ORAL ARGUMENT NOT YET SCHEDULED

No. 09-1038
(and consolidated cases Nos. 15-1083, 15-1085, 15-1088, 15-1089, and 15-1094)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN PETROLEUM INSTITUTE, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

ON PETITIONS FOR REVIEW OF FINAL REGULATIONS PROMULGATED BY THE ENVIRONMENTAL PROTECTION AGENCY

OPENING BRIEF OF INDUSTRY PETITIONERS

(AMERICAN PETROLEUM INSTITUTE; UTILITY SOLID WASTE ACTIVITIES GROUP, *et al.*; FREEPORT-MCMORAN INC.; and NATIONAL ASSOCIATION OF MANUFACTURERS and AMERICAN CHEMISTRY COUNCIL)

(Names and addresses of counsel appear inside cover.)

December 9, 2015
(Initial Brief)

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Petitioners American Petroleum Institute, Utility Solid Waste Activities Group, Edison Electric Institute, National Rural Electric Cooperative Association, American Gas Association, Freeport-McMoRan Inc., National Association of Manufacturers, and American Chemistry Council (collectively, "Petitioners") submit this certificate as to parties, rulings, and related cases:

(A) Parties and *Amici*. These consolidated cases involve six separate petitions for review of final actions of the U.S. Environmental Protection Agency. Accordingly, the requirement of Circuit Rule 28(a)(1) to list the parties, intervenors, and *amici* that appeared in the court below does not apply. The parties and entities moving to intervene and to participate as *amici* in this Court are listed below.

Parties:

Petitioner in No. 09-1038 is American Petroleum Institute.

Petitioners in No. 15-1083 are Utility Solid Waste Activities Group, Edison Electric Institute, National Rural Electric Cooperative Association, and American Gas Association.

Petitioner in No. 15-1085 is the American Petroleum Institute.

Petitioner in No. 15-1088 is Freeport-McMoran Inc.

Petitioners in No. 15-1089 are the National Association of Manufacturers and the American Chemistry Council.

Petitioners in No. 15-1094 are California Communities Against Toxics, Clean Air Council, Coalition For A Safe Environment, Louisiana Environmental Action Network, and Sierra Club.

Respondent in all cases is the U.S. Environmental Protection Agency.

Gina McCarthy, Administrator of the U.S. Environmental Protection Agency, is an additional Respondent in Nos. 15-1089 and 15-1094.

Intervenors:

Respondent-Intervenors in these consolidated cases are: American Chemistry Council; American Coke and Coal Chemicals Institute; American Gas Association; American Petroleum Institute; California Communities Against Toxics; Clean Air Council; Coalition For A Safe Environment; Edison Electric Institute; Environmental Technology Council, Inc.; Freeport-McMoRan Inc.; Louisiana Environmental Action Network; Metals Industries Recycling Coalition; National Association of Manufacturers; National Mining Association; National Rural Electric Cooperative Association; Sierra Club; Society of Chemical Manufacturers and Affiliates; and Utility Solid Waste Activities Group.

Movant-Intervenor in No. 09-1038 is Gulf Chemical and Metallurgical Corporation.

***Amici Curiae*:**

At present, no entities are participating as *amici curiae*.

(B) Rulings under review. These consolidated cases involve petitions for review of two final actions of the Administrator of the U.S. Environmental Protection Agency, published in the Federal Register as: *Revisions to the Definition of Solid Waste*, 73 Fed. Reg. 64,668 (Oct. 30, 2008); and *Definition of Solid Waste*, 80 Fed. Reg. 1694 (Jan. 13, 2015).

(C) Related cases. These cases were not previously before this Court or any other court. At this time, to the knowledge of undersigned counsel, there are no other related cases currently pending in this Court or any other court.

Date: December 9, 2015

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CORPORATE DISCLOSURE STATEMENTS

Petitioners submit the following statements pursuant to D.C. Circuit Rule 26.1:

American Chemistry Council: The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry, including by participating on behalf of its members in administrative proceedings before EPA and in litigation arising from those proceedings that affects member company interests. The business of chemistry is an $801 billion enterprise and a key element of the nation's economy. ACC has no parent company, and no publicly held company has a 10% or greater ownership interest in ACC.

American Gas Association: 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 greater ownership interest in AGA.

