AMERICAN PETROLEUM INSTITUTE V. EPA: BLURRING THE LINE BETWEEN EPA RULEMAKING AUTHORITY AND THE D.C. CIRCUIT COURT'S POWER TO REVISE FINAL AGENCY ACTIONS

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For the week ending March 23, the U.S. petroleum industry produced 68,460 barrels of crude oil.[1] At $57.30[2] per barrel, this week's supply of crude oil is valued at $3,902,220.[3] As energy attorneys know, refining crude oil can have a negative effect on the environment.[4] To minimize this negative effect, in 2015, the Environmental Protection Agency (EPA) updated the Resource Conservation and Recovery Act (RCRA) by promulgating a new final agency rule that revised the definition of "solid" waste.[5]

Generally, Congress passed RCRA to give the EPA statutory authority to regulate solid and hazardous waste from "cradle to grave."[6] "Cradle to grave" is defined as management of waste from its point of generation to its point of proper disposal.[7] Importantly, a waste must be classified as "solid" before it can be classified as "hazardous."[8] Prior to the 2015 final rule, the petroleum industry enjoyed a solid waste exemption.[9] This exemption was crafted in such a way that the millions of pounds of spent petroleum catalysts (typically composed of vanadium oxide) generated during the petroleum refinery process could not be classified as "solid" waste,[10] which meant they could not be classified as a "hazardous" waste and therefore escaped RCRA regulation altogether.[11]

The American Petroleum Institute (API) filed suit[12] against the EPA as soon as the 2015 final rule was published in the Federal Register.[13] Due to its complex regulatory scheme, the U.S. Court of Appeals for the District of Columbia has exclusive jurisdiction over RCRA litigation.[14] As such, *American Petroleum Institute v. EPA* was heard by a panel of three federal appeals judges in the D.C. Circuit Court.[15] The court upheld in part and vacated in part the 2015 final rule.[16] Crucial to our discussion thus far, the court, in its decision, did not issue a holding on whether spent petroleum catalysts will be subject to RCRA regulation.[17] This was most likely an unsatisfactory verdict for API, which was seeking to reinstate its previously enjoyed spent petroleum catalyst exemption.

Instead, the court considered—more broadly—the validity of the 2015 final rule as a whole[18] and invited both parties to file petitions for a rehearing on the spent catalyst issue.[19] Both parties filed petitions for a rehearing, and in March the D.C. Circuit issued a unsigned *per curiam* opinion.[20]

American Petroleum Institute v. EPA was decided on July 7, 2017. API alleged that the EPA improperly decided to regulate spent petroleum catalysts by classifying them as a "hazardous waste." The EPA did this by revoking the previously enjoyed blanket exemption on spent petroleum catalysts and by designing a "legitimacy test" that allowed waste generating firms—or those firms involved in the petroleum refining process—to qualify for the solid waste exemption.[21]

The legitimacy test has four factors.[22] The four factors are:

- Factor 1: Legitimate recycling must involve hazardous secondary material that provides a useful contribution to the recycling process or to a product or intermediate of the recycling process.
- Factor 2: The recycling process must produce a valuable product or intermediate.
- Factor 3: The generator and the recycler must manage the hazardous secondary material as a valuable commodity when it is under their control.
- Factor 4: The product of the recycling process must be comparable to a legitimate product or intermediate.[24]

Importantly, API did not challenge EPA's ability to design a legitimacy test, nor did they challenge Factors 1 or 2.[23] However, API did challenge Factors 3 and 4. The court upheld Factor 3 and vacated Factor 4. In order to better understand the economic incentives of sham recycling, the EPA commissioned two studies to examine waste generating and waste disposal firm behavior.[25] Sham recycling is defined as "illegitimate activities executed under the guise of recycling in order to be exempt from or subject to lesser regulation."[26] First, the EPA's "market forces" study outlined market incentives that influence a firm's decision-making process when recycling hazardous waste.[27] Second, the "environmental problems" study delineated the economic forces specific to the recycling of hazardous secondary material and explained why environmental problems originate from the petroleum industry's recycling activities.[28] The studies concluded that the petroleum industry demonstrates a "need for greater, not less, oversight."[29]

In considering the EPA's studies, the court stated that the EPA failed to "justify its assumption" that materials that do not pass the legitimacy test are sham recycled.[30] Thus, the studies did not take the court "beyond EPA's bare assertion that high levels of hazardous constituents … *could* indicate" sham recycling.[31] As such, the majority opinion found that the EPA's studies were unable to justify the full reach of the 2015 final rule.[32] Thus, the court upheld Factor 3 while vacating Factor 4.[33]

