In mid-February, The Economist’s cover depicted a high stack of paperwork, with the heading “Over-regulated America.” From small, mind-numbingly absurd enforcement actions to colossal, nationwide regulatory efforts, the magazine detailed the regulatory quicksand the United States has sunk into.

It didn’t cite, but certainly could have, the example of an EPA final rule published on March 21, 2011, which reinterpreted the definition of “solid waste” to include many additional materials — including “off-specification” used oil.

Under 40 CFR Part 241 (“Identification of Non-hazardous Secondary Materials that are Solid Waste”), EPA ruled that off-spec used oil could not be burned as fuel oil, as it is now, but must be incinerated in more stringently permitted waste disposal facilities, to ensure contaminants are not released into the air.

The rulemaking got the swift attention of members of NORA, an Association of Responsible Recyclers. Concerned that used oil from industrial sources was about to become a solid waste, and lose its status as a legitimate fuel, NORA’s board of directors decided a year ago, in April 2011, to sue EPA. The change, it argued, constitutes a very bad precedent for oil recycling, and bad policy for the environment as well.

NORA and other industries sent detailed comments on why the rule should be stayed, and on June 16, 2011, NORA sued EPA in the U.S. Court of Appeals for the District of Columbia Circuit. On Dec. 23, EPA “reproposed” its rule, effectively temporarily withdrawing the original version and allowing affected industries to make additional comments. On Feb. 21, NORA did just that;
on the same day so did Earthjustice, an affiliate of the Sierra Club which argued that the rule needed to be even stronger.

Christopher Harris, NORA's general counsel since 1984 (when the group was still called the National Oil Recyclers Association), observes that NORA pulled no punches in its written comments. The comments blasted the EPA rule as “not rational,” “intellectually dishonest,” “arbitrary and capricious,” “producing unintended consequences,” “no logical justification or environmental benefit,” and “unsound public policy.”

NORA's suit and comments, says Harris, “can be viewed as the first round in a 15-round boxing match, with neither side willing to throw in the towel.” He vows NORA will be “relentlessly fighting” the EPA to the bitter end.

NORA Suits Up Haymarket, Va.-based NORA is a big-tent association of liquid recycling companies that handle used oil (the largest component in terms of volume) as well as antifreeze, oil filters and absorbents, wastewater and chemicals. With nearly 300 member companies but just a four-person staff, it’s not an association heavy-weight, not in the same league, for example, as the American Petroleum Institute or the American Chemistry Council.

Still, this small association has taken the big-time step to take on EPA, and its members have voluntarily ponied up close to $150,000 for the challenge.

NORA's focus is used oil but the EPA rule targets other materials, too, which drew the attention of a host of other associations, including the rubber, forestry products and foundry industries, plus the National Association of Manufacturers. NAM is concerned over the likely increased cost of manufacturing and loss of jobs which the new rule will cause.

What's On, What's Off? On-spec used oil, mostly generated from motor vehicles, is considered by EPA to be a traditional fuel, and EPA has proposed no change in its classification. By volume, on-spec oil is the far larger portion of used oil, accounting for more than 85 percent of the roughly 1 billion gallons generated and collected annually.

Off-spec used oil, by contrast, is generated through industrial uses. It also has been considered a traditional fuel for more than 80 years, and much of it can be burned in facilities which meet air emission control standards prescribed in Section 112 of the federal Clean Air Act (CAA).

There are lots of Section 112 facilities across the United States, including cement kilns, steel mills and power plants. Oil recycling companies may pay generators of used oil for their oil or be paid to collect it, depending on the situation. They then process it into on-spec and off-spec fuel products for marketing to industrial burners. Used oil is considered a valuable product, not a hazardous waste, and it’s a healthy market. Dehydrated used oil has the same BTU content as virgin fuel oil.

The EPA rule, however, would convert off-spec used oil’s classification to a “solid waste” because it contains contaminants at levels “that are not comparable to those in traditional fuels.” NORA strongly disagrees with this assessment and the data.
behind it, and has presented the agency with data to the contrary. But EPA says the contaminants — halogens, lead, chromium and others — compel the oil's disposition in facilities that meet CAA Section 129 requirements. These are both more rare and more stringently regulated than facilities with Section 112 permits, and would dispose of off-spec used oil as waste, not as fuel.

