ORAL ARGUMENT NOT YET SCHEDULED

Case No. 11-1189 (and consolidated cases)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SOLVAY USA INC., et al.
Petitioners

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.
Respondent

Petition for Review of 78 Fed. Reg. 9112 (Feb. 7, 2013)
and 76 Fed. Reg. 15456 (March 21, 2011)

JOINT BRIEF OF INDUSTRY PETITIONERS

AMERICAN CHEMISTRY COUNCIL, AMERICAN FOREST & PAPER ASSOCIATION, AMERICAN GAS ASSOCIATION, AMERICAN PETROLEUM INSTITUTE, AMERICAN WOOD COUNCIL, ASSOCIATION OF AMERICAN RAILROADS, BIOMASS POWER ASSOCIATION, CEMENT KILN RECYCLING COALITION, CEMEX, INC., CEMEX CONSTRUCTION MATERIALS FLORIDA, LLC, COUNCIL OF INDUSTRIAL BOILER OWNERS, EDISON ELECTRIC INSTITUTE, HATFIELD TOWNSHIP MUNICIPAL AUTHORITY, HOLCIM (US) INC., LAFARGE NORTH AMERICA INC., LAFARGE MIDWEST, INC., LAFARGE BUILDING MATERIALS INC., NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, PORTLAND CEMENT ASSOCIATION, RAILWAY TIE ASSOCIATION, SOLVAY USA, INC., TREATED WOOD COUNCIL, UTILITY SOLID WASTE ACTIVITIES GROUP

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES, AND CORPORATE DISCLOSURE STATEMENTS

Pursuant to FED. R. APP. P. 26.1 and D.C. CIRCUIT RULES 26.1 and 28(a)(1), Petitioners hereby certify as follows:

1. Parties

(a) Petitioners

Industry Petitioners:

American Chemistry Council
American Forest & Paper Association
American Gas Association
American Petroleum Institute
American Wood Council
Association of American Railroads
Biomass Power Association
Cement Kiln Recycling Coalition
CEMEX, Inc.
CEMEX Construction Materials Florida, LLC
Council of Industrial Boiler Owners
Edison Electric Institute
Hatfield Township Municipal Authority
Holcim (US) Inc.
Lafarge Building Materials Inc.
Lafarge Midwest, Inc.
Lafarge North America Inc.
National Association of Clean Water Agencies
National Association of Manufacturers
National Rural Electric Cooperative Association
Portland Cement Association
Railway Tie Association
Solvay USA Inc.
Treated Wood Council
Utility Solid Waste Activities Group

Environmental Petitioners:

Clean Air Council
Composite Panel Association
Desert Citizens Against Pollution
Downwinders at Risk
Environmental Integrity Project
Huron Environmental Activist League
Louisiana Enviromental Action Network
Montanans Against Toxic Burning
Partnership for Polity Integrity
Sierra Cub

(b) Intervenors In Support of Industry Petitioners

American Petroleum Institute
Metals Industries Recycling Coalition
Rubber Manufacturers Association

(c) Respondents

United States Environmental Protection Agency ("EPA")
Gina McCarthy, Administrator

(d) Intervenors in Support of Respondents

Industry Intervenors:

American Chemistry Council
American Forest & Paper Association
American Gas Association
American Home Furnishings Alliance, Inc.
American Petroleum Institute
American Wood Council
ARIPPA
Biomass Power Association
Brayton Point Energy, LLC
Cement Kiln Recycling Coalition
Coalition for Responsible Waste Incineration
Council of Industrial Boiler Owners
Edison Electric Institute

Hardwood Plywood & Veneer Association
JELD-WEN, inc.
Lafarge Building Materials Inc.
Lafarge Midwest, Inc.
Lafarge North America Inc.
National Association of Manufacturers
National Rural Electric Cooperative Association
Portland Cement Association
Rubber Manufacturers Association
Steel Manufacturers Association
Treated Wood Council
Utility Solid Waste Activities Group
Waste Management, Inc.
WM Organic Growth
WM Renewable Energy, LLC

Environmental Intervenors:

Desert Citizens Against Pollution
Downwinders At Risk
Environmental Integrity Project
Huron Environmental Activist League
Louisiana Environmental Action Network
Montanans Against Toxic Burning
Partnership for Policy Integrity
Sierra Club

2. Ruling Under Review

The ruling under review is a final action of EPA entitled "*Identification of Non-Hazardous Secondary Materials That Are Solid Waste,*" 76 Fed. Reg. 15456 (Mar. 21, 2011), as amended by the final rule entitled "*Commercial and Industrial Solid Waste Incineration Units: Reconsideration and Final Amendments; Non-Hazardous Secondary Materials That Are Solid Waste; Final Rule*," 78 Fed. Reg.

9112 (Feb. 7, 2013) (collectively referred to as the "NHSM Rule"), codified at 40 C.F.R. Part 241.

3. Related Cases

Each of the petitions for review consolidated under No. 11-1189 is related. These cases consist of Case Nos. 11-1192, 11-1202, 11-1214, 11-1216, 11-1217, 11-1220, 11-1221, 11-1223, 11-1224, 11-1226, 11-1227, 11-1228, 11-1230, 11-1232, 11-1233, 11-1235, 11-1238, 13-1152, 13-1156, 13-1157, 13-1158, 13-1159, 13-1160, 13-1162, 13-1164, and 13-1165.

The following related cases are also pending before this court: (a) *United States Sugar Corporation et al. v. EPA,* No. 11-1108 (and consolidated cases) in which petitioners are seeking review of 76 Fed. Reg. 15608 (March 21, 2011) and 78 Fed. Reg. 7138 (Jan. 31, 2013) ("Boiler MACT"); and (b) *American Forest & Paper Association, et al. v. EPA*, No. 11-1125 (and consolidated cases), in which petitioners are seeking review of 76 Fed. Reg. 15704 (March 2, 2011) and 78 Fed. Reg. 9112 (Feb. 7, 2013) ("CISWI Rule").

4. Corporate Disclosure Statements

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health

and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a $770 billion enterprise and a key element of the nation's economy. It is one of the nation's largest exporters, accounting for twelve percent of all U.S. exports. Chemistry companies are among the largest investors in research and development. Safety and security have always been primary concerns of ACC members, and they have intensified their efforts, working closely with government agencies to improve security and to defend against any threat to the nation's critical infrastructure. ACC does not have any outstanding shares or debt securities in the hands of the public and no-publicly owned company has a 10% or great ownership interest in ACC.

The American Forest & Paper Association ("AF&PA") serves to advance a sustainable U.S. pulp, paper, packaging, and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA member companies make products essential for everyday life from renewable and recyclable resources and are committed to continuous improvement through the industry's sustainability initiative - Better Practices, Better Planet 2020. The forest products industry accounts for approximately 4 percent of the total U.S. manufacturing GDP, manufactures approximately $210 billion in products

annually, and employs nearly 900,000 men and women. The industry meets a payroll of approximately $50 billion annually and is among the top 10 manufacturing sector employers in 47 states. No parent corporation or publicly held company has a ten percent (10%) or greater ownership interest in AF&PA.

American Gas Association ("AGA") in the national association of natural gas utilities with no parent company, subsidiaries or affiliates. AGA does not have any outstanding shares or debt securities in the hands of the public and no-publicly owned company has a 10% or great ownership interest in AGA.

The American Petroleum Institute ("API") is a nationwide, not-for-profit association representing over 600 member companies in all aspects of the oil and gas industry, including science and research, exploration and production of oil and natural gas, transportation, refining of crude oil and marketing of oil and gas products. API is a "trade association" within the meaning of Circuit Rule 26.1. API is a continuing association operating for the purpose of promoting the general commercial, professional, legislative or other interests of its membership. API has no parent companies, and no publicly held company has a 10 percent or greater interest in API.

The American Wood Council ("AWC") is the voice of North American traditional and engineered wood products, representing over 75% of the industry. From a renewable resource that absorbs and sequesters carbon, the wood products

industry makes products that are essential to everyday life and employs over one-third of a million men and women in well-paying jobs. AWC's engineers, technologists, scientists, and building code experts develop state-of-the-art engineering data, technology, and standards on structural wood products for use by design professionals, building officials, and wood products manufacturers to assure the safe and efficient design and use of wood structural components. AWC also provides technical, legal, and economic information on wood design, green building, and manufacturing environmental regulations advocating for balanced government policies that sustain the wood products industry. No parent corporation or no publicly held company has a ten percent (10%) or greater ownership interest in AWC.

The Association of American Railroads ("AAR") is a trade association whose membership includes freight railroads that operate 83 percent of the line-haul mileage, employ 95 percent of the workers, and account for 97 percent of the freight revenues of all railroads in the United States; and passenger railroads that operate intercity passenger trains and provide commuter rail service. AAR has no parent company and is a nonstock corporation.

The Biomass Power Association ("BPA") is a non-profit, national trade association headquartered in Portland, Maine and organized under the laws of the State of Maine. BPA has no parent corporation, and no publicly held company

has a ten percent (10%) or greater ownership interest in BPA. BPA serves as the voice of the U.S. biomass industry in the federal public policy arena. BPA is comprised of 23 member companies who either own or operate biomass power plants, and 16 associate and affiliate members who are suppliers to or customers of the industry. BPA's member companies represent approximately 80 percent of the U.S. biomass to electricity sector.

The Cement Kiln Recycling Coalition ("CKRC") is a non-profit "trade association" within the meaning of Circuit Rule 26.1(b). It has no parent corporation, and no publicly held company owns a 10 percent or greater interest in CKRC.

