 2883867, No. 09-1038 (D.C. Cir.); 80 Fed. Reg. 1694 (January 13, 2015) (EPA's "Final Rule" revising the definition of solid waste). The definition is a cornerstone of the RCRA hazardous waste regulatory program, inasmuch as it specifies when recyclable materials may be classified as solid wastes and thus potentially hazardous wastes subject to the hazardous waste regulatory program promulgated by EPA under RCRA Subtitle C. The Court decision upends a significant part of the RCRA regulatory scheme, has broader implications for the hazardous waste program and beyond, and creates implementation issues at the federal and state level that will likely take years to sort out. Don Patterson of Beveridge & Diamond ("B&D") presented oral argument on behalf of the National Mining Association and other Industry Intervenors in opposition to Environmental Petitioners' challenge, and Eric Klein, another B&D principal, joined Don on the Industry Intervenors' brief.

Overview of the Court Decision

The full Court panel of three judges rejected and dismissed the challenges brought by the Sierra Club and other "Environmental Petitioners" that EPA's Final Rule was not stringent enough. Environmental Petitioners claimed that EPA had unlawfully failed to add two conditions to 32 exclusions from the definition of solid waste that had been promulgated prior to 2008 (the "Pre-2008 Exclusions"): (1) a requirement that the materials be properly "contained" in order to be excluded, and (2) a requirement that persons claiming the exclusions notify EPA. However, the Court concluded that it lacked jurisdiction over these challenges because EPA had merely deferred a decision on the containment and notification conditions, and had not "reopened" the Pre-2008 Exclusions to new legal challenges.

In the opinion, the Court, by a 2-to-1 majority, granted key portions of the challenges to the Final Rule brought by the American Petroleum Institute and other "Industry Petitioners":

- First, the Court vacated one of the four "legitimacy factors" that EPA had promulgated to determine when a material is being legitimately recycled and thus possibly eligible for exclusion from the definition of solid waste (as opposed to being sham recycled, such that the material would be deemed disposed and thus a waste). That factor, commonly referred to as "Factor 4," stated that for recycling to be legitimate, the product of the recycling process must be comparable to a legitimate product or intermediate, as determined in specific ways depending in part on whether there is an "analogous" product or intermediate. For example, in situations where an analogue exists, the concentrations of hazardous constituents in the recycling product must be "comparable to or lower than" the levels in the analogue or must be shown not to pose a significant environmental risk. The Court concluded that this aspect of Factor 4 cast "too wide a net" to encompass materials that are not truly hazardous and/or imposed overly "draconian" procedures for demonstrating the absence of significant environmental risk. It therefore vacated Factor 4 insofar as it applies to all hazardous material via 40 C.F.R § 261.2(g).
- Second, the Court vacated one of the exclusions that EPA issued in 2015, known as the "Verified Recycler Exclusion," and reinstated an earlier exclusion that the Agency had issued in 2008 (the Transfer Based Exclusion), albeit with the addition of two provisions of the 2015 Verified Recycler Exclusion that the Court sustained. Both the 2015 Verified Recycler Exclusion and its 2008 predecessor were designed to exclude certain materials (e.g., spent materials and listed sludges and by-products) sent offsite from generating facilities for reclamation (e.g., recovery of useful components). Under the 2008 Transfer Based Exclusion, materials could be excluded if the generator made a "reasonable effort" to make sure the receiving facility intended to properly and legitimately reclaim the material (and if certain other conditions were satisfied), while under the 2015 Verified Recycler Exclusion, the receiving facility had to obtain a variance from EPA or an authorized state (under both exclusions having a RCRA permit (or interim status) would also satisfy this requirement). The Court determined that the requirement for government issuance of a variance was unlawful, and thus vacated the Verified Recycler Exclusion, except for (1) the requirement that the generator meet certain emergency preparedness standards, and (2) the expanded requirement for the materials to be properly contained, and reinstated the Transfer Based Exclusion.

A more detailed analysis of the Court decision is set forth below, followed by a discussion of potential consequences and implementation of the decision.

