ORAL ARGUMENT NOT YET SCHEDULED

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 INTERVENOR-RESPONDENTS

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, 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, INC.,WM RENEWABLE ENERGY, LLC

Counsel for parties listed inside cover.

Susan Parker Bodine
Barnes & Thornburg LLP
1717 Pennsylvania Ave., NW
Washington, D.C. 20006
susan.bodine@btlaw.com
(202) 371-6364

Counsel for American Forest & Paper Association, American Wood Council, Biomass Power Association, National Association of Manufacturers, Rubber Manufacturers Association

Lisa Marie Jaeger
Sandra Y. Snyder
BRACEWELL & GIULIANI LLP
2000 K Street, N.W., Suite 500
Washington, DC 20006-1872
(202) 828-5844
Lisa.Jaeger@bgllp.com
Sandra.Snyder@bgllp.com

Counsel for Council of Industrial Boiler Owners

Jane Charlotte Luxton
Clark Hill PLC
601 Pennsylvania Ave., NW
Washington, DC 20004
(202) 572-8674
jluxton@clarkhill.com

Counsel for Treated Wood Council

Christopher L. Bell
Greenberg Traurig LLP
1000 Louisiana Street, Suite 1700
Houston, TX 77002
(713) 374-3556
bellc@gtlaw.com

Counsel for American Chemistry Council and American Petroleum Institute

Leslie A. Hulse
American Chemistry Council
700 2nd Street, NE
Washington, DC 20002
(703) 741-5165
leslie_hulse@
americanchemistry.com

Of Counsel American Chemistry Council

Harry M. Ng
Matthew Haynie
American Petroleum Institute
1220 L Street, N.W.
Washington, DC 20005
(202) 682-8000
ng@api.org
HaynieM@api.org

Of Counsel American Petroleum Institute

Carol F. McCabe
Suzanne Ilene Schiller
Michael Dillon
MANKO, GOLD, KATCHER & FOX, LLP
401 City Avenue, Suite 901
Bala Cynwyd, PA 19004
(484) 430-5700
cmccabe@mankogold.com
sschiller@mankogold.com
mdillon@mankogold.com

Counsel for Waste Management, Inc., WM Organic Growth, Inc., and WM Renewable Energy, LLC

John L. Wittenborn
Wayne J. D'Angelo
Kelley Drye & Warren, LLP
3050 K. Street, N.W.
Washington, D.C. 20007

Counsel for Steel Manufacturers Association

Ronald A. Shipley,
Attorney at Law
10229 Crosscut Way
Damascus, MD 20872-2912
(301) 540-0315
ron@rshipleylaw.com

Counsel for Coalition for Responsible Waste Incineration

Richard Stoll
Foley & Lardner LLP
3000 K Street, NW, Suite 600
Washington, DC 20007-5109
(202) 295-4021
rstoll@foley.com

Counsel for Cement Kiln Recycling Coalition, Portland Cement Association, Lafarge North America Inc., Lafarge Midwest, Inc. and Lafarge Building Materials Inc.

Aaron J. Wallisch
Margaret K. Kuhn
Venable, LLP
575 7th Street, NW
Washington, DC 20004
(202) 344-4474
AJWallisch@Venable.com
MKKuhn@venable.com

Counsel for Utility Solid Waste Activities Group, Edison Electric Institute, National Rural Electric Cooperative Association and American Gas Association

Bart E. Cassidy
Katherine L. Vaccaro
Manko, Gold, Katcher & Fox, LLP
401 City Avenue, Suite 901
Bala Cynwyd, PA 19004
(484) 430-5700
bcassidy@mankogold.com
Counsel for ARIPPA

Claudia M. O'Brien
Stacey L. VanBelleghem
Eli Hopson
LATHAM & WATKINS
555 Eleventh Street, N.W.
Suite 1000
Washington, D.C. 20004
202-637-2200
claudia.obrien@lw.com

Counsel for Brayton Point Energy, LLC and JELD-WEN, inc.

William F. Lane
Kilpatrick Townsend & Stockton LLP
4208 Six Forks Road, Suite 1400
Raleigh, NC 27609
(919)420-1794
blane@kilpatricktownsend.com

Counsel for American Home Furnishings Alliance, Inc.

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.** All parties and Intervenors appearing before this Court are correctly listed in Industry Petitioners' brief.

2. **Ruling Under Review.** Accurate references to the rulings at issue appear in Industry Petitioners' brief.

3. **Related Cases.** Accurate references to the rulings at issue appear in Industry Petitioners' brief.

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") is 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 Home Furnishings Alliance, Inc. ("AHFA") is a non-profit industry trade association headquartered in High Point, North Carolina. AHFA's membership consists of approximately 450 companies in the home furnishings industry, including most domestic wood manufacturers. AHFA has no parent corporation and no publicly held company has a ten percent (10%) or greater ownership interest in AHFA.

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.

ARIPPA is a non-profit trade association that represents a membership primarily comprised of electric generating plants using environmentally-friendly circulating fluidized bed ("CFB") boiler technology to convert coal refuse and/or other alternative fuels such as biomass into alternative energy and/or steam, with the resultant alkaline ash used to reclaim mine lands. ARIPPA was organized in 1988 for the purpose of promoting the professional, legislative and technical interests of its member facilities. ARIPPA has no outstanding shares or debt securities in the hands of the public and does not have any parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

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.

Brayton Point Energy, LLC owns the Brayton Point Power Station in Somerset, Massachusetts, and Brayton Point Energy, LLC is a wholly-owned subsidiary of Brayton Point Holdings, LLC. Brayton Point Holdings, LLC is a Delaware limited liability company that is directly held by four affiliated investment funds: (i) Energy Capital Partners II-A, LP ("ECP II-A"), a limited partnership organized under the laws of the State of Delaware; (ii) Energy Capital Partners II, LP ("ECP IILP"), a limited partnership organized under the laws of the State of Delaware; (iii) Energy Capital Partners II-B (Brayton Point IP), LP ("ECP II-B Brayton Point"), a limited partnership organized under the laws of the State of Delaware; and (iv) Energy Capital Partners II-C (Brayton Point IP), LP ("ECP II-C Brayton Point"), a limited partnership organized under the laws of the

State of Delaware. No publicly held company owns a 10% or greater ownership interest in Brayton Point Holdings, LLC or Brayton Point Energy, LLC.

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.

The Coalition for Responsible Waste Incineration ("CRWI") is a non-profit trade association as described in Circuit Rule 26.1(b) that provides information about, and conducts advocacy regarding, the use of high temperature combustion which is used at facilities owned or operated by CRWI members. Some of CRWI's members are regulated by the rule at issue in this proceeding. No publicly held corporation owns ten percent (10%) or more of CRWI and CRWI does not have a parent corporation.

The Council of Industrial Boiler Owners ("CIBO") is a trade association of industrial boiler owners, architect-engineers, related equipment manufacturers, and university affiliates representing 20 major industrial sectors. CIBO members have facilities in every region of the country and a representative distribution of almost every type of boiler and fuel combination currently in operation. CIBO was formed in 1978 to promote the exchange of information within the industry and between industry and government relating to energy and environmental

equipment, technology, operations, policies, law and regulations affecting industrial boilers. CIBO has not issued shares to the public and has no parent company.

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.

JELD-WEN is a window and door manufacturer headquartered in Oregon. JELD-WEN is a privately held company. The parent company of its operations is JELD-WEN Holding, inc., a privately held company. Onex Corporation (TSX: OCX), a publicly held corporation, holds more than 10% percent interest in JELD-WEN Holding, inc.

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 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 Rubber Manufacturers Association ("RMA") is the national trade association representing tire manufacturing companies that manufacture tires in the United States. RMA's eight member companies operate 30 manufacturing plants, employ thousands of Americans and ship over 90 percent of the original equipment tires and 80 percent of the replacement tires sold in the United States.