CEMEX, Inc. is not a publicly held company. Its ultimate parent company is CEMEX, S.A.B. de C.V., a publicly held company traded on the New York Stock Exchange. No other publicly held company or entity owns 10% or more of CEMEX, Inc. CEMEX Construction Materials Florida, LLC is an indirect, wholly-owned subsidiary of CEMEX, Inc. CEMEX Construction Materials Florida, LLC is a producer and supplier of portland cement.

The Council of Industrial Boiler Owners ("CIBO") certifies that it is a trade association of industrial boiler owners, architect-engineers, related equipment manufacturers, and University affiliates with over 100 members representing 20

major industrial sectors. CIBO has not issued shares to the public, although many of CIBO's individual members have done so.

The Edison Electric Institute ("EEI") is the national association of investor-owned electric utility companies with no parent company, subsidiaries or affiliates. EEI does not have any outstanding shares or debt securities in the hands of the public and no publicly-owned company has a 10% or greater owned ownership interest in EEI.

Hatfield Township Municipal Authority ("Authority") is not required to file a Disclosure Statement under either Federal Rule of Appellate Procedure 26.1 or D.C. Circuit Rule 26.1. The Authority is a government entity duly created under the provisions of the Pennsylvania Municipality Authorities Act of 1945, as amended, and is the entity within Hatfield Township, Montgomery County, Pennsylvania, responsible for providing sewer service to the township.

Holcim (US) Inc. is one of the largest manufacturers and suppliers of cement and mineral components in the United States. Holcim (US) Inc.'s headquarters are in Bedford, Massachusetts, and it serves markets throughout most of the United States. Holcim (US) Inc. is a wholly-owned subsidiary of Holcim Ltd., of Switzerland, and no other publicly held corporation owns 10% or more of Holcim (US) Inc.'s stock.

Lafarge S.A., a company publicly traded in France, owns directly or indirectly 100% of the stock of Lafarge North America Inc; Lafarge Midwest, Inc. and Lafarge Building Materials Inc. are each wholly-owned subsidiaries of Lafarge North America Inc.

The National Association of Clean Water Agencies ("NACWA") is a voluntary not-for-profit trade association whose membership includes nearly 300 municipal clean water agencies. NACWA's members operate publicly-owned treatment works ("POTWs") and collectively serve the majority of the sewered population of the United States. NACWA's purpose and general nature is to provide a forum for collaboratively addressing issues affecting POTWs and to advocate on behalf of its members regarding legislative, regulatory and legal matters. NACWA has no parent company, and no publicly held company has a 10 percent or greater ownership interest in NACWA. NACWA has no outstanding shares or debt securities in the hands of the public and has no parent, subsidiary or affiliate that has issued shares or debt securities to the public.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding

among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. NAM has no parent company, and no publicly held company has a 10% or greater ownership interest in NAM.

The National Rural Electric Cooperative Association ("NRECA") is the national association of rural electric cooperatives with no parent company, subsidiaries or affiliates. NRECA does not have any outstanding shares or debt securities in the hands of the public and no publicly-owned company has a 10% or greater ownership interest in NRECA.

The Portland Cement Association ("PCA") is a non-profit "trade association" within the meaning of Circuit Rule 26.1(b). It has no parent corporation, and no publicly held company owns a 10 percent or greater interest in PCA.

The Railway Tie Association (RTA), based in Fayetteville, GA, is a non-profit corporation organized under the laws of the state of Georgia in existence since 1919 to promote the economical and environmentally sound use of treated wood crossties, which have been central to North American railroads for more than 160 years. RTA engages in research into crosstie design and conducts ongoing activities dealing with sound forest management, conservation of timber resources, timber processing, wood preservation and safety of industry workers. It

has no parent organization, and no publicly held company has a 10% or greater ownership interest in RTA.

Solvay USA Inc. ("Solvay"), formerly known as Rhodia Inc., is a specialty chemicals manufacturing company that, among other things, operates sulfuric acid recovery units ("SARUs") located across the United States. The primary customers for Solvay's SARUs are oil refineries. Solvay is 100% owned by Solvay Holding Inc., a Delaware corporation and wholly-owned subsidiary of Rhodia S.A., a French publicly-owned company. Rhodia S.A. is owned by the ultimate parent Solvay S.A.

The Treated Wood Council (TWC), based in the District of Columbia, is a not-for-profit corporation organized in 2003 under the laws of the state of Florida, serving more than 440 companies and organizations throughout the United States. The TWC's members produce pressure-treated wood products, manufacture wood preservatives, harvest and saw wood or serve the treated wood industry. The TWC monitors and responds to legislation and regulatory activities related to the treated wood industry, including environmental issues, and advocates for environmentally sound standards for treated wood manufacture and use. It has no parent corporation, and no publicly held company owns a 10% or greater interest in the TWC.

The Utility Solid Waste Activities Group ("USWAG") is an association of approximately 80 individual electric utilities, EEI, NRECA and AGA that represents that the electric and gas utility industry on rulemaking and administrative proceedings before the EPA under the Resource Conversation and Recovery Act, 42 U.S.C. §§6901, *et seq*., and in litigation arising from such proceedings that affect its members. USWAG members are affected by the final action of the EPA that is challenged in this proceeding. USWAG has not parent company, subsidiaries or affiliates. USWAG does not have any outstanding shares or debt securities in the hands of the public and no publicly-owned company has a 10% or greater ownership in USWAG.

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* Authorities upon which we chiefly rely are marked with asterisks.

Statutes

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GLOSSARY

"*2008 DSW Rule Study*" means *An Assessment of Environmental Problems Associated with Recycling of Hazardous Secondary Materials* (U.S. EPA January 11, 2007).

"*ABR*" means *Association of Battery Recyclers, Inc., et al. v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000).

"*AMC I"* means *American Mining Congress v. EPA*, 824 F.2d 1177 (D.C. Cir. 1987).

"*API I*" means *American Petroleum Institute v. EPA*, 906 F.2d 729, 741 n.16 (D.C. Cir. 1990) ("*API I*").

"*API II*" means *American Petroleum Institute v. EPA*, 216 F.3d 50, 56 (D.C. Cir. 2000).

"Boiler MACT" means 76 Fed. Reg. 15608 (March 21, 2011) and 78 Fed. Reg. 7138 (Jan. 31, 2013).

"CAA" means the Clean Air Act, 42 U.S.C. §§7401, *et seq.*

"CISWI" means commercial or industrial solid waste incinerators.

"CISWI Definition Rule" means 40 C.F.R. §60.2265 (2005).

"CISWI Rule" means 76 Fed. Reg. 15704 (March 2, 2011) and 78 Fed. Reg. 9112 (Feb. 7, 2013).

"CWA" means the Clean Water Act, 33 U.S.C. §§1251, *et seq*.

"DSE" means Domestic Sewage Exclusion.

"EPA" means United States Environmental Protection Agency.

"NHSM" means non-hazardous secondary material.

"NHSM Rule" means 76 Fed. Reg. 15456 (Mar. 21, 2011) and 78 Fed. Reg. 9112 (Feb. 7, 2013), codified at 40 C.F.R. Part 241.

"PAH" means polycyclic aromatic hydrocarbon.

"POTWs" means publicly-owned treatment works.

"PRR" means paper recycling residuals.

"RCRA" means the Resource Conservation and Recovery Act, 42 U.S.C. §§6901, *et seq*.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over these consolidated cases involving petitions for review of the NHSM Rule because the petitions for review were timely filed under Section 7006(a) of the Resource Conservation and Recovery Act ("RCRA"). 42 U.S.C. §6976(a).

STATEMENT OF ISSUES

1. Whether the classification as "solid waste" of non-hazardous secondary materials that are not discarded but are transferred to third parties for combustion as alternative fuels is contrary to law and arbitrary and capricious under RCRA.

2. Whether the classification as "solid waste" of alternative fuels such as construction and demolition wood, railroad ties, and other treated woods that have heating value, are managed as valuable fuel, and are processed to create new fuel products, is contrary to law and arbitrary and capricious under RCRA.

3. Whether the classification as "solid waste" of alternative fuels such as paper recycling residuals is contrary to law and arbitrary and capricious under RCRA where the combustion is an integral part of an industrial process or functionally equivalent to a traditional fuel.

4. Whether the classification as "solid waste" of sewage sludge when combusted is contrary to law and arbitrary and capricious, given that RCRA

§1004(27) expressly excludes domestic sewage from the definition of solid waste. 42 U.S.C. §6903(27).

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Addendum to the Opening Brief of the Industry Petitioners.

STATEMENT OF THE CASE

EPA decided in the Non-Hazardous Secondary Materials Rule ("NHSM Rule") that combusting any non-hazardous secondary material ("NHSM" or "secondary material") for any purpose (including as alternative fuel for energy recovery) is the "discard" of a "solid waste," unless the material qualifies for narrowly-drawn exceptions. 40 C.F.R. §241.3(a). This decision is important because "alternative fuels" that are "solid wastes" may be burned only in commercial or industrial solid waste incinerators ("CISWI" or "incinerators") subject to air emission standards promulgated under §129 of the Clean Air Act ("CAA"), while alternative fuels that are not "solid wastes" may be combusted in industrial boilers, furnaces and other units that are subject to emission standards promulgated under CAA §112. The practical effect of the NHSM Rule is that alternative fuels that could have been productively combusted in industrial boilers and furnaces may now have to be burned as waste in units regulated as incinerators under CAA §129 or otherwise disposed of as waste. Operators of

combustion units regulated by CAA §112 will therefore avoid burning these alternative fuels and, given the limited capacity of existing solid waste incinerators and EPA's expectation that no new incinerators will be built, misclassifying alternative fuels as wastes will increase the volume of valuable materials sent to landfills.[1] Similarly, if sewage sludge is a "solid waste" when combusted, many sewage sludge incinerators will be subject to CAA §129 standards, which could require more than $3 billion in capital expenditures by the nation's clean water agencies with no appreciable environmental gain over the existing comprehensive sewage sludge regulatory regime in §405 of the Clean Water Act ('CWA") and 40 C.F.R. Part 503. [EPA-HQ-RCRA-2008-0329-1261.] For agencies that do not or cannot invest in their incinerators, the only options will be landfilling or land applying the sludge, with its associated costs (which could be as high as $10 million per year for each publicly owned treatment works) and environmental implications. [*Id*.]