Detailed Analysis of the Court Decision

Environmental Petitioners' Challenge

Before 2008, EPA had promulgated 32 exclusions from the definition of solid waste. In 2011, EPA proposed to add containment and notification requirements, as well as four regulatory legitimacy factors, to these exclusions. *See* 76 Fed. Reg. 44,139 (July 22, 2011) ("Proposed Rule"). In the Final Rule, EPA applied only the legitimacy factors to the Pre-2008 Exclusions, and deferred action on applying the containment and notification standards, given the wide range of issues that had been raised during the comment period.

Environmental Petitioners argued that EPA's "deferral" of the containment and notification standards was not really a "deferral." Instead, they argued, it was a reviewable final action by EPA, which allegedly reversed the Agency's prior position (in the Proposed Rule) that the containment and notification requirements were necessary to ensure that materials otherwise covered by the exclusions were not discarded and thus not wastes.

The Court dismissed the Environmental Petition for review. All three judges joined in a per curiam opinion which found that "[w]e need not – indeed cannot – reach the merits of this challenge." *Slip Opinion* at 39. The Court ruled that it had no jurisdiction to hear these claims because EPA had expressly stated that it was deferring action on applying containment and notification conditions to the Pre-2008 Exclusions. *Id.* at 40. The Court rejected Environmental

Petitioners' attempt to end run this "straightforward jurisdictional analysis," ruling that the cases cited by Environmental Petitioners did not involve RCRA provisions and were easily distinguished. According to the Court, "EPA had not made up its mind," meaning that there was nothing to review. *Id.*

The Court also denied Environmental Petitioners' attempt to rescue their challenge with the reopener doctrine, which allows courts to review an old agency rule if an agency considers substantive changes to the rule and then declines to do so. The Court stated that "the doctrine has no applicability to this case because EPA never considered changing the *substance* of the pre-2008 exclusions." *Slip Opinion* at 41 (emphasis in the original) (stating that the proposed containment and notification requirements were merely potential ways to *enforce* the substance of the pre-existing rules). Finally, the Court stated that because of its ruling that it lacked statutory jurisdiction to hear Environmental Petitioners' claims, it need not reach Industry Intervenors' contention that the Environmental Petitioners lacked Article III standing to bring their challenge in the first place. *Id.*

Industry Petitioners' Challenge to Legitimacy Factors 3 and 4

In 2008, EPA established two new exclusions from the definition of solid waste and required, as a condition of these exclusions, that the materials be legitimately recycled, as determined by two mandatory factors and two additional "considerations." *See* 73 Fed. Reg. 64,668 (October 30, 2008) ("2008 Rule"); Beveridge & Diamond, P.C., "EPA's Final Revisions to the Definition of Solid Waste: Recycling the Rules for Recyclable Materials" (October 30, 2008) (summary and analysis of the 2008 Rule). The 2015 Final Rule modified the factors and considerations, and made all of them mandatory for all exclusions from the definition of solid waste, including the pre-2008 Exclusions, the 2008 Exclusions, and the new 2015 exclusions (e.g., the Verified Recycler Exclusion). Under the 2015 Final Rule, to be eligible for an exclusion, a material/recycling process must meet four separate legitimacy factors. *See generally* Beveridge & Diamond, P.C., "EPA Revisions to Definition of 'Solid Waste' Change the Regulatory Landscape for Hazardous Recyclable Materials" (December 19, 2014) (summary and analysis of the 2015 Final Rule). Industry Petitioners challenged Factor 3 – that the material must be managed "as a valuable commodity"-- and Factor 4 – that the product of the recycling process must be "comparable to a legitimate product or intermediate."

The Court noted at the outset of its analysis that Industry Petitioners did not attack EPA's authority to formulate and apply a legitimacy test, nor did Industry Petitioners challenge the Agency's premise that legitimate recycling involves "valuable" materials being used for a "recognizable benefit" (Factors 1 and 2). *Slip Opinion* at 7, 8. Instead, Industry Petitioners argued that mandating Factors 3 and 4 across all recycling resulted in the "unlawful regulation of non-discarded materials." *Id.* at 8, quoting *Industry Petitioners' Brief* at 16.