American Petroleum Institute: API represents over 625 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's members are leaders of a technology-driven industry that supplies most of America's energy, supports more

than 9.8 million jobs and 8 percent of the U.S. economy, and, since 2000, has invested nearly 2 trillion dollars in U.S. capital projects to advance all forms of energy, including alternatives. API is a continuing association operated for the purpose of promoting the general commercial, regulatory, legislative, or other interests of the membership. API is a "trade association" within the meaning of Circuit Rule 26.1. API has no parent companies. No publicly held company has a 10 percent or greater ownership interest in API.

Edison Electric Institute: 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 ownership interest in EEI.

Freeport-McMoRan Inc.: Freeport-McMoran Inc. ("Freeport") is a publicly traded corporation organized under the laws of the State of Delaware and headquartered in Phoenix, Arizona, whose securities are listed on the New York Stock Exchange (NYSE: FCX). Freeport is a natural resource company with a global portfolio of mineral assets and oil and natural gas resources. Freeport has no parent companies, and no publicly-held corporation has a 10% or greater ownership interest in it.

National Association of Manufacturers: 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. The 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. The NAM has no parent company, and no publicly-held company has a 10% or greater ownership interest in the NAM.

National Rural Electric Cooperative Association: The National Rural Electric Cooperative Association ("NRECA") is the nonprofit national trade association for electric cooperatives. On behalf of its members, NRECA participates in administrative and judicial proceedings involving or affecting its members' interests. NRECA has no parent company. No publicly held company has a 10% or greater ownership interest in NRECA. NRECA is an unincorporated entity.

Utility Solid Waste Activities Group: The Utility Solid Waste Activities Group ("USWAG") is an association of approximately one hundred and ten individual electric utilities, as well as EEI, NRECA, and AGA that represents the electric and gas utility industry on rulemaking and administrative proceedings

before EPA under the Resource Conservation 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 United States Environmental Protection Agency ("EPA") that is challenged in this proceeding. USWAG has no parent company. 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 interest in USWAG.

Date: December 9, 2015

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GLOSSARY

As used herein,

API means petitioner American Petroleum Institute;

EPA means respondent United States Environmental Protection Agency;

JA means the Joint Appendix; and

RCRA means the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k.

JURISDICTIONAL STATEMENT

The Court has jurisdiction because these consolidated cases involve timely petitions for review of EPA final rules issued under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k; *see also id.* § 6976(a). Case 09-1038 (filed Jan. 27, 2009) seeks review of the rule published at 73 Fed. Reg. 64,668 (Oct. 30, 2008), JA __-__. Cases 15-1083 (filed Apr. 9, 2015), 15-1085 (Apr. 10, 2015), 15-1088 and 15-1089 (both Apr. 13, 2015) seek review of the rule published at 80 Fed. Reg. 1694 (Jan. 13, 2015), JA __-__.

STATEMENT OF THE ISSUES

RCRA authorizes EPA to regulate "discarded" materials. 42 U.S.C. § 6903(27). The questions presented are whether EPA's rules exceed its statutory authority, are arbitrary or capricious, or otherwise not in accordance with law because:

(1) EPA's four mandatory "legitimacy factors" impose affirmative RCRA duties and conditions on in-process materials that are not "discarded";

(2) EPA imposed the legitimacy factors on (a) pre-2008 exclusions without a record basis; and (b) used-oil recycling without notice or opportunity for comment and contrary to statute;

(3) The verified recycler exclusion imposes RCRA regulation upon materials transferred for recycling that are not "discarded"; and

(4) EPA asserts RCRA authority over off-specification products that are used in their normal manner (and not "discarded").

STATUTES AND REGULATIONS

Pertinent provisions are reproduced in Addendum 1.

STATEMENT OF THE CASE

This case again calls on this Court to enforce clear statutory limits on EPA's RCRA jurisdiction to regulate "solid waste," a term Congress defined to mean "discarded" material. Petitioners challenge two final EPA rules asserting RCRA jurisdiction over materials (including in-process materials and intermediates) that are processed into valuable products—not "disposed of, abandoned, or thrown away." *See* Revisions to the Definition of Solid Waste, 73 Fed. Reg. 64,668 (Oct. 30, 2008) ("2008 rule"); Definition of Solid Waste, 80 Fed. Reg. 1694 (Jan. 13, 2015) ("2015 rule").