In his dissent, Judge David S. Tatel stated that the court "displays a level of scrutiny" that "conflicts with the APA's highly deferential standard of review" on agency final rules.[34] Judge Tatel correctly found that "reasoned decision-making can use an economic model to provide useful information" about the need for additional regulatory oversight.[35] The dissent would have found that the studies provided "plenty of empirical support" and were persuasive on their merits to justify Factor 3 *and* 4.[36] As such, Judge Tatel concluded that promulgating the 2015 final rule is "within [EPA's] technical expertise" and that the court owes the EPA an "extreme degree of deference" that was not provided in the instant action.[37]

For practitioners, *American Petroleum Institute v. EPA* may signal an application of "heightened scrutiny" to EPA rulemaking—a troubling development. In March, the court issued its *per curiam* opinion on the parties petitions for a rehearing on the spent petroleum catalyst issue.[38] Here, it: (1) severed and affirmed the EPA's removal of the spent petroleum catalyst bar from the vacated portions of the VRE; (2) vacated Factor 4 in its entirety; and (3) reinstated the 2008 Rule's version of Factor 4.[39]

The "fundamental problem with the court's conclusion is that the court decides for itself a policy question Congress left to the [EPA's] administrator."[40] Understanding the full implications of the court's decision "may take years," but given RCRA's seemingly constant motion, either in the rule promulgation process, or in the federal courts, energy attorneys will bear witness to additional RCRA litigation in 2018 and beyond.[41] ⊙

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Endnotes

[1]U.S. Energy Info. Admin., Weekly Petroleum Status Report: Table 1. U.S. Petroleum Balance Sheet, Week Ending 3/23/2018 (2018), https://www.eia.gov/petroleum/supply/weekly/pdf/table1.pdf.

[2]*Crude Oil*, NASDAQ, http://www.nasdaq.com/markets/crude-oil.aspx (last visited Mar. 29, 2018).

[3]*See supra* text accompanying note 1.

[4]*Oil: Crude and Petroleum Products Explained*, U.S. Energy Info. Admin., https://www.eia.gov/energyexplained/index.cfm?page=oil_environment (last updated Feb. 1, 2017).

[5]Press Release, Environmental Protection Agency, EPA Promotes Responsible Hazardous Materials Recycling, Protects Communities (Dec. 10, 2014) (on file with author).

[6]*Summary of the Resource Conservation and Recovery Act 42 U.S.C. 6901 et seq. (1976)*, U.S. Envtl. Prot. Agency, https://www.epa.gov/laws-regulations/summary-resource-conservation-and-recovery-act (last updated Aug. 24, 2017).

[7]*See generally id.*

[8]40 C.F.R. § 261.3(a)(1).

[9]40 C.F.R. § 261.4(a)(12) (noting the exclusion for "oil-bearing hazardous secondary materials that are generated at a petroleum refinery and are inserted into the petroleum refining process").

[10]*Id.*

[11]*Id.*

[12]*Am. Petroleum Inst. v. Envtl. Prot. Agency,* 862 F.3d 50, 55 (D.C. Cir. 2017).

[13]EPA Definition of Solid Waste, 80 Fed. Reg. 1694 (Jan. 13, 2015), https://www.gpo.gov/fdsys/pkg/FR-2015-01-13/pdf/2014-30382.pdf.

[14]42 U.S.C. § 6976(a)(1) (noting that RCRA judicial review "may be filed only in the United States Court of Appeals for the District of Columbia").

[15]*See supra* text accompanying note 11.

[16]*Am. Petroleum Inst.* 862 F.3d at 55.

[17]*Id.* at 72.

[18]*See id.* at 55.

[19]*See supra* text accompanying note 16.

[20]*See supra* text accompanying note 38; *see also* Gwendolyn Fleming, *D.C. Circuit Decision Loosens Restrictions on Solid Waste*, Van Ness Feldman LLP: Alerts (April 4, 2018, 2:40 PM), http://