The NHSM Rule arises from litigation over defining which materials will be subject to the CAA §129 incinerator rules. CAA §129 regulates emissions from incinerators which combust "any solid waste material," 42 U.S.C. §7429(g)(1), "as established by the Administrator pursuant to [RCRA]." *Id*. at

[1] According to EPA, there are fewer than 170 permitted CISWI incinerators and EPA does not expect any new ones to be built. [75FR31966.]

§7429(g)(6). EPA first addressed the scope of §129 in CAA rules that defined "commercial and industrial solid waste" to include only solid waste combusted in a unit "whose design does not provide for energy recovery." 65 Fed. Reg. 75338 (Dec. 1, 2000); 70 Fed. Reg. 55568 (Sept. 22, 2005) ("CISWI Definition Rule"). In 2005, this Court vacated and remanded the CISWI Definition Rule because it excluded materials burned for energy recovery, even if they might be "solid wastes." *Natural Resources Defense Council v. EPA*, 489 F.3d 1250, 1260 (D.C. Cir. 2007) ("*NRDC*"). [2] EPA responded by promulgating the NHSM Rule under RCRA, defining "solid waste" for purposes of CAA §129. 76 Fed. Reg. 15456 (Mar. 21, 2011), amended by 78 Fed. Reg. 9112 (Feb. 7, 2013). [3]

The NHSM Rule begins with EPA's assertion that *all* alternative fuels are solid waste unless otherwise excluded:

> (a) Except as provided in paragraph (b) of this section or in §241.4(a) of this subpart, non-hazardous secondary materials that are combusted are solid wastes, unless a petition is submitted to, and a determination granted by, the EPA pursuant to paragraph (c) of this section.

40 C.F.R. §241.3(a). EPA established two generic "exclusions" from this

[2] The Court also vacated and remanded the air emission standards for industrial boilers established under CAA §112 ("Boiler MACT"), because it needed to be revised as a consequence of the decision on the CISWI Definition Rule. 489 F.3d at 1261-62.

[3] EPA also revised the Boiler MACT (76 Fed. Reg. 15608 (Mar. 21, 2011)); 78 Fed. Reg. 7138 (Jan. 31, 2013) and the incinerator emissions rule. 76 Fed. Reg. 15704 (Mar. 21, 2011) ("CISWI Rule"), 78 Fed. Reg. 9112 (Feb. 7, 2013).

determination. First, alternative fuel that is combusted on-site by the generator of the secondary material is not a "solid waste" provided the alternative fuel meets "legitimacy criteria" that are intended to establish that the material is not being burned for disposal. *Id*. at §241.3(b)(1). Second, alternative fuel products created by processing "discarded" secondary materials are not "solid wastes" when combusted, again provided that the "legitimacy criteria" are met. *Id*. at §241.3(b)(4).

The "legitimacy criteria" are (1) the alternative fuel must be managed as a valuable commodity, (2) must have meaningful heating value and be used as fuel, and (3) any Clean Air Act pollutants or groups of pollutants in the alternative fuel should be at concentrations that are comparable to or lower than the concentrations found in "traditional fuels" that the combustion unit is designed to burn. *Id*. at §241.3(d)(1). Addressing the third criterion may involve extensive sampling and analysis of alternative fuels, and can result in the same material having different classifications depending on the unit in which it might be burned. *See infra* pp. 26-27, 34. A combustor must maintain documentation showing that the conditions of the applicable exclusions have been satisfied or the fuel will be considered waste and the unit a CISWI incinerator. 40 C.F.R. §§63.11225(c)(ii), 63.11225(d)(2), 60.2175(v), 60.2740(u), 60.2265, 60.2875.

The combustion of alternative fuel that does not qualify for these exclusions, including undiscarded alternative fuels transferred to third parties, is considered the disposal of "solid waste" unless EPA by regulation (40 C.F.R. §241.4(b)), or in response to a petition (*Id*. at §241.3(c)(1)), decides such materials are not "solid wastes." Thus, EPA has decided that all alternative fuels are "solid wastes," and it is only through narrowly-drawn exclusions from this initial regulatory decision that they can be combusted as "non-wastes." Since these are styled as exclusions, EPA has shifted the burden to industry of demonstrating that alternative fuels are "non-wastes."[4]

SUMMARY OF ARGUMENT

The NHSM Rule is contrary to law and arbitrary and capricious because EPA is asserting RCRA jurisdiction over alternative fuels that have not been discarded and therefore are not solid wastes subject to RCRA. Specifically, EPA has, contrary to law and arbitrarily and capriciously:

(1) decided that transfering alternative fuels to third parties for combustion is a discard and therefore such fuels are solid wastes;

[4] The specific alternative fuels conditionally excluded from the classification of "solid waste" by EPA include scrap tires, coal refuse and dewatered pulp and paper sludge when managed in specified ways, and resinated wood. 40 C.F.R. §241.4(a)(1)-(4). EPA declined to make such findings for other alternative fuels for which a significant record exists regarding their legitimate combustion as a fuel. EPA also concluded that sewage sludge generated from publicly-owned treatment works is a solid waste when combusted. *See* [76FR15513-14].

(2) classified as solid waste alternative fuels such as those made from construction and demolition wood, railroad ties, and other treated woods that have heating value, are managed as valuable fuel, and are processed to create new fuel products;

(3) classified as solid waste alternative fuels such as paper recycling residuals, even though the record demonstrates no discard has occurred and the combustion is an integral part of an industrial process or functionally equivalent to a traditional fuel; and

(4) classified as solid waste sewage sludge when combusted even though RCRA prohibits such a classification.

STANDING

The NHSM Rule regulates the management and disposal of alternative fuels that are generated, managed, transferred or combusted by the Industry Petitioners and imposes substantial costs on them. Where "the complainant is 'an object of the action …'—as is the case usually in review of a rulemaking … there should be 'little question that the action … has caused him injury, and that a judgment preventing … the action will redress it.'" *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992)). Each of the individual Industry Petitioners have standing because they own or operate facilities that generate, manage, transfer, or combust alternative

fuels subject to the NHSM Rule, and the trade association Industry Petitioners also have standing because their individual members are similarly situated. *Sierra Club*, 292 F.3d at 900-901.

ARGUMENT

I. Standard Of Review

The Court reviews the NHSM Rule pursuant to RCRA §7006(a), under which regulations are reviewed in accordance with Sections 701 – 706 of the Administrative Procedure Act which proscribes agency actions that are arbitrary and capricious, an abuse of discretion, or otherwise contrary to law, and that are in excess of an agency's jurisdictional authority. 5 U.S.C. §706(a)(2). EPA's legal interpretations are reviewed under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984). EPA's factual determinations and explanations are reviewed under the arbitrary-and-capricious test, which requires an agency to "articulate a satisfactory explanation for its action" and forbids it from "entirely fail[ing] to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

II. EPA's Decision That Firm-To-Firm Transfers Of Alternative Fuels For Combustion As Fuel Are "Discards" Of "Solid Waste" Is Contrary To Law And Arbitrary And Capricious.

EPA's RCRA authority extends only to the regulation of "solid waste" (*see* Section II.B *infra*). Ignoring that statutory limitation, EPA has unlawfully decided that all firm-to-firm transfers of alternative fuels are "discards" of "solid wastes,"

and imposes on facilities the burden of demonstrating that such fuels are "non-wastes." This decision is contrary to law and not supported by the record.

A. EPA Has Decided That Firm-To-Firm Transfers Of Alternative Fuels Are "Discards" Of "Solid Waste".

EPA starts from the incorrect position that *all* alternative fuels are "discarded" and therefore "solid wastes" unless explicitly excluded by EPA. 40 C.F.R. §241.3(a). EPA has improperly created a RCRA jurisdictional framework where wastes are the norm and "non-wastes" are the exception.

EPA carves out a few narrowly-drawn exceptions to its jurisdictional premise. Alternative fuel that remains under the control of the generator of the fuel is not solid waste if the fuel meets the "legitimacy criteria" that establish, in EPA's view, that the material is not being discarded. *Id*. at §241.3(b)(1). Further, discarded alternative fuels burned in a unit that is outside the control of generator may be excluded, but only if the material has been appropriately "processed" and the "legitimacy criteria" are met. *Id*. at §241.3(b)(4).

The combustor must keep records showing that it "satisfies" the conditions of these exclusions. *Id*. at §§63.11225(c)(ii), 63.11225(d)(2), 60. 2175(v), 60.2740(u). EPA characterizes this as a "demonstration" that the conditions of the exclusion have been met and the required documentation as being the "basis for this demonstration." [76FR15481]; *see id*. [15484]; [78FR9155]. If a combustor

does not keep these records, EPA, without more, deems the alternative fuel to be a solid waste. *Id*. at §§60.2265, 60.2875.

There is no exclusion for firm-to-firm transfers of alternative fuels.[5] This creates an indefensible and absurd result. The same alternative fuel that EPA conditionally excludes when combusted by the generator is not excluded when transferred to another firm. When transferred, the fuel escapes classification as a "solid waste" only if EPA grants a petition that demonstrates that the fuel has not been discarded "*even though* it has been transferred to a third party" and that the legitimacy criteria have been satisfied. *Id*. at §241.3(c)(1) (emphasis supplied). *See*, [76FR15538] ("the petitioner would need to demonstrate that [the NHSM] was not initially abandoned or thrown away by the generator of the non-hazardous secondary material.").