I. EPA's RCRA Jurisdiction Is Limited To "Discarded" Materials.

RCRA authorizes EPA "to regulate solid and hazardous waste." *API v. EPA*, 683 F.3d 382, 384 (D.C. Cir. 2012) ("*API III*"). The statute defines "hazardous waste" as "solid waste" that may pose a danger to human health or the environment. 42 U.S.C. § 6903(5). "Hazardous waste" is subject to a range of stringent regulatory obligations, governing generation, treatment, storage, disposal, and permitting. *See id.* § 6924.

Because by statute "hazardous waste" is a subset of "solid waste," "EPA's jurisdiction is limited to those materials that constitute 'solid waste.'" *American Mining Cong. v. EPA*, 824 F.2d 1177, 1179 (D.C. Cir. 1987) ("*American Mining*"). RCRA defines "solid waste" as: "garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and *other discarded material*." 42 U.S.C. § 6903(27) (emphasis added). "Congress [thereby] 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." *American Mining*, 824 F.2d at 1193.

This Court has repeatedly applied this plain-language definition of "solid waste" to limit EPA's RCRA jurisdiction to materials actually "disposed of, abandoned, or thrown away"—not materials productively reused or recycled. *See id.*; *Safe Food & Fertilizer v. EPA*, 350 F.3d 1263, 1268 (D.C. Cir. 2003). EPA regulations define "solid waste" both affirmatively (what *is* "solid waste," 40 C.F.R. § 261.2) and negatively (what is *not* solid waste, through exclusions, variances, and non-waste determinations, *see id.* § 261.4(a)(1)). The affirmative and negative definitions, however, are both subject to the statutory principle of "discard."

If material is *actually* "discarded" despite claims of recycling or reuse, EPA "can regulate" it. *API v. EPA*, 216 F.3d 50, 59 (D.C. Cir. 2000) ("*API II*"). For decades, to prevent such "sham recycling" from escaping RCRA jurisdiction, a non-binding EPA memorandum was the "primary source of guidance . . . in distinguishing between legitimate and sham recycling." 73 Fed. Reg. at 64,700-01 (discussing EPA Office of Solid Waste and Emergency Response Directive 9441.1989(19)). That memorandum identified non-exclusive, non-dispositive criteria, but left the ultimate legitimacy determination to a case-by-case evaluation of whether "discard" was occurring. Directive 9441.1989(19) at 1, 4-6. In the 2008 rule, EPA modified this approach in part, determining whether certain specific classes of secondary materials were truly "recycled" by considering four codified "legitimacy factors," two of which were not mandatory. *See* 73 Fed. Reg. at 64,743-44, 64,759.

II. The 2015 Rule Expanded The Definition Of "Solid Waste" To Subject All "Hazardous Secondary Materials," Whether Or Not "Discarded," To Regulatory Duties.

The 2015 rule significantly expanded EPA's definition of "solid waste" in three main ways. First, EPA declared that any "hazardous secondary material[s]" that are "sham recycled" are deemed "discarded and a solid waste." 80 Fed. Reg.

at 1774 (codified at 40 C.F.R. § 261.2(b)(4), (g)).[1] Second, EPA defined "sham recycling" as any recycling that is not "legitimate." *Id.* (codified at § 261.2(g)). Third, EPA defined "legitimate recycling" by imposing four new "legitimacy" factors, and making them mandatory for *all* recycling—including for regulatory exclusions EPA adopted in pre-2008 rulemakings, and other materials not previously subject to *any* codified legitimacy factors. *Id.* at 1773 (codified at § 260.43).

Together, these changes (1) extend the "legitimacy" factors to govern *all recycling* of "hazardous secondary materials," and (2) through now-mandatory factors nominally defining "solid waste," actually impose substantive regulatory duties and obligations (e.g., assessments, labeling, documentation, and storage requirements) regardless of whether materials are "discarded."

Under the first and second legitimacy factors, legitimate recycling must "involve a hazardous secondary material that provides a useful contribution to the recycling process or to a product or intermediate of the recycling process," and "produce a valuable product or intermediate." 40 C.F.R. § 260.43(a)(1)-(2) .