Factor 4

Beginning with the more complicated factor, Factor 4, the Court noted that EPA justified this criterion as necessary to prevent "toxics along for the ride," a shorthand for a situation in which a recycler incorporates hazardous constituents from a secondary material into a recycled product simply as a way to avoid proper disposal. *Slip Opinion* at 9-10. The Court separately addresses the two "tracks" in Factor 4: one for products where there is an analogue of undoubted legitimacy, and another track addressing products with no such analogue.

The Court's problem is with the "analogue" track, and in particular its requirement that in order for legitimate recycling to occur, the levels of hazardous constituents in the recycled product must be "comparable to or lower than" in the analogue to the recycled product. The Court finds that this standard is overbroad because it "sets the bar at the contaminant level of the analogue without regard to whether any incremental contaminants are significant in terms of health or environmental risks." *Slip Opinion* at 13. The Court further states that an alternative in Factor 4, under which a material can be excluded if it meets widely recognized commodity standards and specifications that include hazardous constituent levels, is not enough to save the analog track (and Factor 4 more generally) because commodity standards/specifications in many cases do not include levels of hazardous constituents and thus are not a "reasonable tool for distinguishing product from waste." *Id.*

The Court then suggests that the Factor 4 "overbreadth" issues could, theoretically, be saved by a provision included by EPA allowing generators or recyclers to meet the factor – even if the concentrations of hazardous constituents in a recycled product are not "comparable to or lower than" in the analogous product – by producing and keeping records demonstrating that the elevated levels of hazardous constituents do not pose a significant risk to human health or the environment, and by notifying EPA of its reliance on this provision. However, the Court finds that this exception "falls shorts of saving the rule [Factor 4], due to the draconian character of the procedures it imposes on recyclers." *Slip Opinion* at 15.

The Court states that "EPA is correct that the notice and recordkeeping mandates [in this exception] will create useful 'oversight' and may be correct that they will only create a 'minimal burden' on recyclers," but adds that "paperwork is not alchemy; a legitimate product will not morph into waste if its producer fails to file a form (or loses a copy two years later)." *Id.* at 16. The Court concluded that the analogue track's "comparable to or lower than" test for hazardous constituents – even when combined with the other elements of Factor 4 designed to limits its impact – do not prevent EPA from casting too wide a net over materials outside its jurisdiction. *Id.* Accordingly, the Court vacated Factor 4 "insofar as it applies to all hazardous secondary materials via [40 C.F.R.] § 261.2(g)." *Id.* at 42; *see also id.* at 20 (noting that Petitioners did not challenge Factor 4 as it applies to specific exclusions that have the legitimacy factors "written … into" them, citing the single example of the Generator Control Exclusion, which refers to the legitimacy factors – and requires documentation of how the factors are met – independent of § 261.2(g)).

Factor 3

Industry Petitioners also challenged Factor 3 of the legitimacy factors, which requires that secondary materials to be handled as "valuable commodities." The Court upheld Factor 3, stating that Industry Petitioners' reading of an earlier D.C. Circuit case (*Association of Battery Recyclers v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000)) to mean that EPA is barred from ever regulating how recycled materials are contained goes too far, and found that the Agency can impose a containment requirement "so long as it is such that an inference of 'sham' or illegitimacy would logically flow from a firm's non-compliance." *Slip Opinion* at 9. The Court continued that, given EPA's explanation that a material may be "contained" even if it is simply piled on the ground, and if it meets requirements that Industry Petitioners did not challenge as unreasonable – except for a labeling requirement – Factor 3 seemed reasonable, as it does not ask for anything beyond what could be expected of firms engaged in legitimate recycling. *Id.* As for the labeling requirement, the Court stated that, particularly given that EPA authorized a "keep a log" alternative to labeling, it did not interpret the Factor 3 language as unreasonable. Accordingly, the Court rejected Industry Petitioners challenge to Factor 3.