RMA has no parent corporation, and no publicly held company has a ten percent (10%) or greater ownership interest in RMA.

The Steel Manufacturers Association ("SMA") is the national trade association representing the electric arc furnace carbon steel industry in North America. SMA members represent over 75% of domestic steelmaking capacity producing new steel products from scrap steel and other valuable secondary materials. SMA's thirty-three member companies operate 127 steel plants across North America. SMA is a non-profit "trade association" within the meaning of Circuit Rule 26.1(b). SMA has no parent corporation and no publicly held company owns a 10 percent or greater interest in SMA.

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 no 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.

Waste Management, Inc. is a publicly-traded holding company; it does not have a parent company and all of its operations are conducted by its subsidiaries. No publicly-held company has a 10% or greater ownership interest in Waste Management, Inc. WM Organic Growth, Inc. is a wholly-owned subsidiary of Waste Management Holdings, Inc. Waste Management Holdings, Inc. is a wholly-owned subsidiary of Waste Management, Inc. WM Renewable Energy, LLC is a wholly-owned subsidiary of Waste Management Partnership Holdings, Inc. Waste Management Partnership Holdings, Inc. is a wholly-owned subsidiary of Waste Management Holdings, Inc., which is a wholly-owned subsidiary of Waste Management, Inc. Waste Management, Inc., through its

subsidiaries, including WM Renewable Energy, LLC and WM Organic Growth, Inc., is the largest residential recycler in North America and a leader in waste-based energy technologies. Headquartered in Houston, Texas, the company serves over 20 million customers with environmentally sound management of solid wastes and transformation of wastes into usable resources.

TABLE OF CONTENTS

Page

Table of Authorities iii

Glossary viii

Jurisdictional Statement 1

Statement of Issues 1

Statutes and Regulations 1

Statement of the Case 1

I. Clean Air Act Framework. 1

II. RCRA Framework. 4

A. The Goals of RCRA. 4

B. Advancing RCRA's Goals by Distinguishing Use from Discard. 4

Summary of Argument 7

Standing 8

Argument 8

I. Standard of Review 8

II. The Rule is a Valid Exercise of EPA's RCRA Authority. 8

A. Discard under RCRA is Not Synonymous with Use or Combustion. 9

B. RCRA Does Not Preclude a Discarded Material from Being Recovered and Processed into a Non-Waste Fuel Product 10

1. RCRA Subtitle D Does Not Address the Processing of Nonhazardous Waste into a Legitimate Fuel 11

2. Because RCRA Is Silent on Processing Nonhazardous Waste into Non-Waste Fuels, This Court Must Only Determine Whether EPA's Action Is Reasonable under the Statute. 13

III. EPA's Classification of "Scrap Tires," Used Oil, Pulp and Paper Residuals, Construction and Demolition Debris, and Other Traditional Fuels as Non-wastes is Consistent with RCRA. 15

A. Tire-Derived Fuel and Ingredients are Not Wastes. 15

1. Tires Managed under Established Tire Collection Programs or Contractual Arrangements Are Not Discarded. 16

2. Processing Waste Tires into Non-Waste Fuel Products Benefits Human Health and the Environment. 17

3. Tires are legitimate fuels or ingredients, not wastes, when combusted. 18

4. The Possibility That Some Tires May Be Considered "Homogeneous Wastes" Does Not Mean All Tires Are Wastes. 20

B. EPA Properly Classified On-Specification Used Oil as a Traditional Fuel. 21

C. Classifying Paper Recycling Residuals as Non-Waste Fuels Is Consistent with RCRA. 24

D. Classifying Clean Cellulosic Biomass and Processed Construction and Demolition Materials as Non-waste Fuel Is Consistent with RCRA. 26

1. Clean Cellulosic Biomass. 26

2. Processed Construction and Demolition Wood. 28

E. Environmental Petitioner's Challenge to EPA's Definition of Traditional Fuels Is Waived and Meritless. 29

Conclusion 32

Certificate of Compliance 35

Certificate of Service 36

TABLE OF AUTHORITIES
CASES

Am. Petrol. Inst. v. EPA,
216 F.3d 50 (D.C. Cir. 2000)1.....13

**Am. Mining Cong. v. EPA*,
824 F.2d 1177 (D.C. Cir. 1987).....5, 9, 14, 22, 26

Ass'n of Battery Recyclers v. EPA,
208 F.3d 1047, 1051 (D.C. Cir. 2000).....5

Barnhart v. Sigmon Coal Co.,
534 U.S. 438 (2002).....11

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,
467 U.S. 837 (1984).....13

Chicago v. Envtl. Def. Fund,
511 U.S. 328 (1994).....11

City of Tacoma v. Taxpayers of Tacoma,
357 U.S. 320 (1958).....24

Cronin v. FAA,
73 F.3d 1126 (D.C. Cir. 1996).....30

Ctr. For Cmty. Action & Envtl. Justice v. BNSR Ry. Co.,
No. 12-56086 (9th Cir. Aug. 20, 2014) 12

Envtl. Def. Fund v. EPA,
852 F.2d 1316 (D.C. Cir. 1988).....11

Nat'l Ass'n of Clean Water Agencies v. EPA,
734 F.3d 1115 (D.C. Cir. 2013).....2, 13

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

Nat'l Lime Ass'n v. EPA,
233 F.3d 625 (D.C. Cir. 2000) 2

Nat'l Recycling Coal., Inc. v. Browner,
984 F.2d 1243 (D.C. Cir. 1993) 13

Natural Res. Def. Council v. EPA,
489 F.3d 1250 (D.C. Cir. 2007) 10

Natural Res. Def. Council v. EPA,
706 F.3d 428 (D.C. Cir. 2013) 10

Natural Res. Def. Council v. EPA,
No. 98-1379 (D.C. Cir. June 27, 2014) 11

Newspaper Ass'n of Am. v. Postal Regulatory Comm'n,
734 F.3d 1208 (D.C. Cir. 2008) 17, 30

Safe Food & Fertilizer v. EPA,
350 F.3d 1263 (D.C. Cir. 2003) 15

STATUTES AND CODES

5 U.S.C. § 706(2)(A) 8

5 U.S.C. § 706(2)(C) 8

42 U.S.C. §§ 6901, *et seq* 21

42 U.S.C. § 6901(c) 4

42 U.S.C. § 6903(36) 22

42 U.S.C. § 6903(37) 22

42 U.S.C. §§ 6921-6939g 11

42 U.S.C. § 6924(q) 11, 14

42 U.S.C. § 6935(a) 21

42 U.S.C. § 6941 13

42 U.S.C. §§ 6941-6949a 11

42 U.S.C. § 6976(a) 1

42 U.S.C. § 7412 2

42 U.S.C. § 7412(d)(5) 2

42 U.S.C. § 7429(g)(1) 2, 20

42 U.S.C. § 7429(g)(1)(B) 20

42 U.S.C. § 7429(g)(6) 2, 10, 20

42 U.S.C. § 7604(a)(2) 25

Pub. L. No. 96-463, 94 Stat. 2055 (1980) 21

Pub. L. No. 96-463, § 2, 94 Stat. 2055 (1980) 22

Pub. L. No. 96-463, § 8, 94 Stat. 2055 (1980) 23

40 C.F.R. § 63.1343, Table 1 2

40 C.F.R. Part 63, Subpart DDDDD, Tables 1 and 2 3

40 C.F.R. Part 241 1

*40 C.F.R. § 241.2 ..... 16, 21, 26, 27, 29, 31

40 C.F.R. § 241.3(b)(4) 15, 18

40 C.F.R. § 241.4(a)(1) 15, 18

40 C.F.R. Part 279 ..... 21, 24

40 C.F.R. § 279.11 21

FEDERAL REGISTER

63 Fed. Reg. 42,110 (Aug. 6, 1998).....30

70 Fed. Reg. 55,568 (Sept. 22, 2005) 10

75 Fed. Reg. 31,844 (June 4, 2010) 4

75 Fed. Reg. 31,938 (June 4, 2010) 18, 23

76 Fed. Reg. 15,456 (Mar. 21, 2011).....1, 14, 16, 21

76 Fed. Reg. 15,554 (Mar. 21, 2011).....1, 3

76 Fed. Reg. 15,704 (Mar. 21, 2011).....19

78 Fed. Reg. 7138 (Jan. 31, 2013) 1, 3

78 Fed. Reg. 9112 (Feb. 7, 2013) 16, 27

79 Fed. Reg. 21,006 (Apr. 14, 2014) 26, 27

MISCELLANEOUS

U.S. Energy Info. Admin., Monthly Energy Review 129 (July 2014), available at http://www.eia.gov/totalenergy/data/monthly/pdf/mer.pdf
.....31