B. EPA's Decision That Firm-to-Firm Transfers Of Alternative Fuels Is The "Discard" Of "Solid Waste" Is Contrary To Law.

EPA's RCRA jurisdiction "is limited to those materials that constitute 'solid waste.'" *American Mining Congress v. EPA*, 824 F.2d 1177 (D.C. Cir. 1987) ("*AMC I*"). EPA has exceeded its limited RCRA jurisdiction by asserting jurisdiction over alternative fuels that are not "solid wastes."

[5] The exclusion for NHSM that has been processed into an alternative fuel presumes that the NHSM is discarded in the first instance, and is subsequently processed into an alternative fuel.

Congress defined "solid waste" as ". . . any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities . . . ." 42 U.S.C. §6903(27). The central question is whether EPA can preemptively declare that alternative fuels transferred to third parties are *per se* "other discarded material."[6]

AMC I held that the term "discarded" was employed by Congress "in its ordinary, everyday senses," and that "Congress clearly and unambiguously expressed its intent that 'solid waste' (and therefore EPA's regulatory authority) be limited to materials that are 'discarded' by virtue of being disposed of, abandoned or thrown away." *Id*. at 1190.[7] *AMC I* held that materials reused within an ongoing industrial process were not "discarded" and thus were not "solid wastes." This Court later observed that there is a wide "spectrum" of secondary materials destined for reuse or recycling that may trigger different regulatory consequences. *American Petroleum Institute v. EPA*, 216 F.3d 50, 56 (D.C. Cir. 2000) ("*API II*"). At one end of the spectrum are secondary materials

[6] EPA notes that the "key concept" is ''discard'' and that the definition of solid waste "turns on the meaning of the phrase 'other discarded material.'''' [76FR15462.]

[7] EPA agrees that "discard" should be given its "plain meaning" (*See*, *e.g.,* [76FR15463]) and that its meaning is "unambiguous." [*Id*. at 14568].

"destined for reuse as part of a continuous industrial process," which "EPA cannot regulate as solid waste" because they are "not abandoned or thrown away." *Id*. "At the other end of the spectrum . . . a material that has been 'indisputably "discarded"' can, of course, be subjected to regulation as solid waste." *Id.* A subsequent decision explained:

> We have held that the term "discarded" cannot encompass materials that "are destined for beneficial reuse or recycling in a continuous process by the generating industry itself." [citation omitted] We have also held that materials destined for future recycling by another industry *may* be considered "discarded"; the statutory definition does not preclude application of RCRA to such materials if they can reasonably be considered part of the waste disposal problem. [citation omitted]

Safe Food and Fertilizer v. EPA, 350 F.3d 1263, 1268 (D.C. Cir. 2003). Accordingly, EPA does not have unfettered discretion to declare that firm-to-firm transfers are *per se* discards.

This court rejected an effort by EPA to narrowly interpret *AMC I* as applying only to secondary materials that were immediately reused in an ongoing industrial process, and that any prior storage was a "discard" that transformed them into "solid waste." *Association of Battery Recyclers, Inc., et al. v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000) ("*ABR*"). *ABR* again emphasized the ordinary meaning that should be attached to the term "discarded": "To say that when something is saved it is thrown away is an extraordinary distortion of the English language. Yet that is where EPA's definition leads." *Id*. at 1054.

EPA's decision that transferring a secondary material from one company to another is throwing it away is equally a distortion of the plain reading of RCRA. EPA lacks the discretion to make such a general and universal decision. *Safe Food* explicitly rejected the argument that firm-to-firm transfers of secondary materials are necessarily discards.

> [W]e have *never* said that RCRA *compels* the conclusion that material destined for recycling in another industry is *necessarily* "discarded." Although ordinary language seems inconsistent with treating immediate reuse within an industry's ongoing industrial process as a "discard," *see AMC I*, 824 F.2d at 1185, the converse is not true. As firms have ample reasons to avoid complete vertical integration, see generally Ronald Coase, "The Nature of the Firm," 4 *Economica* 386 (1937), *firm-to-firm transfers are hardly good indicia of a "discard" as the term is ordinarily understood*.

350 F.3d at 1268 (emphasis supplied). Ignoring this admonition, EPA made firm-to-firm transfers *the* determinative factor in the *regulatory decision* that such transfers are discards.

EPA's starting point that *all* transfers of alternative fuels are discards is precisely the view rejected by *Safe Food*. EPA's upside down view that everything is waste until demonstrated otherwise is contrary to the law regarding EPA's limited RCRA jurisdiction. [8]

[8] Even if the demonstration is successfully made, EPA claims continued RCRA jurisdiction over the "non-waste." (*e.g.*, EPA exercises RCRA jurisdiction over alternative fuels burned onsite by the generator, since the fuels must meet the "legitimacy criteria" established by this rule).

C. EPA Has Not Reasonably Exercised Its Discretion In Deciding That All Firm-To-Firm Transfers Of Alternative Fuels Are Discards.

If EPA has the discretion to decide whether or which firm-to-firm transfers of alternative fuels are acts of discard, EPA has arbitrarily exercised its discretion by making a regulatory decision that *all* firm-to-firm transfers of alternative fuels are discards until demonstrated otherwise. Such a blanket declaration, based on the admitted absence of information rather than the analysis of specific facts, is by definition arbitrary, and is not legitimized by allowing industry to demonstrate that a particular transfer is not a discard.

EPA claims to agree that firm-to-firm transfers do not automatically involve discard. [76FR15492]. EPA asserts that it "evaluates, first, whether such material is discarded in the first instance." [76FR15470]; *see also* [76FR15472]. EPA says it conducts case-by-case analyses of specific materials in which firm-to-firm transfers are only one factor it considers.

> EPA is in no way claiming that such transfer is the definitive criterion for discard. Instead, EPA has examined the issue of company-to-company transfers in the context of specific secondary materials and to the extent the Agency has found either discard or no legitimate recycling, it is requiring companies to file a non-waste petition in order to allow the Agency to review the specifics of their cases.

[76FR15472].

However, this is not what EPA has done. Rather, without a basis in the record, EPA made a *regulatory decision* that, as a matter of law, *all* alternative

fuels are solid wastes, and that transfers of alternative fuels are discards that do not qualify for the limited exclusions in the rule. 40 C.F.R. §§241.3(a) and 241.3(c). These conclusions were not based on specific facts or case-by-case analyses, but rather on the absence of data. *See*, *e.g*. [78 FR 9167], [76 FR 15472]. EPA turns RCRA on its head by concluding that all transfers are discards and making "non-waste" determinations dependent on the information made available to it. According to the Agency, it "would consider transferred materials not to be wastes *if it could make the appropriate findings for those categories*." [76FR15471] (emphasis supplied).

EPA misapprehends its limited RCRA jurisdiction. *AMC I* held that EPA's RCRA jurisdiction is *limited* to those materials that constitute "solid waste." *AMC I,* at 1179 (emphasis supplied). If a material is a "non-waste," EPA does not have RCRA jurisdiction over it. EPA cannot exercise jurisdiction over "non-wastes" under the theory that the Agency does not have information to conclude otherwise, or based merely on the suspicion that such materials could be discarded.[9] Yet that is what EPA has done: "[a]ny petition that is submitted to EPA requesting a non-waste determination must demonstrate that the non-

[9] Courts have rejected similar efforts by EPA to unlawfully extend its jurisdiction. *See*, *e.g*., *Waterkeeper Alliance, Inc v. EPA*, 399 F.3d 486 (2d Cir. 2005) (EPA's Clean Water Act jurisdiction extends only to actual, not potential, discharges); *National Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011).

hazardous secondary material has not been discarded in the first instance." [76FR15460.]

EPA's decision to consign all firm-to-firm transfers into RCRA is not only contrary to law, it is not reasonable. Firm-to-firm transfers are at the foundation of profitable economic activity: engaging in transactions with other entities is what businesses do. This includes a significant flow of transactions in a wide range of secondary materials and alternative fuels. As an example, petitioner Portland Cement Association estimates that over 12 million tons of non-hazardous secondary materials are used at its members' facilities each year as fuels and ingredients, almost all as a result of firm-to-firm transfers.[10] A wide range of legitimate considerations drive these transactions. For example, in some cases, the quantity of alternative fuel generated at a site is too small for efficient use and transfer to another site which aggregates similar materials is economically justified and a better use of those resources. [EPA-HQ-RCRA-2008-0329-1165, p. 3.] Another factor is an increasing interdependence of facilities and complex ownership structures that depend on sharing material flows, including alternative fuels, to optimize process efficiency and resource use. *Id*. EPA does not demonstrate why such transactions are inherently less environmentally protective than management wholly within one entity. It is not reasonable for EPA to

[10] [EPA-HQ-RCRA-2008-0329-1842.]

impose artificial barriers to normal and widespread economic activity simply based on ownership structures.

By extending its RCRA jurisdiction to all alternative fuels, including those EPA concedes may be "non-wastes," EPA has not reasonably exercised its discretion under *AMC I* or *Safe Food*, nor has it advanced a permissible interpretation of RCRA.

D. The Record Does Not Support EPA's Decision That All Firm-To-Firm Transfers Of Alternative Fuels Are Discards Of Solid Waste.

The record does not support EPA's regulatory decision that all firm-to-firm transfers of alternative fuels are discards of solid waste. EPA asserts that "it is plain from any reasonable analysis that transfer to another party, where a generator of a secondary material relinquishes all control of the material is certainly relevant to any determination whether a material is a waste." [76FR15472.] However, EPA did not support this conclusion and has not provided the required "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

What is at issue here is not whether firm-to-firm transfers are merely a "relevant" factor. Rather, EPA has asserted that *all* alternative fuels fall under its RCRA jurisdiction, including firm-to-firm transfers of alternative fuels. Firm-to-firm transfers only segue into becoming a "relevant factor" after the fact, when

industry asks EPA to determine that transferring an alternative fuel is not a discard so that it can be excluded from the initial regulatory declaration.