Industry Petitioners' Challenge to the Verified Recycler Exclusion

In the 2008 Rule, EPA adopted the Transfer Based Exclusion to exclude from the definition of solid waste certain materials (e.g., spent materials and listed sludges and by-products) sent offsite for reclamation, if the generator made a "reasonable effort" to make sure the receiving facility intended to properly and legitimately reclaim the material, and if certain other conditions were satisfied. The Verified Recycler Exclusion adopted by EPA in 2015 replaced this 2008 exclusion, primarily to add two new requirements: (1) a requirement that the generator meet special "emergency preparedness" standards in its custody of the materials before shipment; and (2) a requirement that generators send their secondary materials to a reclamation facility that obtains a variance from EPA or an authorized state (if the facility does not have a RCRA permit or interim status).

Industry Petitioners challenged the Verified Recycler Exclusion on the grounds that EPA had no reason to tighten the conditions of the 2008 Transfer Based Exclusion. Interestingly, the Court applied an analysis premised on the fact that EPA never adequately responded to the seminal 1987 court case on the definition of solid waste (*American Mining Congress v. EPA*, 824 F.2d 1177 (D.C. Cir. 1987)), where the D.C. Circuit struck down EPA's 1985 definition of solid waste for unlawfully classifying broad categories of secondary materials as solid wastes when destined for reclamation. *Slip Opinion* at 21 ("EPA … kept the reclamation-equals-discard rule, apparently on the reasoning that AMC merely 'granted

the petition for review' without ordering vacatur"). According to the Court, EPA has sought over the years to cure the overreach of the definition of solid waste with multiple exclusions for specific materials/recycling processes. *Id.* In what the Court describes as a "perhaps topsy-turvy universe," EPA's choice to retain the reclamation-equals-discard rule "has obligated [the Agency] to create sufficient exceptions to counter that rule's overbreadth." *Id.* at 23.

Using this analysis, the Court first addressed the "emergency preparedness" requirements added as part of the Verified Recycler Exclusion. The Court found these requirements reasonable. It stated that the "mandated preparations" seem rather basic, and in any event, EPA stands ready to waive these requirements if they are not necessary. *Slip Opinion* at 26.

The Court then turned to the abolition of the "reasonable efforts" option in the 2008 Transfer Based Exclusion, under which a material could be excluded as long as the generator made certain inquiries of the offsite recycler (to ensure the intent to properly and legitimately recycle the material), and its replacement in the 2015 Verified Recycler Exclusion with a requirement that if the recycler does not have a RCRA permit or interim status, it must secure a regulatory variance for third-party reclamation from EPA or an authorized state. The Court stated that Industry Petitioners "focus more persuasively" on this issue, and that EPA "fails to provide sufficient linkage" between the rulemaking record and the decision to impose the new requirement. *Slip Opinion* at 29. The Court evaluated, in depth, documents in the record that EPA argued justify the need for the permit-or-variance provision of the Verified Recycler Exclusion on the ground that offsite transfers pose more risk than onsite recycling. The Court found that EPA's studies are insufficient, and fail to demonstrate actual incidence of the additional risks they allegedly point to, or, as the Courts puts it, "a reasonable concurrence between model and reality." *Id.* at 30. The Court rules that "EPA must explain why the risk that purported third-party recyclers will in reality 'discard' the materials is so high that reclamation under the Verified Recycler Exclusion may only proceed on the basis of prior agency approval." *Id.* at 32-33. None of the studies citied by EPA are sufficient in the Court's mind to meet this standard.

In addition to challenging the variance requirement under the Verified Recycler Exclusion, Industry Petitioners also challenged one of the criteria established by EPA for issuing variances. The criterion at issue required third-party reclaimers to account for how any "unpermitted releases" from their facilities might combine with "other nearby potential stressors" to create "risk[s] to proximate populations." The Court struck down this criterion, noting that it "*assumes* discard, i.e., behavior regulable under RCRA, and seeks to constrain its environmental impact, rather than testing for discard's existence." *Slip Opinion* at 34 (emphasis in the original). The Court also states that:

> Were we dealing with materials that were lawfully identified as hazardous waste, this test might be valid for some purposes. But the Verified Recycler Exclusion covers materials that might be labeled waste only because of a reclamation equals discard rule that EPA has all but conceded is overbroad. [citation omitted]. This criterion, therefore, cannot stand as a means of identifying discard.