vnf.com/dc-circuit-decision-loosens-restrictions-on-solid-waste.
[21]*See supra* text accompanying note 11.
[22]40 C.F.R. § 260.43
[23]*See Am. Petroleum Inst. v. Envtl. Prot. Agency*, 862 F.3d 50, 57 (D.C. Cir. 2017).
[24]40 C.F.R. § 260.43(a)(1)-(4).
[25]*Am. Petroleum Inst.,* 862 F.3d at 68-69.
[26]*Legitimate Hazardous Waste Recycling Versus Sham Recycling*, U.S. Envtl. Prot. Agency, https://www.epa.gov/hw/legitimate-hazardous-waste-recycling-versus-sham-recycling (last updated Aug. 28, 2017) (examples of sham recycling include: (1) producing a product with higher concentrations of hazardous constituent than would normally be found within such a product; and (2) storing materials in a leaking surface impoundment instead of a tank that is in good condition and intended for storing such raw materials).
[27]*See Am. Petroleum Inst.*, 862 F.3d at 67.
[28]*See id.* at 62-63.
[29]40 C.F.R. § 261.4(a)(23).
[30]*See Am. Petroleum Inst.,* 862 F.3d at 62.
[31]*Id*. at 63 (emphasis added).
[32]*Id*.
[33]*Id*. at 75.
[34]*Am. Petroleum Inst.,* 862 F.3d at 76 (Judge Tatel, dissenting).
[35]*Id*. at 81 (quoting *Am. Pub. Gas Ass'n v. Fed. Power Comm'n*, 567 F.2d 1016, 1037 (D.C. Cir. 1977)).
[36]*Am. Petroleum Inst.,* 862 F.3d at 81 (Judge Tatel, dissenting).
[37]*Id*. (quoting *ATK Launch Sys. Inc. v. Envtl. Prot. Agency*, 669 F.3d 330, 338 (D.C. Cir. 2012)).
[38]Gwendolyn Fleming, *supra* note 20 *D.C. Circuit Decision Loosens Restrictions on Solid Waste*, Van Ness Feldman LLP: Alerts (April 4, 2018, 2:40 PM), http://vnf.com/dc-circuit-decision-loosens-restrictions-on-solid-waste.
[39]*Id.*
[40]*Am. Petroleum Inst.,* 862 F.3d at 81 (Judge Tatel, dissenting).
[41]*See supra* text accompanying note 36.

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focused on the contract and the expectations of the parties, rather than on some of the tort-based factors of *Davis & Sons*.[22] Applying it to the facts at hand, the court found that a work order for downhole work on a gas well accessible only from a fixed platform, which later required a vessel to resolve an unexpected problem, was not a maritime contract.[23] The contract did not provide, nor did the parties expect, that a vessel would play a substantial role in the performance of the work.[24] While this result may have been the same under *Davis & Sons*,[25] the newly articulated standard certainly simplifies the analysis.

Although the Fifth Circuit acknowledged its limitation to the oil and gas sector, the application of *Doiron* should nevertheless be far-reaching.[26] ⊙

Endnotes

[1]*See*, *e.g.*, *Thurmond v. Delta Well Surveyors,* 836 F.2d 952 (5th Cir. 1988) (holding that a contract to provide wireline services on a wireline barge was non-maritime).
[2]In *Hoda v. Rowan Co. Inc.*, 419 F.3d 379, 380 (5th Cir. 2005), the Fifth Circuit noted the difficulties and practical effects of distinguishing between maritime and non-maritime contracts: "Whether this is the soundest jurisprudential approach may be doubted, inasmuch it creates uncertainty, spawns litigation, and hinders the rational calculation of costs and risks by companies participating in this industry."
[3]*In re Larry Doiron Inc.* 879 F.3d 568 No. 16-30217, 2018 WL 316862 (5th Cir. 2018).
[4]*Id.* at 569 (citing *Norfolk S. R.R. v. Kirby*, 543 U.S. 14 (2004)).
[5]*Hoda*, 419 F.3d at 380.
[6]*Davis & Sons Inc. v. Gulf Oil Corp*., 919 F.2d 313 (5th Cir. 1990).
[7]*Id*. at 315.
[8]*Id*.
[9]*Id.* at 316.
[10]*Id*.
[11]*See*, *e.g.*, *Hoda*, 419 F.3d at 381-383 (analogizing torqueing bolts on a blow-out preventer from a jack-up rig to casing services on jack-up rigs).
[12]*In re Larry Doiron Inc.*, 869 F.3d 338, 347 (5th Cir. 2017).
[13]*Kirby*, 543 U.S. at 23-27.
[14]"To ascertain whether a contract is a maritime one, we cannot look to whether a ship or other vessel was involved in the dispute, as we would in a putative maritime tort case." *Id.* at 23.
[15]"Geography, then, is useful in a conceptual inquiry only in a limited sense." *Id.* at 27.
[16]*Id*. at 24.
[17]*Id.* at 25.
[18]*Doiron.*
[19]*Id*. at 576.
[20]*Id*.
[21]*Id*. at 576, n. 47.
[22]*Id*. at 576-77.
[23]*Id.* at 577.
[24]*Id*.
[25]The initial panel decision concluded the contract to be maritime under *Davis & Sons*, but noted that the question was "close." *Doiron,* 869 F.3d at 340.
[26]*Doiron*, 879 F.3d at 577 n.52 ("If an activity in a non-oil and gas sector involves maritime commerce and work from a vessel, we would expect that this test would be helpful in determining whether a contract is maritime.").