Auto Dismantler Exemption/Solid Waste Permitting: Oregon Appellate Court Addresses Applicability to Scrap Metal Recycling

Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

01/28/2022

The Court of Appeals of Oregon ("Court") addressed in a January 26th opinion an issue involving the "auto dismantler exemption" ("Exemption") to the State of Oregon's solid waste permitting program. See *PNW Metal Recycling, Inc. et al. v. Oregon Department of Environmental Quality*, 317 Or. App. 207.

The question involved whether Oregon Department of Environmental Quality ("DEQ") improperly interpreted the Exemption to exclude its application to scrap metal recyclers that acquire both scrap automobiles as well as other metal items.

The Oregon solid waste management statute requires that "disposal sites" obtain a solid waste disposal permit from DEQ. However, the statute exempts automobile dismantlers from the necessity of obtaining such a permit.

DEQ is stated to have, until 2018, allowed scrap metal recyclers acquiring scrap automobiles to utilize the Exemption. However, scrap metal recyclers may acquire both automobiles and other scrap metal for purposes of processing and sale as commodities.

In late 2018 DEQ stated that two scrap metal facilities would not be allowed to operate without a solid waste disposal permit. In other words, they were deemed to be ineligible for the previously referenced Exemption. The basis for this disallowance was the acceptance of non-vehicular scrap materials in addition to automobiles.

DEQ had previously interpreted the Exemption to apply to an entire facility if it had a dismantler certificate from the Oregon Department of Transportation.The agency subsequently determined that the Exemption only applied to the dismantling operations within each facility.

The scrap facilities (i.e., "Petitioners") argued that DEQ was reinterpreting the relevant statutory provision by the imposition of a "rule" within the meaning of the Oregon Administrative Procedures Act ("APA"). Consequently, they stated that DEQ :

- Does not have rulemaking authority on the subject
- Did not conduct required formal rulemaking procedures

In addressing the issue, the Court notes that DEQ's actions were "evidenced by two principle sources" which included:

- An internal memorandum discussing a fire at an automobile dismantling facility (unrelated to Petitioners) and its analysis of:
- Potential gaps in environmental regulation of automobile dismantlers
- Potential actions to fill those gaps
- Prior practice of interpreting the Exemption to apply to an entire facility
- Statements made by DEQ staff at a meeting between agency representatives and a Petitioner acknowledging that the Exemption applied if a automobile dismantler certificate had been obtained

The Court characterizes the issue as whether the new DEQ interpretation constitutes a rule as defined by the APA.

The Court contrasts a "rule" as opposed to an agency elaboration that:

. . . merely explains what is necessarily required by a validly promulgated rule. . .

The Court notes DEQ's and the Petitioners' contrasting interpretation of the statutory term "disposal site" and concludes they are both reasonable. Nevertheless, it concludes that DEQ's decision to change its interpretation is:

. . . a "new exercise of agency discretion" which must be promulgated as a rule to be valid.

The Court also rejects DEQ's argument that the new interpretation is not "generally applicable" because it only applies to the Petitioners. It cites in support of this conclusion a 2018 DEQ memorandum which noted a need to increase oversight of the entire industry and the decision to simply enforce against the Petitioners first.

The Court concludes that the rule is invalid.

A copy of the opinion can be downloaded here.