"SHAM RECYCLING" HAZARDOUS WASTE RULE UNDER SCRUTINY

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The definition of "solid waste," under the Resource Conservation and Recovery Act, came under scrutiny as the D.C Circuit Court ruled on *Am. Petroleum Inst. v. Envtl. Prot. Agency, No. 09-1038, 2017 WL 2883867 (D.C. Cir. July 7, 2017)* on July 7th.- By striking down restrictions that were added in 2015, this ruling altered an EPA hazardous waste rule to appear more similar to its 2008 form.- -

The D.C circuit dismantled pieces of a 2015 EPA ruling on hazardous material recycling and disposal in a 2 to 1 decision.- In 2015, the EPA had reinstated restrictions on the definition and handling of hazardous waste in an attempt to reduce "sham recycling," when an entity claims to recycle waste that is actually thrown out.-

The pieces of the rule that industry groups, including American Petroleum Institute and the American Chemical Council, challenged most heavily were the legitimacy tests – the Factor 3 and Factor 4 tests.- Opposition to the Factor 3 test was based on the belief that the EPA did not have the authority to impose restrictions on the businesses' "containment" of secondary materials and that they were "to be handled as 'valuable commodities.'"- The rule requires that secondary material be contained and "held in a unit that meets multiple enumerated criteria" including labeling and record keeping.- The court ruled that this test is within the EPA's scope of authority and it remains valid.-

However, industry opposition prevailed with the ruling on the Factor 4 test.- This test was designed to prevent companies from including hazardous materials within products that do not benefit from or necessitate the inclusion of these materials, with hazardous substances just "along for the ride."- This addresses the concern that recyclers could unnecessarily include these materials in their products in an attempt to circumvent proper disposal and reporting protocol.- Factor 4 applies to materials that "provide no recognizable benefit to the final product."-

The court ruled that there was no satisfactory distinction between "genuine" and "sham" recycling under this current test.- A complicated exemption for materials that do not pose "significant human or environmental risk" was also not satisfactory to the court.- This decision was based on the idea that the rule imposed tasks "tangential to disposal" while the EPA did not have significant reason to doubt the legitimacy of a product and its secondary materials.-

The appeals judges also reinstated an exemption that was part of the original 2008 rule about third-party reclamation under the Resource Conservation and Recovery Act.- Under RCRA, reclamation is when "secondary materials are processed to recover a usable product, or…regenerated."- Following this rule, there are many hazardous substances that are too "waste-like" to be reclaimed.- The exemption in the 2015 rule applies only to those companies that have a RCRA permit or variance and have met emergency preparedness measures.- The appeals court found that this exemption was too limited.- A business can now transfer secondary materials if it makes a "reasonable effort: to be sure that the materials will be handled properly by a third party."

While industry groups found the rule to be too limiting, environmental organizations still see it as too lenient.- They challenged the rule from a different angle, arguing for more enforcement of handling and storage of *all* hazardous materials.-

Bick Law LLP's California Environmental Lawyers will continue to monitor regulations and restrictions related to waste and hazardous materials in order to assist and advise clients who wish to learn more about the changing EPA rules.-