GLOSSARY

AMC I	*Am. Mining Cong. v. EPA*, 824 F.2d 1177 (D.C. Cir. 1987)
CAA	Clean Air Act, 42 U.S.C. §§7401, *et seq.*
EPA	United States Environmental Protection Agency
RCRA	Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901, *et seq.*
Rule	76 Fed. Reg. 15456 (Mar. 21, 2011) and 78 Fed. Reg. 9112 (Feb. 7, 2013), codified at 40 C.F.R. Part 241

JURISDICTIONAL STATEMENT

The Court has jurisdiction pursuant to 42 U.S.C. § 6976(a).

STATEMENT OF ISSUES

Industry Intervenor-Respondents agree with issues 1-4 of the Statement of Issues of Respondent EPA. EPA Br. 2.

STATUTES AND REGULATIONS

Relevant statutes and regulations that do not appear in the Addendum to the Industry Petitioners' Brief or Environmental Petitioners' Brief are included in the Addendum to this Brief.

STATEMENT OF THE CASE

EPA promulgated 40 C.F.R. Part 241 (the "Rule") to identify what materials are solid wastes when combusted to determine whether a combustion unit is required to meet emissions standards for solid waste incineration units under section 129 of the CAA or emissions standards issued under section 112 of the CAA. 76 Fed. Reg. 15,456 (Mar. 21, 2011).

I. Clean Air Act Framework.

Under the CAA, all industrial boilers and process heaters (collectively referred to as "boilers") and cement kilns are subject to regulation.[1] The applicable regulatory regime depends on whether the combustion unit in question

[1] *See, e.g.*, tables listing boilers at 78 Fed. Reg. 7138, 7155-56 (Jan. 31, 2013) and 76 Fed. Reg. 15,554, 15,579 (Mar. 21, 2011).

combusts "any solid waste material," 42 U.S.C. § 7429(g)(1), "as established by the Administrator pursuant to [RCRA]." *Id*. at § 7429(g)(6).

Boilers and cement kilns that do not combust solid waste material are regulated as "major source" boilers, "area source" boilers, or kilns under the CAA section 112. 42 U.S.C. § 7412. There are only approximately 13,000 boilers with the potential to emit ten tons per year or more of any single hazardous air pollutant, or twenty-five tons per year or more of any combination of hazardous air pollutants. These major source boilers are subject to emission standards as stringent as those required for incinerators under CAA section 129. *Nat'l Ass'n of Clean Water Agencies v. EPA*, 734 F.3d 1115, 1119-20 (D.C. Cir. 2013); *Nat'l Lime Ass'n v. EPA,* 233 F.3d 625, 631 (D.C. Cir. 2000). Cement kiln emissions standards are similarly very stringent, and virtually all apply to all kilns, regardless of size. 40 C.F.R. § 63.1343, Table 1. For the approximately 200,000 smaller, area source boilers, Congress gave EPA the flexibility to establish standards providing "for the use of generally available control technologies or management practices . . . to reduce emissions of hazardous air pollutants." 42 U.S.C. § 7412(d)(5). In addition to federal regulation, these smaller boilers also are subject to state operating permits, many of which include numeric emission limits. For example, the only area source boiler specifically identified by Environmental Petitioners' declarants has a state permit with numeric limits. *See*

Envt'l Pet'rs Br. DEC002. Thus, whether a unit that combusts a non-hazardous secondary material is a "major source," an "area source," a kiln, or an incinerator it remains regulated.

As a practical matter, the determination under the Rule whether a material is or is not solid waste is relevant to only a small subset of major and area source boilers. Of the approximately 13,000 major source boilers, 11,929 are gas-fired, and thus likely could not burn any solid or liquid fuel without significant and expensive modification. 78 Fed. Reg. at 7155-56. The major source boilers that are able to combust solid or liquid fuel must meet stringent emissions standards. *See* 40 C.F.R. Part 63, Subpart DDDDD, Tables 1 and 2.

Similarly, over 168,000 area source boilers are oil-fired, and, as liquid fuel boilers, are unlikely to be modified to combust solid fuels such as tires or clean cellulosic biomass. 76 Fed. Reg. at 15,579.

Thus, the question the Rule answers is not *whether* these sources will be regulated under the Clean Air Act, but *how* they will be regulated. Human health and the environment are protected whether by application of section 112 or section 129 of the CAA.

II. RCRA Framework.

A. The Goals of RCRA.

Under RCRA, Congress directed EPA to regulate solid waste while also advancing the goal of materials reuse. With respect to materials reuse, section 1002(c) of the RCRA (42 U.S.C. § 6901(c)) states:

> (1) millions of tons of recoverable material which could be used are needlessly buried each year;
>
> (2) methods are available to separate usable materials from solid waste; and
>
> (3) the recovery and conservation of such materials can reduce the dependence of the United States on foreign resources and reduce the deficit in its balance of payments.

The Rule advances materials reuse by allowing non-hazardous secondary material to be used to recover and conserve energy and material resources. This use helps "move the country toward material sustainability and energy self-sufficiency, while protecting human health and the environment." 75 Fed. Reg. 31,844, 31,849 (June 4, 2010).

B. Advancing RCRA's Goals by Distinguishing Use from Discard.

Under the Rule, some non-hazardous secondary materials are wastes when used as fuels or ingredients in a combustion unit and others are not.[2] The distinction depends on whether a material has been discarded, which is a

[2] The definitions of "non-hazardous secondary material" and "solid waste" are in EPA's brief, at 4 and 7.

prerequisite that must be met before a material becomes a solid waste. EPA Br. 7.[3]

As EPA notes, this Court has on several occasions examined the line between use and discard in the context of the reuse and recycling of hazardous secondary materials. EPA Br. 7-8. A determination of whether a material is being discarded depends on the intent of the person managing the material. Indus. Pet'rs Br. 28.

A determination of what constitutes solid waste under RCRA also is made in the context of the goals of the statute. *See Am. Mining Cong. v. EPA*, 824 F.2d 1177, 1189 n.17 (D.C. Cir. 1987) (*AMC I*) (noting "[o]ne of RCRA's primary goals is to promote recovery of reusable material that is currently being 'needlessly buried.' 42 U.S.C. § 6901(c)").

The Rule promotes the statutory goals of efficiency and sustainability while protecting human health and the environment by allowing the continued use of tires, used oil, clean cellulosic biomass, construction and demolition wood and pulp and paper residuals as fuels and ingredients.