Id.

With regard to the remedy, the Court reinstituted the Transfer Based Exclusion from the 2008 Rule, but left in place the emergency preparedness requirements and the expanded containment requirement of the Verified Recycler Exclusion. To the chagrin of some of the Industry Petitioners, the reinstatement of the Transfer Based Exclusion means that the provision making spent hydrotreating and hydrorefining catalysts from the petroleum refining industry (EPA Hazardous Waste nos. K171 and K172) ineligible for the exclusion is also revived, even though that provision had been removed in the 2015 Verified Recycler Exclusion. However, the court invites EPA and other parties to petition for rehearing on the issue of whether the 2015 removal of the provision on spent catalysts should be retained under the newly revived Transfer Based Exclusion. *Slip Opinion* at 36.

Note that, as discussed above, Environmental Petitioners also argued that the Verified Recycler Exclusion was too permissive. The Court rules that, given that it has decided that the exclusion was unreasonable, it did not need to address the Environmental Petitioners' argument that the exclusion is too lenient.

Other Industry Challenges

Industry Petitioners also argued that EPA could not treat off-specification commercial chemical products as secondary materials that would be classified as solid and potentially hazardous wastes if sham recycled. During the rulemaking, EPA replied to a comment on this topic, taking the positon that a commercial chemical product listed as hazardous in 40 C.F.R. § 261.33 could be considered as a hazardous secondary material if it is "off specification or otherwise unable to be sold as a product." The Court stated that Industry Petitioners' challenge was essentially that EPA had abandoned a prior policy, embodied largely in guidance materials, without properly recognizing the change. *Slip Opinion* at 38. The Court decided that any such challenge is within the jurisdiction of the district court, not the D.C. Circuit (and that Industry Petitioners had not made any claim of pendent jurisdiction that might allow the D.C. Circuit to consider the claim anyway). *Id.*

In addition, Industry Petitioners asked the Court to invalidate EPA's legitimacy factors to the extent that they apply to used oil destined for recycling. The Court stated that the Agency's rules exempt used oil from application of the legitimacy factors, such that there was no real dispute for the Court to address. *Slip Opinion* at 20.

Consequences of Court's Rulings

Consequences for the Pre-2008 Exclusions

With regard to the dismissal of the Environmental Petition, EPA's deferral of further action on the proposed addition of containment and notification requirements to the 32 Pre-2008 Exclusions remains in place. As the Court noted, the Environmental Petitioners could file a petition for rulemaking with EPA regarding this issue, and this decision does not foreclose ultimate review of any ultimate decision by the Agency as to whether the containment and notification requirements should be added to the Pre-2008 Exclusions.

As for the legitimacy factors, even though the 2015 legitimacy factor test with four factors will remain codified in the Code of Federal Regulations, Factor 4 will only apply to those exclusions that refer to the factors directly. For all other exclusions, such as the Pre-2008 Exclusions, Factors 1, 2, and 3 will apply "via [40 C.F.R.] § 261.2(g)," but Factor 4 will no longer apply as a regulatory matter. It is worth noting that the "toxics along for the ride" issue addressed by Factor 4 could potentially continue to be relevant in determining whether recycling is sham or legitimate. However, the analysis of this issue will no longer be governed by the terms of Factor 4. Instead, it may be governed by the concepts discussed in "guidance" that pre-dated the 2008 and 2015 Rules, such as the so-called "Lowrance Memorandum." *See* Memorandum from Sylvia K. Lowrance, Director, Office of Solid Waste, EPA, to Hazardous Waste Management Division Directors, Regions I-X, EPA (April 6, 1989) (RCRA Online #11426).

