

## 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.