EPA seeks to justify the regulatory determination by relying on a vague concept of probabilities:

> In the proposal, EPA stated that when non-hazardous secondary material fuels are transferred to another party, the Agency *generally believed* that the material is discarded, since the generator has relinquished control of the secondary material and the entity receiving the materials *may not* have the same incentives to manage them as a useful product, which results in the materials being discarded.

[76FR15466] (emphasis supplied). EPA concedes that reliance on this mere possibility may not be very accurate: "There may also be nonhazardous secondary materials transferred to another party that may not be a waste and EPA is attempting to deal with those categories of non-hazardous secondary materials on a case-by-case basis." [76FR15470, 15533.] Thus, EPA openly admits that its generic regulatory decision captures alternative fuel that is not solid waste (and thus over which it has no RCRA jurisdiction), hoping that this jurisdictional over-reach is cured by offering industry the option of seeking a determination, on a case-by-case basis, that EPA got it wrong. EPA concedes:

> Merely because one party has relinquished control of a secondary material does not make it a waste nor does the fact that a receiving party may not have the same incentives to manage them as a useful product. EPA cannot indict all parties that in fact do manage these secondary materials as a useful product.

[76FR15471.] However, that is what EPA has done: alternative fuels transferred to third parties are "indicted" as discarded solid waste, and are "guilty" unless and until demonstrated "innocent," either through documentation demonstrating compliance with 40 C.F.R. §241.3(b)(4) or by petitions proving to EPA's satisfaction that, "even though" the material has been transferred, it has not been discarded.

EPA fails to rely on any record evidence developed for this rulemaking to support its "general belief" that firm-to-firm transfers are "discards" or that third parties receiving the materials "may not" have the same incentive to manage such materials as useful products. Rather, EPA makes a general reference to the record of a different, yet-to-be concluded, RCRA rulemaking initiated for a different purpose, involving different facts, and initiated under the authority of a different part of RCRA. EPA asserts that:

> [The] "lack of incentive of third parties to manage [secondary materials] as a useful product has been well-documented in the context of hazardous secondary material recycling as evidenced by the results of the environmental problems study performed in support of the 2008 DSW Final Rule and believed that this finding also held true for non-hazardous secondary materials that are used as fuel."

[76FR15466.] The "environmental problems study" to which EPA is referring, *An Assessment of Environmental Problems Associated with Recycling of Hazardous Secondary Materials* (U.S. EPA January 11, 2007) ("*2008 DSW Rule Study*"), was developed in the context of EPA's initiative to revise the regulation

of "hazardous waste" under Subtitle C of RCRA, known as the Definition of Solid Waste ("DSW") rule.[11] EPA cannot rely on this vague reference to a study that addresses different issues in a different regulatory context to support this rulemaking.

The *2008 DSW Rule Study* was performed to support a rulemaking involving the revision of the hazardous waste regulations, and examined the causes of "environmental damage" at facilities that recycle *hazardous* secondary materials. However, this Rule involves the regulation of *non-hazardous* secondary materials. EPA has not supported its assertion that the *2008 DSW Rule Study* is relevant to the evaluation of non-hazardous alternative fuels that are transferred to third parties for combustion. EPA has thus not developed a record supporting the conclusion that all transfers of alternative fuel are discards of solid waste.

EPA attempted to find such evidence. However, it identified only a handful of incidents that have nothing to do with whether burning alternative fuels for energy recovery is waste disposal. *See* [EPA-HQ-RCRA-2008-0329-0423]. This document discusses fires at three tire piles; a fire at a debris pile; and fires at three facilities that recycle wood pallets. None of these incidents involved burning alternative fuels for energy recovery. In addition to the dubious relevance of such

[11] EPA describes the 2008 DSW rulemaking at [76FR15462].

a small number of incidents, these incidents do not support EPA's decision that transfers alternative fuels are discards of solid wastes.

EPA has not "found any facts," nor established any "rational connection" with any facts, supporting its effort to extend RCRA jurisdiction over all transfers of alternative fuels. *See API II*, at 58 (EPA must provide a rational explanation for its decision and develop a record demonstrating that EPA engaged in reasoned decision-making).

III. The Identification Of Alternative Fuels As Wastes Is Contrary To Law and Arbitrary and Capricious When The Record Shows That The Fuels Are Managed As A Valuable Commodity, Combusted To Recover Energy, And Are A New Product Produced From Processing Secondary Materials, Are Integral To An Industrial Process, Or Are Functionally Equivalent To The Fuels They Replace.

The record shows that many alternative fuels are new products produced from processing secondary materials, are integral to an industrial process or are functionally equivalent to the fuel they replace, and are managed as valuable commodities and combusted for legitimate energy recovery. To the extent that the NHSM Rule classifies such alternative fuels as wastes, it is contrary to law and arbitrary and capricious.

A. Construction And Demolition Wood, Railroad Ties And Other Treated Wood, Are Processed Into Legitimate Alternative Fuels That Are Not Wastes.

1. Processed Alternative Fuels Are Not Wastes.

EPA has long recognized that even if a material has been discarded, if resources are expended to manufacture a new product using that material, then that new product is no longer a waste. *See*, *e.g.*, [50FR 614,633-34].[12] As EPA notes, "a safe fuel product that is a valuable commodity and sold in the marketplace no differently from traditional fuels" is not a waste. [75FR31877].

2. The Significant Investments Made To Create Alternative Fuels From Construction And Demolition Wood, Railroad Ties, And Other Treated Woods Through Processing And The Market For These Materials Are Evidence That These Fuels Are Not Discarded.

Processing secondary materials to create alternative fuel products is a significant commercial activity. The record demonstrates that significant investments are made to create alternative fuel products from construction and demolition wood, railroad ties, and other treated woods, that there is a significant

[12] In the context of non-hazardous materials, this is true even when the new product is a fuel because the RCRA regulation of fuels derived from hazardous wastes does not apply to materials that are not and have never been hazardous wastes. 42 U.S.C. §6924(q); [76FR15469]; *AMCI I*, at 1189 (Section 6924(q) addressed burning hazardous wastes only and did not "revamp the basic definitional section of the statute.")

market for these materials, and that these alternative fuels are commodities, not wastes.[13]

For example, over 200 companies across the United States process 4.7 to 6.5 million tons of construction and demolition wood that are combusted for energy recovery each year. [EPA-HQ-RCRA-2008-0329-1928]; [EPA-HQ-RCRA-2008-0329-1811]. Approximately 15 companies in North America with revenue of $65-75 million annually process over 8.5 million railroad ties that are combusted for energy recovery. [EPA-HQ-RCRA-2008-0329-2009]; [EPA-HQ-RCRA-2008-0329-0875]. There are over 89 customers of processed treated wood fuel products, with one company accounting for 2-3 million tons of treated wood fuel since 1989. [EPA-HQ-RCRA-2008-0329-1897].

These are valuable commodities. Two trailer loads of construction and demolition wood have a market value between $700 and $900. [EPA-HQ-RCRA-2008-0329-1946]. Forest products mills pay about $20 to $30 a ton for railroad tie fuel. [EPA-HQ-RCRA-2008-0329-2009]. It would cost forest products mills around $50 million a year to replace the fuel value of the railroad ties. [*Id*. at 2.]

[13] EPA argues that waste can have economic value and still retain its status as waste, citing *American Petroleum Institute v. EPA*, 906 F.2d 729, 741 n.16 (D.C. Cir. 1990) ("*API I*"); *United States v. ILCO, Inc*., 996 F.2d 1126, 1131–32 (11th Cir. 1993); *Owen Electric Steel Co. of S.C. v. Browner*, 37 F.3d 146, 150 (4th Cir. 1994). [76FR15463.] However, these cases address the regulatory status of material *before* it is processed into a product. EPA acknowledges that these cases do not contradict the proposition that "legitimate products made from wastes are, themselves, products and not wastes." [*Id*.]

In addition, there are at least 23 companies across the United States that either own or operate biomass power plants. As much as 40 percent of the biomass fuel for these plants is construction and demolition wood; without this fuel these plants would not be able to remain in operation. [EPA-HQ-RCRA-2008-0329-2009]. In Michigan, 17,625 tons of non-hazardous treated wood were combusted for energy recovery in 2009, and were eligible for clean energy credits under Michigan's Cleaner, Renewable, and Efficient Energy Act. [EPA-HQ-RCRA-2008-0329-1395].

3. The Fuel Value And Management Of Processed Construction And Demolition Wood, Railroad Ties, And Treated Woods Are Further Evidence That These Fuels Are Not Wastes.

The fuel value and management of processed construction and demolition wood, railroad ties, and treated wood provide further evidence that these fuels are not wastes. Heating value is one of the legitimacy criteria (40 C.F.R. §241.3(d)(1)(ii)), and EPA uses 5,000 Btu as a benchmark, recognizing that some boilers can effectively recover energy from fuels with a lower Btu value. [76FR15522.] Managing an alternative fuel as a valuable commodity is also a legitimacy criterion. 40 C.F.R. §241.3(d)(1)(i).

Construction and demolition wood, railroad ties and treated wood all have high Btu values and are managed and used as valuable fuel products. Construction and demolition wood has a heating value averaging about 6,800

Btu/lb. as-fired, which is higher than that of most traditional wood and biomass fuel. [EPA-HQ-RCRA-2008-0329-2009]. Construction and demolition wood is managed as a valuable commodity at both wood processing and energy recovery facilities, in the same way as wood and biomass that are traditional fuels. [*Id*. at 3.]

