

IMPLICATIONS OF *AMERICAN PETROLEUM INSTITUTE V. EPA* ON NON-HAZARDOUS SECONDARY MATERIALS RULE

In 2013, EPA promulgated a final RCRA rule identifying non-hazardous secondary materials (“NHSM”) that are solid waste when combusted, 78 Fed. Reg. 9112 (Feb. 7, 2013). In the rule, EPA established “legitimacy criteria” for use in determining whether a secondary recycled material was discarded and therefore a solid waste that must be combusted in an incinerator, or alternatively a non-waste fuel that could be burned in a boiler. One of these legitimacy criteria required a comparison of the level of contaminants in the NHSM with those in a corresponding “traditional fuel,” such as biomass, fuel oil, or coal. EPA presumed that if the level of contaminants was not comparable, and if the material was combusted in a facility other than one “designed to burn” the traditional fuel, burning the NSHM in a boiler was the equivalent of “sham recycling.” In later determinations as to whether particular NHSM – such as creosote-treated rail ties – could be classified as categorical non-waste fuels, EPA added further restrictions, including requirements that the facility in question had to have been built before April 2014 and the amount of NHSM combusted could not exceed 40% of the fuel mix in a given year.

In a July 7, 2017, opinion in *American Petroleum Institute v. EPA*, 862 F.3d 50 (“*API III*”), the D.C. Circuit invalidated the counterpart legitimacy criterion requiring a comparison of contaminants that EPA had incorporated in its final Definition of Solid Waste rule for identifying hazardous solid waste under RCRA, 40 C.F.R. § 260.43(a)(4). The court concluded that EPA had not provided a “rational basis” as to why the mere presence of additional contaminants in the recycled secondary materials indicated that they were being discarded. 862 F.3d at 63. Specifically, the court found that “never in the rulemaking does EPA make out why a product that fails those [contaminant comparison] criteria is likely to be discarded in any legitimate sense of the term.” *Id.* at 62.

Even though the contaminant comparison criterion vacated in *API III* is essentially the same as that in the NHSM rule, the court’s holding does not automatically carry over to the NSHM rule. To bring about this result, EPA should initiate a new rulemaking to apply the legal reasoning in *API III* to the NHSM rule and that rule’s contaminant comparison criterion, as well as the additional restrictions that are tied to it, including the “designed to burn” condition, facility age limit, and percentage of fuel requirement.

Two other reasons why EPA should address these concerns include (1) EPA’s incorporation in the NHSM rule of flexibility to consider “other relevant factors” in determining whether a recycled material is a legitimate non-waste fuel, 40 C.F.R. §241.4(b)(5)(ii), and (2) Executive Orders 13771 and 13777, directing federal agencies to implement regulatory reform. In fact, several stakeholders recommended this regulatory improvement in their March 2017 comments to the Department of Commerce and May 2017 recommendations to EPA.

Message

From: Kime, Robin [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=7EF7B76087A6475B80FC984AC2DD4497-RKIME]
Sent: 4/2/2018 3:39:39 PM
To: 'Michelle.Mendlewicz@ge.com'
CC: Lovell, Will (William) [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3b150bb6ade640f68d744fadcb83a73e-Lovell, Wil]
Subject: FW: Question re: SEERIL Lisbon Panel

Hi

Sorry to bug you but Julie is out of the office. Is there any chance someone else may know? Again, my apologies for being a pain...

From: Kime, Robin
Sent: Monday, April 2, 2018 11:37 AM
To: 'Julie.Elliott@int-bar.org' <Julie.Elliott@int-bar.org>
Cc: William Lovell (lovell.william@epa.gov) <lovell.william@epa.gov>; 'Michelle.Mendlewicz@ge.com' <Michelle.Mendlewicz@ge.com>
Subject: Question re: SEERIL Lisbon Panel

Hi

I hope you are well. Just checking back to see if the conference is open to press. Much appreciated!

From: Mendlewicz, Michelle (GE Corporate) [<mailto:Michelle.Mendlewicz@ge.com>]
Sent: Thursday, March 29, 2018 3:26 PM
To: Kime, Robin <Kime.Robin@epa.gov>; Julie Elliott <Julie.Elliott@int-bar.org>
Cc: Lovell, Will (William) <lovell.william@epa.gov>
Subject: RE: SEERIL Lisbon Panel Call

Hi Robin,

Thanks for your reply. I'm not sure what the policy is regarding press. I'm copying Julie, from the IBA, who might be able to help with this question.

Julie – could you please let us know if the conference will be open for press?

Many thanks,
Michelle

From: Kime, Robin [<mailto:Kime.Robin@epa.gov>]
Sent: Thursday, March 29, 2018 2:49 PM
To: Mendlewicz, Michelle (GE Corporate) <Michelle.Mendlewicz@ge.com>
Cc: Lovell, Will (William) <lovell.william@epa.gov>
Subject: EXT: SEERIL Lisbon Panel Call

Hi Michelle,

I hope you are well. Can you remind me if the sessions will be open to press? Thanks very much.

From: Mendlewicz, Michelle (GE Corporate) [<mailto:Michelle.Mendlewicz@ge.com>]
Sent: Wednesday, March 28, 2018 9:24 AM

To: Rio, Filipa <Filipa.Rio@fticonsulting.com>; Dravis, Samantha <dravis.samantha@epa.gov>; Kime, Robin <Kime.Robin@epa.gov>; fh@allende-brea.com.ar; VC@vda.pt; lpiou@neoenergia.com

Cc: 'Angeles Murgier' <AMurgier@beccarvarela.com>; Martella, Roger (GE Corporate) <Roger.Martella@ge.com>

Subject: SEERIL Lisbon Panel Call

Hello all,

I hope this email finds you well.

I'm reaching out to schedule a call for **next Tuesday, April 3rd 11am EST** to go over the panel "The rapid tide of transformation and disruption in energy, transportation, and industrial activity: how technology is fundamentally changing the way the world does business, and how lawyers can keep up with these trends and be prepared to face new challenges and opportunities" that will take place from 11.50 to 13.15 on Monday, April 9 at the SEERIL Lisbon Conference. I'll send a calendar invite with the Skype link shortly.

Please feel free to reach out if you have any questions.

Thank you,
Michelle

Michelle Mendlewicz
Environment, Health & Safety Stephen D. Ramsey Fellow
General Electric Company

Ex. 6

Message

From: Lovell, Will (William) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=3B150BB6ADE640F68D744FADCB83A73E-LOVELL, WIL]
Sent: 2/7/2018 3:23:42 PM
To: moffetth@api.org
Subject: Daisy's Speech

Good morning, Hilary,

I just left voicemails on your cell and desk phone regarding Daisy's speech to your group today. Please give me a call as soon as you get a chance.

Thank you,

Will Lovell
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U.S. Environmental Protection Agency
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