Consequences for the Generator Control Exclusion

The Court decision leaves the Generator Control Exclusion, as amended by EPA in the 2015 Rule, generally intact. Importantly, though not completely clear, because this exclusion directly refers to the legitimacy factors, independent of 40 C.F.R. § 261.2(g), all four factors – including Factor 4 – may continue to apply to this exclusion.

Consequences for the Verified Recycler and Transfer Based Exclusions

The Court decision invalidates the 2015 Verified Recycler Exclusion, and reinstates in its place the 2008 Transfer Based Exclusion, with a few important twists. First, because the Court did not vacate two provisions of the 2015 Verified Recycler Exclusion (i.e., the emergency preparedness requirement and expanded requirements for containment), those provisions will now be grafted onto the 2008 Transfer Based Exclusion. *Slip Opinion* at 36 ("EPA can of course renumber its rules as necessary to accommodate the returning Transfer-Based Exclusion provisions"). Second, although the reinstated Transfer Based Exclusion directly refers to the legitimacy factors, independent of 40 C.F.R. § 261.2(g), and therefore is not subject to the vacatur of Factor 4, there is some uncertainty about which version of the four legitimacy factors will now apply to the Transfer Based Exclusion. One possibility is that the four factors as codified in the 2015 Rule will apply. However, because the reinstated exclusion from 2008 referred to the legitimacy test as it existed at the time, the relevant legitimacy test may be the one codified in the 2008 Rule. This could be important because, as noted above,

the 2008 legitimacy test was generally less stringent than the 2015 test, consisting of two mandatory factors (corresponding roughly to Factors 1 and 2 under the 2015 test) and two additional "considerations" (corresponding roughly to Factors 3 and 4). Note that under this second possibility, there would effectively be three separate legitimacy tests: (1) Factors 1 through 3 as codified in 2015 (for the Pre-2008 Exclusions), (2) Factors 1 through 4 as codified in 2015 (for the Generator Control Exclusion), and (3) the two factors and two considerations as codified in 2008 (for the Transfer Based Exclusion).

Broader Consequences for the RCRA Program

The Court decision may have important consequences for the RCRA regulatory program beyond the exclusions discussed above. As noted above, the Court states that EPA failed to adequately respond to the 1987 AMC decision that the reclamation-equals-discard rule was overbroad, but instead tried to save the rule by adopting multiple exclusions for specific materials. The Court then uses this filter throughout its opinion, stating that "because EPA close to *retain* a rule that improperly treats as discarded materials that are [not actually discarded] … it has obligated itself to creating sufficient exceptions to counter that rule's overbreadth." *Slip Opinion* at 23 (emphasis in the original).

The Court determined that the Verified Recycler Exclusion failed to meet this standard of providing a "sufficient exception." One can only wonder whether EPA's full array of exclusions (including the pre-2008 Exclusions, the Generator Control Exclusion, and the reinstated Transfer Based Exclusion) are truly sufficient to cure the overbreadth of the underlying reclamation-equals-discard rule. The Court decision may invite the regulated community to seek new and/or expanded exclusions, and may color all future rulemakings related to the RCRA regulatory status of recycled materials.

Moreover, Judge Tatel, in his dissent, states that "[i]f someday the Administrator applies the rule[s] to a recycler in an arbitrary and capricious manner … that recycler 'may bring a particularized, as-applied challenge to the [rule].'" *Dissent* at 5. This language may encourage defendants in enforcement actions to argue that EPA's regulatory definition of solid waste is unlawfully overbroad as applied to their particular materials, notwithstanding the general rule in RCRA § 7006(a)(1) that regulations not challenged within the first 90 days after promulgation "shall not be subject to judicial review in civil or criminal proceedings for enforcement." *See* 42 U.S.C. § 6976(a)(1). It will be interesting to see what results from what the Court describes as the "topsy-turvy" universe EPA has created.