If, instead, the alternative fuels challenged by Environmental Petitioners are considered wastes, most combustion units would cease using these materials,

[3] *See Ass'n of Battery Recyclers v. EPA*, 208 F.3d 1047, 1051 (D.C. Cir. 2000) ("Congress 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.").

frustrating Congress's goals for material reuse.[4] These combustion units would have to find replacement fuels, likely fossil fuels that will result in increased greenhouse gas emissions. [EPA-HQ-RCRA-2008-0329-0871, at 18; EPA-HQ-RCRA-2008-0329-1811, at 10, EPA-HQ-RCRA-2008-0329-1809, at 8.] Further, without the ability to combust clean cellulosic biomass and processed construction and demolition wood, many biomass boilers would have to shut down, reducing the capacity to manage these materials, resulting in adverse environmental consequences such as the open burning of agricultural residue. [EPA-HQ-RCRA-2008-0329-1946, at 67.] Finally, contrary to the Congressional goal of eliminating the needless burial of millions of tons of recoverable material, if the materials challenged by Environmental Petitioners cannot be used as fuel, they will create a solid waste disposal problem.[5]

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[4] We agree with EPA that very few units will elect to be regulated under CAA section 129. [EPA-HQ-RCRA-2008-0329-0871, at 15-16.]

[5] EPA's Materials Characterization Papers indicate that at least 35 million tons of pulp and paper residue, 4.7 to 6.5 million tons of construction and demolition wood, and 2.5 million tons of tires are combusted each year. [EPA-HQ-RCRA-2008-0329-1809, at 5; EPA-HQ-RCRA-2008-0329-1811, at 3-4; EPA-HQ-RCRA-2008-0329-1822, at 2.] In addition, more than a billion gallons of used oil are generated annually, most of it on-specification. [EPA-HQ-RCRA-2008-0329-1958, at 10.] Incinerator capacity and alternative beneficial uses are limited so much of the solid non-hazardous secondary materials that are currently combusted in boilers and kilns would be landfilled if these materials are considered wastes. *See* [EPA-HQ-RCRA-2008-0329-1273, at 25-29.] Illegal disposal also may increase because some states ban the landfilling of tires. [EPA-HQ-RCRA-2008-0329-1166, at 41.] Moreover, because liquids cannot be landfilled, the

SUMMARY OF ARGUMENT

Under RCRA, only discarded materials are wastes and many secondary materials are not discarded. In fact, a variety of public and private systems have been established to keep secondary materials from being discarded, advancing Congress's resource conservation and recovery goals. The positions advanced by Environmental Petitioners would undermine those recycling systems and the achievement of Congress's goals. This outcome is contrary to RCRA and this Court's precedents.

EPA has authority under RCRA to determine that new fuel products, produced using waste material as inputs to the manufacturing process, are not wastes, and EPA properly excercised its discretion to include fuel produced from processing construction and demolition material, tires, and used oil in that category.

EPA has authority under RCRA and EPA properly exercised its discretion to determine (1) that tires are not discarded when they are managed under a comprehensive collection system or contractual arrangement that ensures tires are not discarded and are handled as valuable commodities through arrival at the combustion facility, and (2) that paper is not discarded when it is collected and

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mismanagement of used oil may increase if on-specification used oil can be combusted only in incinerators. [EPA-HQ-RCRA-2008-0329-1958, at 21-22.]

sold to paper mills as an input to the manufacturing process and that residuals from that manufacturing process are not waste when combusted.

EPA has authority under RCRA to identify traditional fuels that are not waste when combusted and EPA properly excercised its discretion to include materials beyond virgin fossil fuels in this category.

STANDING

Like Industry Petitioners, the Industry Intervenor-Respondents have standing because they own or operate facilities that generate, manage, transfer, or combust alternative fuels subject to the Rule, and the trade association Industry Petitioners have standing because their individual members are similarly situated. Ind. Pet'rs Br. 7.

ARGUMENT

I. Standard of Review

As set forth in the brief of Industry Petitioners, the Court reviews the Rule pursuant to 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(2)(A), (C); Ind. Pet'rs Br. 8.

II. The Rule is a Valid Exercise of EPA's RCRA Authority.

EPA's classification of certain tires, used oil, paper recycling residuals, construction and demolition wood, clean cellulosic biomass, and other traditional

fuels as non-waste fuels is a valid exercise of EPA's authority under RCRA. By contrast, Environmental Petitioners' interpretation of RCRA -- that all secondary material is *per se* discarded and that all waste material must remain waste and cannot be used as an input to produce new commodities -- contradicts the resource recovery goals of Congress and the structure of the statute.

A. Discard under RCRA is Not Synonymous with Use or Combustion.

RCRA authorizes EPA to regulate only material that is discarded. Whether used or unused, if material is not discarded, it is by definition not waste. Under this Court's precedents, if material is not reasonably considered part of the solid waste disposal problem it is not discarded even if it has been used. *See AMC I,* 824 F.2d at 1185.

Environmental Petitioners would have this Court read RCRA to say that once a material is used or generated as a secondary material in a manufacturing process, it becomes and forevermore remains discarded. Envt'l Pet'rs Br. 30-33. As EPA observes, this novel view contradicts EPA's long-standing interpretations of RCRA and this Court's precedents. EPA Br. 34. Further, it ignores the fact that "one of RCRA's primary goals is to promote recovery of reusable material that is currently being 'needlessly buried.'" *AMC I,* 824 F.2d at 1189, n.17 (citing 42 U.S.C. § 6901(c)).

Environmental Petitioners also argue that the Rule contravenes this Court's opinion in *Natural Resources Defense Council v. EPA*, 489 F.3d 1250 (D.C. Cir. 2007). Envt'l Pet'rs Br. 41. There, this Court vacated the Commercial and Industrial Solid Waste Incinerator Definitions Rule (70 Fed. Reg. 55,568 (Sept. 22, 2005)) because that rule's definition of "commercial or industrial waste" excluded solid waste that is burned for energy recovery. Thus, that case stands for the proposition that an incinerator that burns solid waste, whether it recovers energy or not, is regulated under section 129 of the CAA. 489 F.3d at 1260. That case did not address what is or is not waste. That determination must be made under RCRA. 42 U.S.C. § 7429(g)(6).

B. RCRA Does Not Preclude a Discarded Material from Being Recovered and Processed into a Non-Waste Fuel Product

Neither RCRA's definition of "solid waste" nor its management criteria for waste materials precludes processing nonhazardous secondary materials that have been discarded into legitimate non-waste fuel products. Therefore, the Court should defer to EPA's determination to allow for processing nonhazardous wastes into legitimate fuel products because it is a reasonable interpretation of and consistent with RCRA's statutory language and stated goal of encouraging recovery and reuse of discarded materials to promote resource conservation. *Natural Res. Def. Council v. EPA*, 706 F.3d 428, 431 (D.C. Cir. 2013).

1. RCRA Subtitle D Does Not Address the Processing of Nonhazardous Waste into a Legitimate Fuel

RCRA Subtitle D addresses non-hazardous wastes. Whereas hazardous wastes are managed under the stringent "cradle-to-grave" framework of RCRA Subtitle C (42 U.S.C. §§ 6921-6939g), nonhazardous wastes are "regulated much more loosely under [RCRA] Subtitle D" (42 U.S.C. §§ 6941-6949a). *Chicago v. Envt'l Def. Fund*, 511 U.S. 328, 331 (1994); *see Envt'l Def. Fund v. EPA*, 852 F.2d 1316, 1318 (D.C. Cir. 1988). Subtitle C, for example, includes 42 U.S.C. § 6924(q), a provision that obligates EPA to "establish standards applicable to all facilities that produce, burn for energy recovery or distribute/market fuels derived from specific listed hazardous wastes." *Natural Res. Def. Council v. EPA*, No. 98-1379, slip op. at 2 (D.C. Cir. June 27, 2014).[6] Subtitle D has no provision analogous to section 6924(q).

This Court recently said that section 6924(q) represents the clear intent of Congress to require EPA to regulate all "fuels derived from *all* listed hazardous wastes." *Id.* at 15. In stark contrast, Congress did not address fuels processed from *nonhazardous* waste. Accordingly, it follows that Congress did not intend to limit EPA's discretion to allow for processing of *nonhazardous* waste into legitimate fuel products. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452

[6] On August 11, 2014, industry intervenors in that case filed a petition for re-hearing *en banc* in *Natural Res. Def. Council v. EPA* (on the issue of petitioners' standing).