The Btu value of creosote-treated wood is approximately 8,000 Btu/lb. ([EPA-HQ-RCRA-2008-0329-0772]), making railroad ties an important fuel for biomass boilers because other biomass fuel can contain more moisture and thus mixing in railroad tie fuel improves combustion. [EPA-HQ-RCRA-2008-0329-2009.] Railroad ties also are managed as valuable commodities. They are removed from service by companies whose business model is reclaiming the value of the railroad ties. They manage railroad ties to retain their value, inspect and sort them and remove metal, and chip and deliver them as fuel to combustors. The combustion facilities manage the railroad tie fuel in the same manner as other biomass fuels. [*Id.* at 4.] Treated wood has a heating value of 7,000 – 8,000 Btu. [EPA-HQ-RCRA-0329-0772]. There has been a commercial market for combusting treated wood for energy recovery for many years, where it is substituted for other wood fuels, coal or other fossil fuels.

Recycling companies are investing in facilities, equipment and people to produce fuels they can sell or use themselves, not to discard solid waste.

Combustors produce or pay for alternative fuels so they can use them, not discard them. This record demonstrates that construction and demolition wood, railroad ties and treated wood are processed into commodity fuels and, when combusted, are not being discarded. These fuels cannot be classified as wastes. *AMC I*, at 1185-87, 1190-93; *ABR*, at 1051.

B. Despite A Record Of Investment, Management, And Legitimate Use, The NHSM Rule Would Arbitrarily And Capriciously Classify Some Alternative Fuels As Wastes.

Notwithstanding this record, under the NHSM Rule some construction and demolition wood, railroad ties and treated wood could be considered a waste when combusted due to EPA's overriding legitimacy criterion that an alternative fuel must, prior to combustion, contain air pollutants at concentrations that are lower than or comparable to a traditional fuel that the combustion unit is designed to burn. 40 C.F.R. §241.3(d)(1)(iii).

For construction and demolition wood, this potential waste classification is a consequence of the levels of semi-volatile organic compounds (*e.g.,* formaldehyde) in manufactured wood products such as paneling and plywood. Due to their low moisture content, these types of wood are valuable components of construction and demolition fuel products. Semi-volatile organic compounds in construction and demolition wood fuel are lower than are found in coal, so construction and demolition wood would not be a waste in boilers that can

combust coal. However, if a boiler could not combust coal (for example, if it has a pneumatic feed system that can blow chipped wood to a boiler but not coal), the alternative wood fuel could fail the "designed to burn" test and would be considered a waste. [78FR9141]; [EPA-HQ-RCRA-2008-0329-2009].[14]

Similarly, railroad tie fuel that is fed to a boiler that combusts only biomass and coal could be considered a waste because railroad ties have polycyclic aromatic hydrocarbon ("PAH") levels that are lower than are found in fuel oil, but are higher than are found in virgin wood or coal. When combusted in a unit that has a feed system for fuel oil, railroad ties would not be considered wastes, but could be a waste when burned in a boiler that could only burn biomass and coal. [*Id*.]. This would be true even if the two boilers were sitting side-by-side at the same facility and were combusting railroad tie fuel purchased under the same contract. This same type of analysis applies to treated wood biomass.

The record demonstrates that construction and demolition wood, railroad ties and treated wood are processed into commodity fuels and are not part of the waste disposal problem. The record further demonstrates that neither processors

[14] In addition, while the record shows that metal is separated, and on average, lead concentrations in processed construction and demolition wood are well below concentrations found in virgin wood, there may be isolated incidents where a single load of processed wood fuel might have higher lead concentrations than in virgin wood. [EPA-HQ-RCRA-2008-0329-2009]. Under the NHSM Rule, those isolated loads might be considered "solid wastes" that can transform a CAA §112 boiler into a CAA §129 CISWI incinerator.

nor combustors discard, or have any intent to discard, construction and demolition would, railroad ties or treated would that are processed and used as valuable fuel products. Thus, classifying these alternative fuels as wastes is arbitrary and capricious.

Intent is relevant under RCRA when determining whether a secondary material is being discarded. *API II*, at 58 (it is arbitrary and capricious to ignore the motivation behind the recycling activity when determining whether a material is a waste). As noted by EPA in a 1989 memorandum issued by the Director of EPA's Office of Solid Waste: [the] "question [whether an activity involves sham recycling] involves assessing the intent of the owner or operator by evaluating circumstantial evidence, always a difficult task." [EPA-HQ-RCRA-2008-0329-0433.] In the NHSM Rule, EPA uses its "legitimacy criteria" to attempt to discern the intent of a person who combusts non-hazardous secondary materials.

> EPA is careful to note that ''legitimacy'' is shorthand for referring to non-hazardous secondary materials that are not thrown away, are saved and are reused by being burned for their value as a fuel. The legitimacy criteria are the factors needed to be examined to make this determination. Thus, for example, it is relevant how the non-hazardous secondary materials is managed and the extent to which contaminants in the secondary material *may* indicate that the real reason for burning the secondary material is simply its destruction—referred to as ''sham'' recycling.").

[76FR15471] (emphasis supplied).

Notwithstanding EPA's description of the legitimacy criteria as mere "factors to be examined," under the NHSM Rule any alternative fuel that fails to

meet a legitimacy criterion is *per se* a discard of solid waste, and remains so unless and until EPA completes a rulemaking to classify the alternative fuel as a "non-waste. With respect to the "contaminant" legitimacy criterion, EPA defends this result by arguing that elevated levels of Clean Air Act pollutants themselves are evidence of a "waste-destroying intention." [76FR15525.][15] However, for construction and demolition wood, railroad tie fuel and treated wood, this inference is not supported by the law or the record.

First, no Clean Air Act pollutants have been added to these fuels. Absent evidence of such adulteration, the presence of Clean Air Act pollutants in various concentrations in alternative fuels is not evidence of "sham recycling" (or "waste destroying intention"). *API II*, at 58 (noting that "improper disposal of waste materials through adulteration" is "called 'sham recycling.'").

Second, the record shows that there is no "waste destroying intention" when these fuels are combusted. In *API II*, this Court determined that unexpected constituents in a recycled material that could be the result of adulteration are relevant to a determination whether a material is a waste. However, this Court also noted that a recycler could show that the constituents in a secondary material

[15] EPA did not look at protection of human health and the environment when evaluating whether a material is discarded. [76FR51525.] The safety of emissions of air pollutants from combustion is addressed under the Clean Air Act. EPA did not consider or evaluate under the NHSM Rule whether there was any additional benefit to the environment associated with the regulation of alternative fuels under the CAA §129 CISWI regulations.

"are not a product of adulteration, not discarded, and outside EPA's authority to regulate such material under RCRA." *Id.* at 59.

The record before the Agency makes this demonstration for construction and demolition wood, railroad ties, and treated wood. Far from being adulterated, these materials are processed in accordance with contracts and specifications to ensure that unwanted material is removed and the resulting fuel product can be combusted in compliance with a unit's Clean Air Act permit. [EPA-HQ-RCRA-2008-0329-2009]; [EPA-HQ-RCRA-2008-0329-2009]. This removal is specified in contracts for the supply of these fuels. [EPA-HQ-RCRA-2008-0329-1946]; [EPA-HQ-RCRA-2008-0329-2009]; [EPA-HQ-RCRA-2008-0329-2004].

Based on this record, it is arbitrary and capricious to classify these fuels as wastes.

C. Alternative Fuels That Are Integral To An Industrial Process Are Not Wastes.

This Court has explicitly stated that the term "discarded materials" cannot include materials that are destined for beneficial use by the generating industry itself, because such materials are not part of the waste disposal problem. *AMC I,* at 1192-93. Further, a continuous process of reuse or recycling does not require a closed-loop process or immediate reuse. *ABR,* at 1056. Despite this clear limitation on EPA's RCRA authority, the NHSM Rule would classify as wastes alternative fuels that are integral to an industrial process.

EPA acknowledges that some alternative fuels, such as paper recycling residuals ("PRR"), are not solid wastes when burned for energy because they are valuable energy sources, using PRR as an example of material that is not discarded when burned for energy:

> For example, use of old corrugated cardboard (OCC) rejects (clay, starches, other filler and coating materials, as well as fiber) are not discarded when used within the control of the generator**,** *since these secondary materials are part of the industrial process*. OCC rejects can include, and are usually burned in conjunction with, other fuels (such as bark) at pulp and paper mills that recycle fibers.

[76FR15472] (emphasis supplied). PRR is the term used to describe materials removed from repulping recovered fibers at paper and pulp mills and returned to the industrial process as fuel (sometimes together with other fuels, such as biomass). [EPA-HQ-RCRA-2008-0329-1946]. PRRs have fuel value and are managed as a valuable commodity. They are specifically generated to provide mills an additional source of energy and are managed in the same manner as other solid fuels burned by mills. Some mills manage residuals in containers before burning; others comingle them with their solid fuels since they are usually mixed for burning. They are conveyed to the boiler in the same manner as other solid fuels. Although it should not be determinative of whether PRRs are legitimate alternative fuels, PRRs also do not contain Clean Air Act pollutants at levels that are higher than found in coal or biomass. [*Id*. at 57.]

Despite EPA's acknowledgement that PRRs are not discarded and the record demonstrating this fact (including meeting the legitimacy criteria), PRRs combusted by mills other than the generator would be a "solid waste" under the NHSM Rule. Even when combusted by the generator, this fuel would be a "solid waste" unless the fuel meets the legitimacy criteria (failure to produce the records demonstrating this fact under 40 CFR §§60.2265 and 60.2875 also results in regulation as a "solid waste"). Given that the use of PRRs as fuel is part of the industrial process at pulp and paper mills, these materials are not discarded and any classification of them as wastes under RCRA is contrary to law and arbitrary and capricious. *AMC I*, at 1186.