Potential Consequences Beyond the RCRA Program

The Court opinion may have broader significance beyond the RCRA program, inasmuch as it may signal heightened scrutiny of EPA actions by the D.C. Circuit (and perhaps other courts). In the Verified Recycler Exclusion portion of the opinion, the majority of the Court showed relatively limited deference to EPA's evaluation of multiple technical studies and the Agency's conclusions that those studies supported the 2015 Rule. In his dissent, Judge Tatel argues that the Court's decisions with regard to both the Verified Recycler Exclusion and Factor 4 display "a level of scrutiny that I believe conflicts with the [Administrative Procedure Act]'s highly deferential standard of review and with the principles governing judicial review of facial challenges to the rules." *Dissent* at 3. One factor that may have justified the enhanced scrutiny in the majority's mind is its belief that, given the overbreadth of the reclamation-equals-discard rule, exceptions must be adequate to address that fault, and that courts must carefully examine EPA's decision making to ensure it has met that burden.

Implementation of the Court Decision and EPA's 2008 and 2015 Changes to the Definition of Solid Waste

The Court decision is not immediately effective. Rather, it will take effect only once the Court's "mandate" issues. That usually happens a few weeks after a decision is issued. However, because the Court invited the parties to file petitions for rehearing on the spent catalyst issue, as noted above, it seems likely that the mandate will be delayed, perhaps for some time.

After the mandate issues, the effect of the Court decision will vary from state to state, due to the fact that almost all states have their own hazardous waste regulatory programs and have been authorized by EPA to implement most or all parts of

those programs in lieu of the corresponding parts of the federal RCRA program. A full analysis of the impacts of the Court decision in all 50 states is beyond the scope of this document. However, a preliminary analysis of the effects in key categories of states is provided below:

- *States without authorized RCRA programs*. In these states (Alaska, Iowa, and Puerto Rico), the federal hazardous waste regulations apply in their entirety. Thus, the full force of the Court's decision will immediately apply, without the need for any action by EPA or the states. For example, the Verified Recycler Exclusion will be automatically replaced with the Transfer Based Exclusion (with the nuances discussed above).
- *Authorized states that have fully adopted the 2008 and 2015 Rules*. The relevant rules in these states are essentially the same as the current federal rules. Thus, it would appear that the decision of the Court regarding the federal rules should apply with equal force to the rules in these states (unless perhaps there is some independent basis under state law for the state regulations to be substantively different than the federal regulations). For example, the Verified Recycler Exclusion should be replaced with the Transfer Based Exclusion (with the emergency response and expanded containment provisions added). Depending upon state law, the effects of the Court's decision on the state regulations may be felt immediately and automatically, or may require action by the relevant state regulatory agency to amend the state regulations. According to an EPA data base, as of September 30, 2016, the states in this category include Illinois, North Carolina, North Dakota, and Pennsylvania.
- *Authorized states that have not adopted either the 2008 Rule or the 2015 Rule*. According to the EPA data base mentioned above, most states (approximately 30) fall in this category. In the preamble to the 2015 Final Rule, the Agency stated that the codification of the legitimacy factors (together with the associated prohibition on sham recycling) was more stringent than the pre-existing regulations, and therefore "all authorized states will be required to modify their programs to adopt equivalent, consistent, and no less stringent requirements." *See* 80 Fed. Reg. at 1768-69. The same would presumably be true after the Court decision, except that the states would no longer have to apply Factor 4 to the Pre-2008 Exclusions. Indeed, given the analysis of the Court, these states would likely be prohibited from applying Factor 4 to the Pre-2008 Exclusions (unless perhaps there is some independent basis under state law for doing so).