(2002) ("[I]t is a general principle of statutory construction that when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *Ctr. For Cmty. Action & Envtl. Justice v. BNSR Ry. Co.*, No. 12-56086, slip. op. at 11 (9th Cir. Aug. 20, 2014) (noting that inclusion of particular language in one section of RCRA but not another is evidence of Congressional intent to exclude). If Congress had intended otherwise, it would have expressly addressed processing of nonhazardous waste into non-waste fuels.

Further, this Court's RCRA case law does not preclude EPA's determination that RCRA allows for the processing of nonhazardous waste into legitimate fuel products. As EPA discusses, EPA Br. 25 & 44-48, Environmental Petitioners misread this Court's RCRA precedent. The cases Environmental Petitioners cite for the proposition that legitimate fuel products can never be processed from nonhazardous waste address the processing of *hazardous* waste and do not consider the status of processed fuel products derived from *nonhazardous* materials.

2. Because RCRA Is Silent on Processing Nonhazardous Waste into Non-Waste Fuels, This Court Must Only Determine Whether EPA's Action Is Reasonable under the Statute.

Because RCRA does not preclude EPA's determination that nonhazardous wastes may be processed into non-waste fuel products, the Court should defer to EPA so long as its determination is a permissible construction of the statute. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *Nat'l Ass'n of Clean Water Agencies*, 734 F.3d at 1125. Where, as here, the record reflects that EPA engaged in "reasoned decisionmaking," EPA is entitled to deference. *Am. Petrol. Inst. v. EPA*, 216 F.3d 50, 57 (D.C. Cir. 2000). If EPA's construction of this "very complex" statute is "sufficiently rational," the Court cannot substitute its judgment for that of the Agency's. *Nat'l Recycling Coal., Inc. v. Browner*, 984 F.2d 1243, 1251 (D.C. Cir. 1993).

As discussed above, the structure of RCRA demonstrates that Congress left regulation of fuel products processed from nonhazardous waste to EPA's discretion. EPA's decision to allow nonhazardous secondary materials to be burned as fuels is not only permissible, it advances RCRA's statutory aims of "maximiz[ing] the utilization of valuable resources including energy and materials which are recoverable from solid waste and . . . encourag[ing] resource conservation." 42 U.S.C. § 6941. Indeed, EPA's determination is undergirded by the "essential logic" that "fuel or ingredients processed or extracted from

discarded secondary material is analogous to many products that are processed or extracted from nonhazardous wastes, such as aluminum cans or recycled paper made from recycled secondary materials." 76 Fed. Reg. at 15,475. Applying this principle, EPA properly determined that nonhazardous waste materials can be processed into non-waste fuels, but only under certain conditions and if strict legitimacy criteria are met.

Environmental Petitioners do not dispute the fact that aluminum cans and paper can be recycled – and that the resulting products are *not* solid waste – but fail to explain how the production of a fuel from the processing of nonhazardous waste is different. Envt'l Pet'rs Br. 34. As noted above, Congress knew how to, and did, mandate that energy recovered from fuels processed from hazardous waste must be regulated under RCRA, but did not so mandate for fuels processed from nonhazardous waste. 42 U.S.C. § 6924(q). Accordingly, the RCRA definition of solid waste, under which EPA regulations have long allowed the processing of new products from waste, applies.[7] Further, nothing in section 129 of the CAA, which defers to EPA's authority under RCRA to define solid waste, precludes such a determination.

In sum, EPA's determination that nonhazardous waste can be processed into non-waste fuel is a rational interpretation of the Act that is "'reasonable and

[7] *AMC I*, 824 F.2d at 1189 (section 6924(q) addressed burning hazardous wastes only and did not "revamp the basic definitional section of the statute.").

consistent with [RCRA's] statutory purpose.'" *See Safe Food & Fertilizer v. EPA*, 350 F.3d 1263, 1269 (D.C. Cir. 2003) (quoting *Am. Mining Cong. v. EPA*, 907 F.2d 1179, 1186-87 (D.C. Cir. 1990)) (explaining that if RCRA does not preclude EPA's determination, the inquiry is whether the Rule is reasonable and consistent with RCRA's purpose). Therefore, this Court should defer to EPA and uphold the Rule's processing provisions.

III. EPA's Classification of "Scrap Tires," Used Oil, Pulp and Paper Residuals, Construction and Demolition Debris, and Other Traditional Fuels as Non-wastes is Consistent with RCRA.

A. Tire-Derived Fuel and Ingredients are Not Wastes.

Under 40 C.F.R. § 241.4(a)(1), tires are not wastes when they are managed in established tire collection programs or under contractual arrangements that ensure that tires and tire components are not discarded when removed from a vehicle or declared off-specification by a tire manufacturer and are handled as valuable commodities through arrival at the combustion facility. Under 40 C.F.R. § 241.3(b)(4), tires are not wastes when they are processed into a new fuel product.

Environmental Petitioners seek vacatur of the sections of the rule under which tires can be non-waste fuel because they argue that all tires removed from vehicles are wastes. Envt'l Pet'rs Br. 28, 51. Their position is contrary to the record and the statute.

1. Tires Managed under Established Tire Collection Programs or Contractual Arrangements Are Not Discarded.

According to Environmental Petitioners, once a tire is removed from a vehicle it becomes waste and stays waste. Envt'l Pet'rs Br. 28, 30-33.

Not so. When a consumer purchases a new tire and leaves his used tire with the dealer, the tire enters an established market infrastructure. It is picked up by a tire hauler, delivered to a processor, and prepared for use in one of the various tire markets, including use as fuel. [EPA-HQ-RCRA-2008-0329-1166, at 15]. This system can be implemented through state programs or under "a contractual arrangement that ensures that scrap tires are not discarded and are handled as valuable commodities through arrival at the combustion facility." 76 Fed. Reg. at 15,492, 78 Fed. Reg. 9112, 9143-44 (Feb. 7, 2013), and 40 C.F.R. § 241.2 (defining "established tire collection program"). Although the tire may no longer be of use to the car or truck owner, the tire has value to others and is not discarded.

In addition to the tires removed from vehicles that Environmental Petitioners claim, erroneously, are discarded, tires that enter the established market infrastructure discussed above also include off-specification materials that are generated in tire manufacturing. Like tires that have been removed from vehicles, off-specification tires and tire components enter state tire collection

programs or are managed under contractual arrangements that preclude these materials from being discarded. [EPA-HQ-RCRA-2008-0329-1946, at 42.] Environmental Petitioners do not claim that these tires and tire components are discarded. Thus, any challenge to these materials is waived and their claim for relief is overly broad.[8]

Under either fact pattern, the tires or components are valuable commodities. Therefore, EPA's determination that these materials are not discarded should be upheld.

2. Processing Waste Tires into Non-Waste Fuel Products Benefits Human Health and the Environment.

Tires that are *not* managed as described above may be classified as wastes under the Rule if they are discarded by being abandoned. Historically, abandonment of tires in piles has been a waste disposal problem. In fact, by 1990, approximately one billion tires had been stockpiled in tire piles that posed fire hazards and were vectors for disease-carrying insects. [EPA-HQ-RCRA-2008-0329-1822, at 2, 17-18.] Health hazards posed by these piles particularly impact low income and minority communities. [EPA-HQ-RCRA-2008-0329-1834, at 16.] By 2007, the number of stockpiled tires had been reduced to about 128 million.

[8] *Newspaper Ass'n of Am. v. Postal Regulatory Comm'n,* 734 F.3d 1208, 1212 (D.C. Cir. 2008) ("[W]e have repeatedly held that we do not consider arguments raised only in a reply brief.").

The majority of tires removed from tire piles were combusted. [EPA-HQ-RCRA-2008-0329-1822, at 2.]