Off-spec used oils can be made compliant with on-spec requirements under Section 112, by blending with on-spec oils to dilute contaminants to prescribed levels. But NORA points out that off-spec oil sources are geographically concentrated, largely in the upper Midwest, which makes blending both practically and economically unrealistic.

**In This Corner...** In addition to used oil, Harris noted, the new rule brings under the Section 129 umbrella a huge increase in additional waste materials. This, he adds, has raised the specter of insufficient incineration capacity to manage this material.

Moreover, EPA has acknowledged that many companies will give up their 129 permits rather than incur major costs to become compliant with new more stringent requirements of Section 129. NORA estimates that fewer than 10 facilities nationwide will be available for incinerating solid waste fuels, a strikingly small number.

Also suing EPA is Earthjustice, an independent legal affiliate of the Sierra Club which represents the environmental group in this case. It argues that on-spec used oil belongs in the same waste classification as off-spec oil.

Jim Pew, Earthjustice’s lead attorney, says, “This lawsuit is not about on-spec or off-spec used oil but about what’s a waste and whether things like scrap tires can be burned in units that don’t have to control or measure the resulting toxic pollution. If EPA’s final rule doesn’t fix the loophole for scrap tires, etc., it won’t have addressed environmental groups’ concerns. But if the lawsuit goes forward it would not necessarily address the status of off-spec and on-spec used oil. There are lots of groups other than the Sierra Club that have challenged the solid waste rule and the parties will decide what issues they want to bring forward.”

Pew points out, “It’s a practical issue of whether the pollution from waste burning is controlled. There are literally thousands of very significant toxic polluters under CAA Section 112, and these plants can burn tires and other wastes without doing anything to control the resulting pollution. That’s the problem the [Earthjustice] lawsuit seeks to fix.”

Finally, he notes, “Although I disagree with EPA that used oil is a ‘traditional fuel’ or that the agency can simply exempt discarded materials from the definition of waste by declaring that they’re ‘traditional fuel,’ there are far more important flaws in the current rule, such as the exclusion of tires.”
The two products, on-spec and off-spec used oil, now are caught up in a convoluted legal process. NORA, on the one hand is suing EPA over its classification of off-spec used oil as waste; yet in the same suit, it is supporting EPA's definition of on-spec oil and declaring itself an official "intervener." If politics makes strange bedfellows, so does the bureaucratic/legal system.

Scott Parker, NORA's executive director, makes the larger point that, "Although off-spec used oil is a smaller percentage of the total volume of more than 1 billion annual gallons, this attempt by EPA to separate, to divide the market, is an industrywide issue, and to us doesn't make sense. The legal reasoning applied by EPA to off-spec oil could, down the line, be applied to on-spec used oil."

He says NORA believes strongly that the market should manage the disposition of used oil. "We've successfully managed off-spec oil for decades as a valuable resource. Reclassifying it as a waste product will greatly diminish its value, demand will plummet and there will be few disposal facilities available. People will either receive less for their used oil or pay more to have it removed, a problematic outcome. It can lead to an unhealthy market and chaos, and that's not helping the environment."

If classed as a solid waste, some 117 million gallons of off-spec used oil a year could wind up in landfills — not a beneficial environmental outcome, Parker emphasizes. "Or, if the energy in this product is not reclaimed in this country, it could be exported, likely to China, along with the associated jobs. That's one reason why the NAM is interested."

Rounds 2 and 3 NORA General Counsel Harris sees neither side giving ground in the contest, so in addition to the legal front, NORA is proceeding on the national legislative front. With its partners, it helped to convince a bipartisan majority of the U.S. House of Representatives to enact H.R. 2250, "The EPA Regulatory Relief Act." H.R. 2250 specifically would limit EPA's role in determining what can be classified as solid waste. A similar bill was sponsored in the Senate, but a majority has not signed on as of this writing. The White House has stated that if passed, President Barack Obama will veto the bill.

Now it's on to Round 4: EPA promises the final rule, including responses to comments, will be released this spring. Harris, with considerable experience in Washington, notes that "EPA's decision is bound to annoy either industry or environmental groups. But there's a wild card here and that is November 6th — it's possible the Administration will decide to delay the decision past the election."

In an election year, controversial issues sometimes meet that fate. For Rounds 5 to 15, stay tuned.