# Environmental Groups Argue Sham Recycling Rule Should Be Recycled by EPA Rather Than Partially Discarded by Court

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EPA promulgated a final rule in 2015 redefining "solid waste" under the Resource Conservation and Recovery Act ("RCRA") to curb sham recycling (the "Rule"). In the August 2017 issue of *Environmental Notes*, we reported that the United States Court of Appeals for the District of Columbia Circuit sided with industry in an appeal of portions of the Rule. However, as is common in environmental litigation, the fight is not over. On October 20, 2017, various environmental group petitioners and intervenors requested a rehearing on whether the remedy ordered by the Court was appropriate.

As we previously reported, the opinion at issue scrapped two portions of the Sham Recycling Rule. First, the Rule required that four factors be satisfied by a generator to prove a hazardous secondary material (i.e. spent materials, byproducts and sludges) was being legitimately recycled and not discarded. Factor 4 required the final recycled product to be "comparable to a legitimate product or intermediate" by meeting these requirements: (1) the recycled product cannot exhibit a characteristic not exhibited by a legitimate product; and (2) the recycled product must have levels of hazardous constituents comparable to the legitimate product, or, if higher, studies must show the higher levels are not harmful to health or the environment. The Court did away with Factor 4 completely, stating EPA failed to determine what levels of contaminants would be "significant" in terms of risk to health and the environment.

Second, the opinion threw out the Rule's requirement that third party recyclers of hazardous secondary materials be "Verified Recyclers" who hold a RCRA permit or RCRA variance and meet emergency preparedness standards. The Court held EPA did not establish the need to "pre-approve" recyclers. Specifically, the Court held EPA failed to prove the low value of materials recycled from hazardous secondary materials caused third-party recyclers to discard rather than recycle them. In so finding, the Court held EPA did not have the authority under RCRA to require "pre-approval" through a rigorous verification process. To remedy the problem, the Court reinstated a more general standard that allows a generator to transfer a material to a third party claimed to be a recycler (the "Transfer-Based Exclusion") so long as the generator makes "reasonable efforts" to ensure proper reclamation by the third party. This more general standard was proposed by EPA in 2008 and never finalized. Rather, the 2008 EPA proposed rule on Sham Recycling was also appealed. In a settlement with The Sierra Club, EPA agreed to withdraw the rule. The 2015 Sham Recycling Rule was the product of that settlement.

In the Petition for Rehearing, environmental groups argue the Court "disrupt[ed] important health and

environmental protections and intrude[d] on the rulemaking authority of the executive branch." To remedy this error, they ask the Court to revise its decision and send the two provisions back to EPA to rework or re-justify, without vacating the Rule. Furthermore, since the groups had challenged the 2008 proposed Transfer-Based Exclusion and only settled their challenge when EPA agreed to provide an enhanced system of legitimacy, they argue reinstating it "leaves unaddressed substantial objections that environmental groups . . . raised to that exclusion before EPA eliminated it." The groups state by remanding the Rule to EPA to rewrite the two portions, EPA can address both the Court's concerns with the Verified Recycler exclusion and the environmental groups' concerns with the Transfer-Based Exclusion through the normal rulemaking process. The environmental groups go on to explain that they want the Court to direct EPA to "fully address, consistent with the [Court's] opinion, both provisions" by another round of notice and opportunity for comments from concerned groups. This will start another process subject to appeal and will again result in delay in finalizing the Rule. In the meantime, industries that intend to use third party recyclers will have to wait a little (or a lot) longer to know what the rules are and to begin implementing processes to comply.

**American Petroleum Institute vs. EPA, No. 09-1038 (D.C. Cir. July 7, 2017); 80 Fed. Reg. 1694 (Jan. 13, 2015).**

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