By allowing tires in tire piles to be processed into fuel products, the Rule promotes the continued reduction of existing tire piles and discourages the creation of new tire piles. As noted by EPA: "The increased acceptance of tires as a legitimate fuel led to success in reduction of tire piles." [EPA-HQ-RCRA-2008-0329-1822, at 7.]

If the Court accepts the invitation of Environmental Petitioners to vacate 40 C.F.R. § 241.4(a)(1) and 40 C.F.R. § 241.3(b)(4), and combustion of tires can take place only in a unit permitted under section 129, that success will be reversed.[9]

3. Tires are legitimate fuels or ingredients, not wastes, when combusted.

Instead of being landfilled or stockpiled, the majority of tires today are used by industrial facilities, including cement kilns, pulp and paper mills, electric utilities, and the steel industry, as fuel or ingredients. Tires have a high fuel value,

[9] Existing commercial and industrial solid waste incinerators have limited capacity to manage additional material that would be newly classified as wastes. *See* [EPA-HQ-RCRA-2008-0329-1273, at 25-29.] EPA does not expect any new solid waste incinerator capacity to be built. 75 Fed. Reg. 31,938, 31,966 (June 4, 2010); 76 Fed. Reg. 15,704, 15,742 (Mar. 21, 2011). Environmental Petitioners argue that tires can be used for other purposes. Envt'l Pet'rs Br. 8-9. However, those other uses cannot manage the volume of currently generated and historically stockpiled tires. [EPA-HQ-RCRA-2008-0329-1822, at 7; EPA-HQ-RCRA-2008-0329-1166, at 41 (analyzing availability of alternatives to use by cement kilns on a state by state basis).]

are in the chain of commerce and are managed as valuable fuel products. EPA Br. 51. As stated in comments on the Rule, "when [association] members purchase [tire-derived fuel], they are purchasing energy." [EPA-HQ-RCRA-2008-0329-0871, at 69.]

Because tire-derived fuel has contaminant levels that are comparable to or lower than traditional fuel, specifically coal, [EPA-HQ-RCRA-2008-0329-1822, at 13], tire-derived fuel can result in lower emissions of criteria air pollutants. [*Id.* at 15-17.] Moreover, tires contain natural rubber, a biogenic material that is carbon neutral. [EPA-HQ-RCRA-2008-0329-1839, att. C at 8.]

When used by cement kilns and in the steel industry, tires function as both fuel and ingredients.[10] For example, in the steelmaking process, tires provide metal and carbon – both essential ingredients in steelmaking. [EPA-HQ-RCRA-2008-0329-1160.] Steel from tires replaces virgin ores and the carbon from tires replaces the need to add carbon through use of coal, coke, or petroleum coke. [EPA-HQ-RCRA-2008-0329-0604.]

[10] Environmental Petitioners do not challenge the use of tires as ingredients and thus have waived the argument that such use constitutes waste disposal. *See supra*, n.8.

4. The Possibility That Some Tires May Be Considered "Homogeneous Wastes" Does Not Mean All Tires Are Wastes.

Section 129 includes an exemption for qualifying small power production facilities and qualifying cogeneration facilities as long as these facilities are combusting "homogenous wastes," citing used oil and tires as examples of homogenous wastes. 42 U.S.C. §7429(g)(1)(B). Environmental Petitioners argue that the existence of an exemption for waste oil and waste tires means that all used oil and tires must be wastes. Envt'l Pet'rs' Br. 37-38.

Not so. Only the *combustion* of waste is regulated under section 129 of the CAA. 42 U.S.C. § 7429(g)(1). However, the *definition* of waste is "as established by the Administrator pursuant to [RCRA]." *Id.* at § 7429(g)(6). A material must first be identified as waste under RCRA before section 129 of the CAA even becomes operative.

Industry Intervenor-Respondents do not dispute that *some* tires may be wastes.[11] However, as discussed above, the assertion that *all* used tires are wastes is not supported by RCRA or the record for this rulemaking. Accordingly, the exemption proves nothing.

Thus, EPA's classification of specific tires as non-waste fuel should be upheld.

[11] Under the Rule, unprocessed whole tires removed from tire piles are wastes. *See supra*, at 17-18.

B. EPA Properly Classified On-Specification Used Oil as a Traditional Fuel.

Like their attack on EPA's classification of certain tires, Environmental Petitioners' attack on EPA's classification of used oil subverts a successful recycling program. In 1980, Congress specifically amended RCRA to create a unique program for used and recycled oil. Used Oil Recycling Act of 1980, Pub. L. No. 96-463, 94 Stat. 2055 (codified in various sections of RCRA, 42 U.S.C. §§ 6901, *et seq.*). Congress directed EPA to regulate used oil to protect public health and the environment and encourage the recovery and recycling of used oil. 42 U.S.C. § 6935(a).

The used oil recycling program, implemented through 40 C.F.R. Part 279, has been a huge success. Approximately 96% - 98.5% of used oil is "on-specification" (equivalent to new fuel oil), and 70% - 90% of it is combusted for energy recovery.[12] [EPA-HQ-2008-0329-1827, at 2 and 4.] Combusting on-specification used oil generates lower air emissions than combusting new fuel oil (taking into account the emissions from creating the new fuel oil replaced by the used oil). [*Id.* at 11.] Therefore, the used oil program has accomplished what

[12] "On-specification" used oil meets criteria similar to those for new fuel oil (40 C.F.R. § 279.11), and "is for all intents and purposes the same as oil refined as a product fuel" (76 Fed. Reg. at 15,506). It is classified as "traditional" fuel in the Rule. 40 C.F.R. § 241.2.

Congress wanted: widespread recycling, avoided disposal, and enhanced environmental protection.[13]

Environmental Petitioners argue that used oil must be discarded based on *dicta* in a footnote in *AMC I*, in which the Court observed that "[o]il recyclers typically collect discarded used oil, distill them, and sell the resulting material for use as fuel in boilers" and noted that the "[r]egulation of those activities is likewise consistent with an everyday reading of the term 'discarded." *AMC I*, 824 F.2d at 1187 n. 14. According to Environmental Petitioners, used oil must be "discarded" because "[o]therwise, EPA would not have RCRA authority to regulate the collection, distillation, and sale of used oil for fuel." Envt'l Pet'rs Br. 33. However, Environmental Petitioners are wrong on the law: EPA's RCRA jurisdiction over used and recycled oil is not dependent on the existence of "discard."

The Used Oil Recycling Act and the regulatory status of used oil were not before the *AMC I* court. Under that Act, oil becomes "used" when, as a result of its *use*, not discard, it becomes contaminated with impurities (42 U.S.C. § 6903(36)), and it is "recycled" when it is "*reused*" for "any purpose," including burning or reprocessing (42 U.S.C. § 6903(37)). Thus, EPA's RCRA jurisdiction

[13] *See* Pub. L. No. 96-463, sec. 2 (finding it is in the national interest to recycle used oil).

over used oil is not dependent on its being a "solid waste," and recycling used oil is not predicated on a prior "discard."

Environmental Petitioners' position runs afoul of the statute in other ways as well. They assert that Congress drew a line between recycling to recover "materials" and combustion for energy recovery, but this contradicts Congress' definition of "recycled oil," which expressly includes burning as a "reuse" (not disposal). They also argue that off-specification used oil cannot be processed into a "non-waste" fuel, but this too is contrary to the statute, which includes "reprocessed" oil as a "reused" form of "recycled oil."