  With respect to the reinstated Transfer Based Exclusion and the Generator Control Exclusion, EPA in 2015 stated that such exclusions are less stringent than the pre-2008 regulations, and thus "authorized states that have not adopted the 2008 … final rule are not required to modify their programs to adopt these exclusions." *Id.* at 1768. However, the Court's decision casts considerable doubt on this assertion by EPA. As noted above, the Court stated that the underlying reclamation-equals-discard rule is unlawfully overbroad and can be cured (if at all) only by "sufficient exceptions to counter that rule's overbreadth." *Slip Opinion* at 23. Thus, it may be unlawful for a state regulatory agency to decline to adopt the necessary exceptions (again, unless state law somehow authorizes the agency to regulate, as solid wastes, materials that that are not "discarded" within the meaning of RCRA). In this way, states may be required to adopt the Transfer Based Exclusion, the Generator Control Exclusion, and other exclusions from the definition of solid waste (e.g., the "Remanufacturing Exclusion" that was also promulgated as part of the 2015 Final Rule), notwithstanding EPA's claim to the contrary (and the general rule that state hazardous waste programs may be more stringent or broader in scope than the federal RCRA program).
- *Authorized states that have adopted the 2008 Rule, but not the 2015 Final Rule*. According to the EPA data base mentioned above, the states in this category include the District of Columbia, Idaho, Michigan, and Tennessee (as of September 30, 2016). The rules in these states already include the 2008 version of the legitimacy factors and considerations, but will likely have to be updated to include the 2015 version of the factors. Based on the Court decision, however, Factor 4 of the revised state rules will not have to be applied – and probably cannot lawfully be applied – to the Pre-2008 Exclusions. Moreover, as discussed earlier, it is possible that the states could retain

the 2008 version of the legitimacy factors and considerations for use in the context of the Transfer Based Exclusion (which still exists in these states and will be reinstated at the federal level as a result of the Court decision). These states will also likely have to revise their Transfer Based Exclusions to include the new emergency response requirements and the expanded containment requirements.

- *Authorized states that adopted the 2015 Final Rule, but did not adopt the 2008 Rule.* According to the EPA data base referred to above, eight states fell into this category as of September 30, 2016 (i.e., Alabama, Indiana, Missouri, Nebraska, Oklahoma, Texas, Utah, and Virginia). Without actually reviewing the rules in each of these states, it is not entirely clear what this means. However, to the extent it means that these states have adopted the 2015 version of the legitimacy factors, the states will likely have to cease applying Factor 4 to the Pre-2008 Exclusions. To the extent it means that these states adopted the 2015 Verified Recycler Exclusion, but never had the 2008 Transfer Based Exclusion on the books, there would be no Transfer Based Exclusion in these states to reinstate following vacatur of the Verified Recycler Exclusion. Thus, the states might have neither exclusion in the wake of the Court decision. As discussed above, EPA has asserted that states are not required to adopt any of the exclusions from the definition of solid waste, but the Court decision suggests that adoption might not be optional, since the exclusions may be necessary to cure the overbreadth of EPA's reclamation-equals-discard rule. For these reasons, even though the states in this category may temporarily not have either a Verified Recycler Exclusion or a Transfer Based Exclusion, they may be required to adopt the Transfer Based Exclusion (with the new emergency response requirements and the expanded containment requirements added). Similarly, to the extent any of these states do not have either the Generator Control Exclusion (from the 2008 Rule) or the Remanufacturing Exclusion (from the 2015 Final Rule), they may be required to adopt those exclusions, as well.
- *Authorized states that adopted the legitimacy factors from the 2015 rule, but not the Verified Recycler Exclusion.* According to the EPA data base referred to above, only South Carolina and Colorado fell into this category as of September 30, 2016. In the case of South Carolina, the state also adopted the 2008 Rule, but this was not the case with Colorado. At this point, we have not fully assessed the implications of the Court decision in these states. However, it seems likely that the impacts will be some hybrid of those discussed above for other states. For example, since both states apparently have the 2015 version of the legitimacy factors, they will no longer be required – or probably even allowed – to apply Factor 4 to the Pre-2008 Exclusions.

Clearly, implementation of the Court decision raises a number of significant questions. It may take years before these issues are fully resolved.

Beveridge & Diamond assists clients in a wide range of industrial sectors with solid and hazardous waste regulatory issues under RCRA, its state counterparts, international treaties, and the laws and regulations of countries around the world. We have been lead counsel in many of the seminal cases challenging prior iterations of the RCRA definition of solid waste, routinely advise clients on when specific recyclable materials may be classified as wastes, and defend companies in related enforcement actions. For more information about the Court decision and its potential implications, please contact Don Patterson, Aaron Goldberg, Eric Klein, or any other members of our Hazardous Waste/RCRA practice group.