D. Fuels That Are Functionally the Same As Traditional Fuel Are Not Waste.

EPA also has acknowledged that an alternative fuel that is "functionally the same as a comparable traditional fuel" is not a waste. 40 C.F.R. §241.4(b)(5). We agree. However, EPA's starting point is a regulatory decision that all such alternative fuels are solid waste, and requires combustors to petition for a rulemaking before an alternative fuel can be combusted in a CAA §112 boiler, unless the fuel is combusted by the generator or is processed from a secondary material, and meets all three of EPA's legitimacy criteria. Like fuels that are integral to an industrial process, there is no intent to discard a fuel via combustion

when it is functionally the same as the traditional fuel that it replaces. The alternative fuel is simply a fuel.

The record for construction and demolition wood, railroad ties and other treated wood, and paper recycling residuals demonstrates that those alternative fuels replace the energy produced by a traditional fuel. Similarly, sulfuric acid recovery units, which regenerate spent sulfuric acid, combust not only spent sulfuric acid, other sulfur sources, and natural gas/fuel oil, but also alternative non-hazardous fuels. [EPA-HQ-RCRA-2008-0329-1246.] Therefore, they are functionally the same as the traditional fuel they replace and to the extent that the NHSM Rule would classify these alternative fuels as wastes, it exceeds EPA's authority under RCRA.

IV. The Possibility Of A Future Rule-Making To Classify An Alternative Fuel As A Non-Waste Does Not Cure The Overreach Of The NHSM Rule.

EPA acknowledges that "there are cases where a secondary material may not fully meet the self-implementing legitimacy criteria, but upon consideration of other relevant factors, it can be determined that the material is a legitimate fuel and is not merely being discarded by being burned." [76FR 80482.] To address this situation, EPA established a process for petitioning EPA to promulgate rules to classify individual alternative fuels as "non-wastes." 40 C.F.R. §241.4(b). EPA already has classified the following as non-waste fuels: resinated wood,

scrap tires, coal refuse, and pulp and paper wastewater treatment residuals that are combusted by the generator. 40 C.F.R. §241.4(a). These decisions were based on an extensive record demonstrating that these alternative fuels were combusted for energy recovery and were not discarded solid waste. [78FR9154-71.] Facilities can combust these four alternative fuels without their boiler being considered a commercial and industrial solid waste incinerator.[16]

However, EPA also has the extensive record discussed above demonstrating that construction and demolition wood, railroad tie fuel and other treated woods, as well as paper recycling residuals, are not wastes when combusted. EPA has indicated that it may in the future identify these alternative fuels as non-wastes. [78FR 9173.][17] However, under the NHSM Rule, these alternative fuels would be considered wastes when combusted by some companies in some boilers, despite the investments in time and resources that are made to create these fuel products for themselves or for customers, despite the contracts and specifications used to ensure the quality of these fuel products, despite the care taken to manage these

[16] Under the CISWI regulations, a combustor that burns solid waste, even inadvertently, is subject to incinerator standards for six months thereafter. 40 C.F.R. §60.2145(a)(2); 40 C.F.R. §60.2710(a)(2); 40 C.F.R. §60.2265; 40 C.F.R. §60.2875. To avoid a violation, a boiler that is operating under MACT standards would have to shut down for six months if it could not meet incinerator standards.

[17] EPA has proposed a rule to list paper recycling residuals, construction and demolition wood, and creosote treated railroad ties as non-waste fuels, subject to certain conditions. 79 Fed. Reg. 21006 (Apr. 14, 2014). EPA has also noted its intention to consider a petition covering treated wood biomass. [78FR9174.]

fuel products, and despite the fact the energy produced by the combustion of these fuel products replaces energy produced by traditional fuels. These facts amply demonstrate that the intent of persons who manage and combust these fuels is legitimate energy recovery and that demonstration far out-weighs any intent to discard EPA suggests can be gleaned from the Clean Air Act pollutant levels found in fuels, or the types of boilers used, or in whether or not a record required under the CISWI Rule is maintained.

Given this record, the NHSM Rule is arbitrary and capricious to the extent that it fails to classify these alternative fuels as non-wastes, whether or not these materials are combusted by a generator and whether or not all of EPA's "legitimacy criteria" are met.

V. The NHSM Rule Is Inconsistent With The Goals Of RCRA And Will Cause Both Economic And Environmental Harm.

By classifying many valuable alternative fuels as wastes, the NHSM Rule is inconsistent with Congress' goals in enacting RCRA, which included preventing the needless burying of millions of tons of recoverable material each year, separating usable materials from solid waste, and reducing the deficit by increasing the recovery and conservation of secondary materials. *See* RCRA §1002(c).

The practical effect of this Rule is that alternative fuel that could have been productively combusted will be managed as a waste and can only be combusted in

a solid waste incinerator regulated by CAA §129. Moreover, given the limited capacity of existing commercial and industrial solid waste incinerators and EPA's expectation that no new units will be built, the real consequence of misidentifying valuable alternative fuels as wastes is an enormous increase in landfill disposal.[18]

This outcome also will cause economic harm. EPA has asserted that the NHSM Rule has no economic impacts and therefore did not prepare an economic assessment of the rule, suggesting that any costs would be captured in the economic analysis of the CISWI Rule. [76FR15547.] However, for most combustors, there is no real opportunity to continue to use alternative fuels if EPA identifies those fuels as wastes. Instead, the uncertainty created by EPA's legitimacy criteria will cause combustors to cease using most alternative fuels because the cost of testing (and storing the fuel while awaiting test results) could

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[18] EPA attempts to diminish the consequences of the classification of alternative fuels as a solid waste:

> In addition, EPA is not, in any sense, forbidding economic reuse of such materials by anyone other than the generator without prior government permission (through the petition process). The effect of this regulation would simply be to require the nonhazardous secondary materials designated as wastes to be combusted only in facilities regulated under section 129 of the CAA, while non-waste fuels could be combusted under section 112 of the CAA.

[76FR15472.] This is misleading. EPA has stated that there are fewer than 170 permitted CISWI units, that many facilities were likely to discontinue use of these units, and that it does not expect any new units to be built. [75FR31966-67]. This assumption is reasonable give the strong public opposition to incinerators. [EPA-HQ-RCRA-2008-0329-0871.]

exceed the value of the fuel,[19] and the fact that inadvertently combusting solid wastes immediately converts the unit into a CISWI incinerator, in most cases forcing the unit to shut down for six months.[20] As a consequence, the market for alternative fuel would be drastically reduced, driving recyclers out of business, increasing the use of fossil fuels, and significantly increasing landfill disposal.[21]

The disposal and replacement of alternative fuels also will cause environmental harm. For example, the disposal of railroad ties that are currently processed into alternative fuels would require a space equivalent to a football field that is 70 stories high. The degradation of those ties in landfill will lead to the production of methane, a potent greenhouse gas. And, the replacement fossil fuels are likely to result in additional emissions of 1.65 million tons of CO_2 equivalent. [EPA-HQ-RCRA-2008-0329-1920.]

Further environmental harm will result from the shutdown of facilities that rely on alternative fuels, such as biomass combustors. Shutting down these facilities will eliminate biomass combustion capacity that is needed to manage additional biomass fuels, such as agricultural material, harming state and local

[19] [EPA-HQ-RCRA-2008-0329-1946.]

[20] *See supra* n. 16.

[21][EPA-HQ-RCRA-2008-0329-1946]; [EPA-HQ-RCRA-2008-0329-1920]; [EPA-HQ-RCRA-2008-0329-2009].

efforts to control ozone and particulate matter levels by minimizing open burning of agricultural material.[22]

Thus, unless the identification of waste under the rule is narrowed consistent with law and the record, it will cause real economic and environmental harm.

VI. EPA Has No Authority Under RCRA To Regulate Sewage Sludge As A Solid Waste.

Contrary to RCRA's plain language, which excludes "solid and dissolved materials in domestic sewage" from the solid waste definition (42 U.S.C. §6903(27)), EPA has classified sewage sludge (or wastewater treatment sludge) generated by publicly-owned treatment works ("POTWs") as a solid waste when combusted. *See* 40 C.F.R. §241.3; [76FR15513-14]. Further, EPA's classification of sewage sludge as solid waste violates EPA's non-discretionary duty to avoid duplication of and conflict with appropriate provisions of the CWA and CAA. *See* 42 U.S.C. §6905(b).

A. EPA's Classification Of Sewage Sludge As A Solid Waste Contravenes Section 1004(27) Of RCRA.

RCRA §1004(27) defines solid waste to include "sludge from a waste treatment plant" but excludes "solid or dissolved materials in domestic sewage," commonly referred to as the Domestic Sewage Exclusion ("DSE"). *See, e.g.,*

[22] [EPA-HQ-RCRA-2008-0329-1946.]

[76FR15513.] When treating solid or dissolved materials in domestic sewage, POTWs across the U.S. generate millions of tons of sewage sludge each year that contain materials from domestic sewage. Consequently, sewage sludge from POTWs is excluded as a matter of law from RCRA's definition of solid waste.

EPA, however, has concluded that sludge generated from the sewage treatment process is discarded and solid waste if it is combusted. *See* [76FR15513]. This interpretation fails under both parts of the standard of review set out in *Chevron*, 467 U.S. 837, because Congress has directly spoken to this precise issue and because the agency's interpretation is not based on a permissible construction of the statute. *See Bluewater Network v. EPA*, 372 F.3d 404, 410 (D.C. Cir. 2004).