Environmental Petitioners' argument that combusting used oil is "waste disposal" simply defies Congress' admonition that EPA must "ensure" that regulating used oil does not discourage the recovery and reuse of used oil. Pub. L. No. 96-463, sec. 8. Acceptance of Environmental Petitioners' position would foreclose the vast majority of current legitimate used oil recycling opportunities, which emit fewer air emissions than are generated by the use of the new fuel oil that they replace.[14] Thus, by seeking to erect barriers to the environmentally

[14] EPA expects solid waste incinerator capacity to decrease (75 Fed. Reg. at 31,966), and suggests that landfills are an option to address the capacity shortfall. [EPA-HQ-OAR-2003-0119-2551[1]), p. 3.] However, landfilling liquids such as used oil poses significant environmental challenges, precisely what Congress sought to avoid with the Used Oil Recycling Act.

sound recycling of used oil, Environmental Petitioners' arguments contravene Congressional policy and environmental common sense.[15]

EPA's classification of on-specification used oil as "traditional fuel" in the Rule is reasonable, since it is the functional equivalent of new fuel oil and EPA's regulation of it is not predicated on prior discard. Accordingly, Environmental Petitioners' effort to destroy the used oil recycling program established by Congress and implemented by EPA through 40 C.F.R. Part 279 should be rejected, and EPA's classification of used oil in the Rule affirmed.[16]

C. Classifying Paper Recycling Residuals as Non-Waste Fuels Is Consistent with RCRA.

Environmental Petitioners also attack paper recycling by arguing that paper collected to be recycled is waste and that all products and co-products of that paper must also be wastes. Envt'l Pet'rs Br. 30-31. Under that extreme view, a newspaper would become waste as soon as the person who bought it finished reading it and EPA would have authority under section 129 of the Clean Air Act to promulgate emissions standards for the use of that newspaper to start a

[15] The identification of used oil as potential "homogeneous waste" under CAA section 129(g) does not lead to a different conclusion. Oil that has been discarded may be "homogenous waste." But, as with tires, just because some used oil is waste does not mean all used oil is waste (*i.e.*, used oil that is in fact discarded). *See supra*, at 19-20.

[16] If accepted, Environmental Petitioners' arguments would eviscerate EPA's used oil program in 40 CFR Part 279, and are a collateral attack on a regulatory program not before this Court that must be rejected. *See, e.g.*, *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958).

campfire.[17] This interpretation of the statute is not supported by the statute or the record.

The forest products industry promotes paper recycling of all forms. In 2009, 63.4 percent of U.S. paper consumed was recovered. [EPA-HQ-RCRA-2008-0329-0871, at 1-2.] The recovered fibers are obtained through various commercial and residential recycling programs. While some recovered paper may end up being disposed, depending on demand, all of the paper that is purchased by pulp and paper mills is destined for recycling, not disposal. [*Id*. at 62]. Thus, the recovered paper that is used as feedstock for recycled paper mills is not waste.

"Paper recycling residuals" 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. [EPA-HQ-RCRA-2008-0329-1946, at 55]. Paper recycling residuals provide an additional source of energy, are managed in the same manner as other solid fuels burned by mills, and do not contain CAA pollutants at levels that are higher than found in coal or biomass. [*Id*. at 57.]

These residuals from the pulping 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

[17]If EPA refused to exercise that authority, a citizen could file a suit seeking to compel such agency action. 42 U.S.C. § 7604(a)(2).

materials are not part of the waste disposal problem. *AMC I*, 824 F.2d at 1192-93.[18] In sum, paper recycling residuals are not part of the solid waste disposal problem. *See AMC I*, 824 F.2d at 1190. Instead, they are a co-product derived from the processing of post-consumer paper and paperboard. Accordingly, they are not solid wastes when combusted.

D. Classifying Clean Cellulosic Biomass and Processed Construction and Demolition Materials as Non-waste Fuel Is Consistent with RCRA.

1. Clean Cellulosic Biomass.

Environmental Petitioners seek vacatur of the Rule's definition of "clean cellulosic biomass" in 40 C.F.R. § 241.2. Envt'l Pet'rs Br. 51. The Rule defines this term to include a variety of biomass materials that have been traditionally used as fuel, including tree trimmings, crops used to produce biofuels, crop residues, wood collected from forest fire clearance activities, trees and clean wood found in disaster debris, clean biomass from land clearing operations, and clean construction and demolition wood. 40 C.F.R. § 241.2.

This definition is based on the understanding that there is no meaningful difference among biomass from a tree that is cut down for firewood, a tree that has fallen down, a tree that has been turned into lumber, or crop residue that has been left over from harvesting. The definition of clean cellulosic biomass includes the

[18] Recognizing that these materials are not wastes, EPA has proposed a rule to specifically list them as non-waste fuels. 79 Fed. Reg. 21,006 (Apr. 14, 2014).

limitation that it cannot contain contaminants at concentrations not normally associated with virgin biomass materials. *Id*.

Environmental Petitioners appear to be particularly concerned with clean construction and demolition wood. This concern is based on their misunderstanding that this material includes mixed debris that is processed into a fuel product (as described below). Envt'l Pet'rs Br. 10-11. That is not correct.

Clean construction and demolition wood by definition cannot contain contaminants at concentrations not normally associated with virgin wood without processing. 40 C.F.R. § 241.2. Thus, clean construction and demolition wood does not include painted or treated wood. In general, wood that meets this definition is left over lumber from construction sites. *See* 79 Fed. Reg. at 21,010-11. Construction and demolition wood that must be processed to remove contaminants is not clean construction and demolition wood or clean cellulosic biomass and thus is not traditional fuel. *See* 78 Fed. Reg. at 9139. It is instead a non-hazardous secondary material that must be adequately processed before becoming a non-waste fuel. *See* 79 Fed. Reg. at 21,010, n.13.

Based on the fact that they are seeking vacatur of the entire definition of clean cellulosic biomass and on the content of the Declarations attached to Environmental Petitioners' Brief, it appears that Environmental Petitioners are urging this Court to rule that all biomass material be considered waste, including

the combustion of wood from land clearing. Envt'l Pet'rs Br., at DEC003. Because biomass boilers rely on biomass from many sources other than virgin wood, if this Court adopts this position, virtually all biomass boilers in the United States will become incinerators, causing them to shut down and eliminating successful state programs to encourage use of biomass fuels, such as the Fuels for Schools program under which almost 20 percent of Vermont public schools are heated with wood from forest product mills. [EPA-HQ-RCRA-2008-0329-2009, at 9; EPA-HQ-RCRA-2008-0329-0871, at 16.] Further, because the definition of clean cellulosic biomass includes biomass used in the production of cellulosic fuels, the position urged by Environmental Petitioners that clean cellulosic biomass is waste and that fuel produced from waste remains waste would mean most biofuels could be combusted only in incinerators, a result that would greatly curtail the use of renewable fuels. This extreme view is not supported by RCRA or the record before the Agency and should be rejected by this Court.

2. Processed Construction and Demolition Wood.

Environmental Petitioners argue that construction and demolition material is waste, and therefore any fuel produced from this material must be waste. Envt'l Pet'rs Br. 27, 31. As discussed above, however, clean untreated and unpainted wood is not waste and other construction and demolition wood that may be waste can be processed into a new, non-waste, fuel product. *Supra* at 10-15 & 26-27.

The record demonstrates that processing construction and demolition wood to create fuel is a significant commercial activity that creates a fuel that is a valuable commodity that is relied upon by a variety of industries. Ind. Pet'rs Br. 23. Contracts and specifications that govern the supply of construction and demolition wood further demonstrate that this material is processed to remove contaminants and treated wood. *Id.* at 29-30. Finally, given the fact that combustors pay for this material, it is clear that it is combusted with the intent of energy production (rather than discard). *Id.* In sum, the record demonstrates that processed construction and demolition wood is a fuel product, and not a waste.

E. Environmental Petitioner's Challenge to EPA's Definition of Traditional Fuels Is Waived and Meritless.

As provided in the Rule, "traditional" fuels are materials "produced as fuels and are unused products." These materials are not wastes if they have not been discarded. 40 C.F.R. § 241.2. The Rule places such fuels in two broad categories: (1) fuels that have been "historically managed as valuable fuel products," such as petroleum coke, blast furnace gas, and virgin wood; and (2) "alternative fuels developed from virgin materials that can now be used as fuel products," including used oil meeting certain specifications and "clean cellulosic biomass."

Environmental Petitioners limit their claims to used oil and clean cellulosic biomass. Those arguments are rebutted above. However, Environmental Petitioners seek vacatur of the Rule's entire definition of "traditional fuel" even

though their brief never mentions any materials that fall into the "historically managed" category.

If Environmental Petitioners had any basis on which to seek vacatur of the "historically managed" category, they lost the opportunity by failing to raise such arguments in their Brief and the Court should reject out-of-hand that portion of their request for relief. *Newspaper Ass'n of Am.*, 734 F.3d at 1212 ("[W]e have repeatedly held that we do not consider arguments raised only in a reply brief."); *Cronin v. FAA*, 73 F.3d 1126, 1134 (D.C. Cir. 1996) ("It is well established that this court will not entertain arguments raised for the first time in a party's reply brief."). Industry Intervenors fully support EPA on this point: "Although Petitioners seek to have [the "traditional fuel" definition] vacated in its entirety, their only specific challenge to it is the claim that EPA improperly determined that on-specification used oil and clean cellulosic biomass should be classified as traditional fuels. Thus, as an initial matter, their relatively narrow claim presents no basis for their sweeping requested relief." EPA Br. 48-49 (internal citation omitted).

Even if it were not waived, any such claim is meritless. Petroleum coke ("petcoke") is a good example of a historically managed traditional fuel under the Rule. As EPA has long recognized, petcoke is "a legitimate fuel product," and "may best be described as a co-product" of the petroleum refining process. 63

Fed. Reg. 42,110, 42,121 (Aug. 6, 1998). The record is replete with documentation showing that petcoke has been marketed and used for decades as a primary fuel source in the industrial and energy sectors.[19] EPA's record for this Rule also contains numerous references demonstrating that petcoke is a "valuable commodity" and that users purchase petcoke just as they purchase coal and other fossil fuels.[20] In fact, data released last month from the U.S. Department of Energy confirms that petcoke has long been a purchased product with a price hovering close to – even at times exceeding – the price of coal.[21]

Clearly, petcoke cannot be deemed a "waste." The same is true for the other materials that have been "historically managed as valuable fuel products" as described in the definition in section 241.2, and Environmental Petitioners have offered absolutely nothing to challenge this well documented conclusion.

[19] [EPA-HQ-RCRA-2008-0329-0484, at 9; EPA-HQ-RCRA-2008-0329-0275, at 22; EPA-HQ-RCRA-2008-0329-0147, at 147, 153, 155, 242-43.]
[20] [EPA-HQ-RCRA-2008-0329-0484, at 27, 92; EPA-HQ-RCRA-2008-0329-02 at 78; EPA-HQ-RCRA-2008-0329-0118, at 8; EPA-HQ-RCRA-2008-0329-0147, at 71.]
[21] *See* U.S. Energy Info. Admin., Monthly Energy Review 129 (July 2014), available at http://www.eia.gov/totalenergy/data/monthly/pdf/mer.pdf (Figure 9.3 at 128 and Table 9.9).

CONCLUSION

For the foregoing reasons, this Court should deny Environmental Petitioners' request for review.

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Respectfully submitted,

/s/Susan Parker Bodine
Susan Parker Bodine
Barnes & Thornburg LLP
1717 Pennsylvania Ave., NW
Washington, D.C. 20006
susan.bodine@btlaw.com
(202) 371-6364

Counsel for American Forest & Paper Association, American Wood Council, Biomass Power Association, National Association of Manufacturers, Rubber Manufacturers Association

/s/ Christopher L. Bell
Christopher L. Bell
Greenberg Traurig LLP
1000 Louisiana Street, Suite 1700
Houston, TX 77002
(713) 374-3556
bellc@gtlaw.com

Counsel for American Chemistry Council and American Petroleum Institute

/s/Lisa Marie Jaeger
Lisa Marie Jaeger
Sandra Y. Snyder
BRACEWELL & GIULIANI LLP
2000 K Street, N.W., Suite 500
Washington, DC 20006-1872
(202) 828-5844
Lisa.Jaeger@bgllp.com
Sandra.Snyder@bgllp.com

Counsel for Council of Industrial Boiler Owners

/s/Leslie A. Hulse
Leslie A. Hulse
American Chemistry Council
700 2nd Street, NE
Washington, DC 20002
(703) 741-5165
leslie_hulse@americanchemistry.com

Of Counsel American Chemistry Council

/s/Bart E. Cassidy
Bart E. Cassidy
Katherine L. Vaccaro
Manko, Gold, Katcher & Fox, LLP
401 City Avenue, Suite 901
Bala Cynwyd, PA 19004
(484) 430-5700
bcassidy@mankogold.com

Counsel for ARIPPA

/s/William F. Lane
William F. Lane
Kilpatrick Townsend & Stockton LLP
4208 Six Forks Road, Suite 1400
Raleigh, NC 27609
(919)420-1794
blane@kilpatricktownsend.com

Counsel for American Home Furnishings Alliance, Inc.

/s/John L. Wittenborn
John L. Wittenborn
Wayne J. D'Angelo
Kelley Drye & Warren, LLP
3050 K. Street, N.W.
Washington, D.C. 20007

Counsel for Steel Manufacturers Association

/s/Harry M. Ng
Harry M. Ng
Matthew Haynie
American Petroleum Institute
1220 L Street, N.W.
Washington, DC 20005
(202) 682-8000
ng@api.org
HaynieM@api.org

Of Counsel American Petroleum Institute

/s/Jane Charlotte Luxton
Jane Charlotte Luxton
Clark Hill PLC
601 Pennsylvania Ave., NW
Washington, DC 20004
(202) 572-8674
jluxton@clarkhill.com

Counsel for Treated Wood Council

/s/Richard Stoll
Richard Stoll
Foley & Lardner LLP
3000 K Street, NW, Suite 600
Washington, DC 20007-5109
(202) 295-4021
rstoll@foley.com

Counsel for Cement Kiln Recycling Coalition, Portland Cement Association, Lafarge North America Inc., Lafarge Midwest, Inc. and Lafarge Building Materials Inc.

/s/Claudia M. O'Brien
Claudia M. O'Brien
Stacey L. VanBelleghem
Eli Hopson
LATHAM & WATKINS
555 Eleventh Street, N.W.
Suite 1000
Washington, D.C. 20004
202-637-2200
claudia.obrien@lw.com

Counsel for Brayton Point Energy, LLC and JELD-WEN, inc.

/s/Aaron J. Wallisch
Aaron J. Wallisch
Margaret K. Kuhn
Venable, LLP
575 7th Street, NW
Washington, DC 20004
(202) 344-4474
AJWallisch@Venable.com
MKKuhn@venable.com

Counsel for Utility Solid Waste Activities Group, Edison Electric Institute, National Rural Electric Cooperative Association and American Gas Association

/s/Ronald A. Shipley
Ronald A. Shipley
Attorney at Law
10229 Crosscut Way
Damascus, MD 20872-2912
(301)540-0315
ron@rshipleylaw.com

Counsel for Coalition for Responsible Waste Incineration

/s/Carol F. McCabe
Carol F. McCabe
Suzanne Ilene Schiller
Michael Dillon
MANKO, GOLD, KATCHER & FOX, LLP
401 City Avenue, Suite 901
Bala Cynwyd, PA 19004
(484) 430-5700
cmccabe@mankogold.com
sschiller@mankogold.com
mdillon@mankogold.com

Counsel for Waste Management, Inc., WM Organic Growth, Inc., and WM Renewable Energy, LLC

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 6967 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/Susan Parker Bodine
Susan Parker Bodine

CERTIFICATE OF SERVICE

I hereby certify that on August 29, 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.

/s/ Susan Parker Bodine
Susan Parker Bodine