1. EPA's Interpretation Of The DSE Is Impermissible Under The Plain Meaning Of Section 1004(27).

Under *Chevron*, this Court's first inquiry is to determine whether the statutory language of RCRA §1004(27) has a plain and unambiguous meaning based on ordinary usage. *See Roberts v. Sea-Land Servs. Inc.*, 132 S. Ct. 1350, 1356 (2012). The DSE is unambiguous and broad. Although its terms are not defined by statute, their plain meaning confirms that the exception has a clear and identifiable scope that includes sewage sludge from POTWs. *See Goldstein v. SEC*, 451 F.3d 873, 878 (D.C. Cir. 2006) ("[The] lack of a statutory definition of a word does not necessarily render the meaning of a word ambiguous."). Sewage

sludge is "solid or dissolved material." Indeed, "solid or dissolved material" uses the disjunctive "or" to indicate that the DSE applies to any "material" regardless of its form (*i.e.*, solid, liquid, gaseous or some combination thereof). Further, "material," defined as "the elements, constituents, or substances of which something is composed," WEBSTER'S NEW COLLEGIATE DICTIONARY 709 (1977), reaches all compounds—organic, chemical or otherwise. If the "solid or dissolved material" language includes any form of any compound, then it clearly encompasses sludge, which is a solid or semisolid matter. *See id.* at 1094; *see also* 42 U.S.C. §1004(26A) (defining sludge, in part, as any solid, semisolid or liquid waste).

In addition, sewage sludge is "domestic sewage." *See*, *e.g.*, 40 C.F.R. §503.9(w). Indeed, this Court recently recognized that domestic sewage is the "but-for source of sewage sludge." *Nat'l Ass'n of Clean Water Agencies v. EPA*, 734 F.3d 1115, 1127 (D.C. Cir. 2013). In doing so, this Court specifically rejected the argument that sewage sludge and domestic sewage should be treated as distinct substances. *Id*. Although the materials in sewage sludge have been filtered, biologically- and chemically-treated, and extracted during the treatment, it is still domestic sewage because its mass and form is a direct product of domestic sewage. *See id.* at 1126–27. Thus, sewage sludge falls under the broad

reach of the DSE's plain language as "solid or dissolved materials in domestic sewage."

This is a view that EPA once shared. In a rule listing certain sludges as hazardous wastes and excluding others, EPA proclaimed that, "if wastewaters generated at petroleum refineries . . . are mixed with domestic sewage …, *the sludges generated in the POTW are covered under the domestic sewage exclusion*." 55 Fed. Reg. 46356, 46346 (Nov. 2, 1990) (emphasis supplied); *see also* 40 C.F.R. §261.4(a)(1)(i)-(ii). For 21 years, EPA has stood by—and POTWs relied upon—this interpretation. Only when it was raised in comment to the NHSM Rule did EPA hurriedly dismiss it as "error." *See* [76FR15514]. EPA's longstanding exclusion of sewage sludge as solid waste demonstrates that the DSE expressly includes sewage sludge.

It is axiomatic that EPA cannot promulgate general regulations using broadly worded definitions of solid waste when Congress limited the definition by drafting specific exclusions. "It is commonplace of statutory construction that the specific governs over the general." *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). When Congress dictates that a specific exception applies, the language of that exception must control. Here, the plain language of the DSE demonstrates Congress' unambiguous intent to remove domestic sewage sludge

from the definition of solid waste. Thus, EPA has no authority to regulate sewage sludge as a non-hazardous solid waste.

2. Legislative History Confirms That The DSE Covers Sewage Sludge.

Legislative history confirms Congress' intent to cover sewage sludge under the DSE. The relevant legislative history comes from Solid Waste Disposal Act of 1965, from which RCRA was adapted. This Act's legislative history indicates that Congress included the DSE (in its prior form) in the statute because domestic wastes were already subject to controls under the Federal Water Pollution Control Act. *See* H.R. REP. NO. 899, at 444 (1965). These controls now exist under CWA §405 and 40 C.F.R. Part 503, both of which expressly cover the disposal and use of sewage sludge. EPA acknowledged this when recommending these provisions as the proper way to regulate domestic sewage more than 30 years ago. *See* 45 Fed. Reg. 333084, 33097 (May 19, 1980); *infra* IV(B).

Almost 50 years after passage of the Solid Waste Disposal Act, Congress has never modified the DSE. Congress recognizes that sewer systems and POTWs are essential public services that are effectively regulated under a complex regime of federal and local statutes and that domestic waste, including sewage sludge, is covered by the DSE. A 1992 statement from Senator Chaffee corroborates this point: "Sewage treatment plants operated by local governments—POTWs—have a special exemption called the domestic sewage

exclusion under RCRA." 138 CONG. REC. 514755, 514758 (daily ed. Sept. 23, 1992). Although this statement was made in the context of RCRA Subtitle C amendments, it reflects Congress' understanding that the DSE covers sewage sludge.

In sum, the legislative history demonstrates Congress' intent to remove sewage sludge from regulation as a solid waste under the DSE. When considered together with the plain language of the DSE, the statute is unambiguous: the DSE covers sewage sludge because Congress intended for sewage sludge to be regulated under other environmental statutes. Thus, EPA's classification of sewage sludge as solid waste under the NHSM Rule cannot stand.

3. Even If Section 1004(27) Is Ambiguous – Which It Is Not, EPA's Interpretation Is Unreasonable.

Even if EPA's interpretation is not unlawful under step 1 of *Chevron*, the Agency's interpretation is not permissible and is not due any deference. EPA's ultimate reason for expanding the definition of solid waste to include sewage sludge is to regulate its combustion under CAA §129. With this goal in mind, EPA shoehorned sewage sludge into the definition of solid waste and entirely overlooked the breadth and scope of the DSE. By focusing on its goal and ignoring the express terms of the statute, EPA cast aside the DSE. *See* [76FR15513].

In addition, EPA's interpretation ignores the legislative history, its own prior statements on the DSE's coverage of sewage sludge from POTWs, its justification for regulating sewage sludge incinerators under §129 in the *NACWA* case (734 F.3d at 1126-27)[23] and, as discussed below, its other statutory duties under RCRA to avoid duplication "to the maximum extent practicable." 42 U.S.C. §6905(b)(1). These are fatal flaws. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. In sum, EPA failed to give the DSE—its scope, history and purpose—due consideration. If it had, EPA would have no choice but to recognize that its current reading of the DSE is unreasonable and mistaken.

B. The Rule Contravenes EPA's Non-Discretionary Duty To Avoid Duplication With Other Environmental Statutes.

RCRA §1006(b)(1) imposes a non-discretionary duty on EPA to "avoid duplication, to the maximum extent practicable, with" other environmental statutes such as the CWA and the CAA. 42 U.S.C. §6905(b)(1). The NHSM Rule, however, duplicates sewage sludge regulation under the CWA.

CWA §405 provides a comprehensive regime for regulating the use and disposal of sewage sludge. 33 U.S.C. §1345. Importantly, §405 states that, "the determination of the manner of disposal or use of sludge is a local determination,

[23] There, EPA argued that sewage sludge incinerators could be regulated under §129(g)(1) because sewage sludge comes from the general public. *Id*.

except … for regulations [that] have been established pursuant to subsection (d) of this section." *Id.* §1345(e).

The significance of this language is twofold. First, Congress unambiguously requires that sewage sludge disposal be a "local determination." EPA's NHSM Rule disregards this statutory mandate, effectively federalizing how sewage sludge must be managed by abrogating the DSE. *See* 40 C.F.R. §241.3.

Second, Congress mandates that the regulation of the use or disposal of sewage sludge must be under CWA §405(d). For decades, EPA has drafted and implemented regulations pursuant to this section in "an unprecedented effort to assess the potential for pollutants in sewage sludge to affect public health and the environment through a number of different routes of exposure." 58 Fed. Reg. 9248 (Feb. 19, 1993). However, EPA is now duplicating many of these regulations through both the NHSM Rule and CWA rules, most notably the sewage sludge incinerator requirements in 40 CFR Part 503, Subpart E. Further, the implementation of the NHSM Rule as it relates to POTWs will create multiple inconsistent obligations for municipalities who must comply with state laws and regulations that will now conflict with the NHSM Rule's requirements. For example, both Ohio and North Carolina exclude sewage sludge from their definitions of "solid waste." [EPA-HQ-RCRA-2008-0329-1261.] Instead of

avoiding redundancy "to the maximum extent practicable," EPA is actively promoting redundancy and conflict in direct violation of RCRA's mandate.

EPA's duplicative efforts directly violate its non-discretionary duty in RCRA and mark a stunning reversal from its previous position that CWA §405 is the enabling statute for regulating the use and disposal of sewage sludge. 45 Fed. Reg. 33084, 33102 ("Where such overlapping jurisdiction exists, EPA seeks to integrate and coordinate its regulatory actions to the extent feasible.").

By applying the NHSM Rule to sewage sludge, EPA has violated Congress' directive to harmonize RCRA with other environmental statutes and avoid redundancy. Because the NHSM Rule contravenes Congress' unambiguous intent and cannot be harmonized with CWA §405, it must be vacated with respect to its classification of sewage sludge as a solid waste when combusted.

CONCLUSION

For the foregoing reasons, this Court should grant the Industry petitions for review and (i) remand the Rule to EPA with the direction that EPA may only exercise RCRA jurisdiction over transfers of alternative fuels that are found to be discards, (ii) remand the Rule to EPA with the direction to classify construction and demolition wood, railroad ties, other treated woods, and paper recycling residuals as non-wastes, and (iii) vacate EPA's classification as solid waste sewage sludge when it is combusted.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 10,639 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14 pt. Times New Roman font.

/s/Christopher L. Bell
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CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2014, I filed and served the foregoing with the Clerk of the Court by causing a copy to be electronically filed via the appellate CM/ECF system. I also hereby certify that the participants in the case are registered CM/ECF users and will be served via the CM/ECF system.

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