Under the third legitimacy factor, those handling secondary material "must manage [it] as a valuable commodity." *Id.* § 260.43(a)(3). If an "analogous raw

[1] "Hazardous secondary material means a secondary material (e.g., spent material, by-product, or sludge) that, when discarded, would be identified as hazardous waste." 40 C.F.R. § 260.10.

material" exists, the secondary material must be managed "in a manner consistent with the management of the raw material or in an equally protective manner." *Id.* If no analogous raw material exists, the secondary material "must be contained," *id.*—i.e., "held in a unit (including a land-based unit)" that is "in good condition, with no leaks or other continuing or intermittent unpermitted releases," and "designed . . . to prevent [such] release[s]," *id.* § 260.10. The unit also must be "properly labeled" or logged in a system. *Id.*

Under the fourth legitimacy factor, the "product of the recycling process" must be "comparable to a legitimate product or intermediate," in one of three ways. *Id.* § 260.43(a)(4). *One:* If "there is an analogous product or intermediate," (1) the product of recycling cannot "exhibit a hazardous characteristic . . . that analogous products do not exhibit," and (2) every hazardous constituent in the product of recycling or intermediates must be "at levels that are comparable to or lower than those found in analogous products or at levels that meet [any] widely-recognized commodity standards and specifications" that specifically address each constituent. *Id.* § 260.43(a)(4)(i).[2] *Two:* If there is *no* "analogous product" (*e.g.*, where a product is unique, innovative, or proprietary), (1) the product of recycling must be "a commodity that meets widely recognized commodity standards and

[2] EPA has identified some 400 such hazardous constituents. 40 C.F.R. pt. 261, App. VII.

specifications," or (2) the "hazardous secondary materials being recycled" must be "returned to the original process or processes from which they were generated to be reused." *Id.* § 260.43(a)(4)(ii). *Three:* If the product does not satisfy either of those approaches, it "*may*" satisfy the fourth factor if the recycler prepares an environmental and health risk assessment, documentation, and a "certification statement" showing why the recycling is legitimate, and notifies EPA. *Id.* § 260.43(a)(4)(iii) (emphasis added). However, the only consequence of following those steps is that the recycling "*may*" or "*can be shown*" to be legitimate—from the after-the-fact perspective of an agency decisionmaker. *Id.* (emphasis added). The 2015 rule also requires ongoing documentation of how materials satisfy the legitimacy factors. *See* 80 Fed. Reg. at 1755-56.[3]

Additionally, in responding to comments, EPA departed from its historical position by interpreting the term "secondary materials" to include off-specification products used in their normal manner (or processed for such use).

[3] After issuing the 2015 rule, EPA published a "Frequent Questions" document. *See* EPA, *2015 Definition of Solid Waste Final Rule Frequent Questions* (Mar. 31, 2015), http://www3.epa.gov/epawaste/hazard/dsw/expanded_faq_%20033115.pdf ("*Frequent Questions*"). The document states that it is "for public information purposes only" and "does not substitute for the actual laws and regulations."

III. The 2015 Rule Replaced The 2008 Rule's "Transfer-Based" Exclusion With A "Verified Recycler" Exclusion.

Under the 2008 rule's "transfer-based" exclusion, certain secondary materials transferred to third parties for reclamation were not deemed "solid waste" if several conditions were satisfied. For example, generators had to undertake "reasonable efforts" to ensure that the reclaimer would legitimately and safely recycle the material. 40 C.F.R. § 261.4(a)(24)(v)(B) (2014). The reclaimer had to "contain[]" the material and "manage [it] in a manner that is at least as protective as that employed for analogous raw material." *Id.* § 261.4(a)(24)(vi)(D).

The 2015 rule replaced this exclusion with a "verified recycler exclusion," under which hazardous secondary materials must be sent for reclamation "to a verified reclamation facility." *Id.* § 261.4(a)(24)(v)(B) (2015). Among other requirements, such a facility must either have a RCRA subtitle C hazardous waste management permit, or go through an alternative pre-approval process to obtain a variance. *Id.* §§ 260.31(d), 261.4(a)(24)(v)(B).

The 2008 rule's transfer-based exclusion was not available for petroleum refinery hydroprocessing catalysts that are regenerated or sent to reclaimers for recovery of valuable metals. *Id.* §§ 261.2(a)(2)(ii), 261.4(a)(23)(iv), 261.4(a)(24)(iii). Both the Sierra Club and API challenged the 2008 rule in this Court. *See Sierra Club v. EPA*, No. 09-1041; *API v. EPA*, No. 09-1038. In

response to Sierra Club's suit, EPA agreed to revisit the 2008 rule. *See* Settlement Agreement filed in No. 09-1041 (Sept. 10, 2010) [Doc. #1265157]. In 2012, this Court concluded that EPA's then-pending rulemaking rendered API's challenge unripe, and held it in abeyance. *API III*, 683 F.3d at 384.

The 2015 rule makes refinery catalysts eligible for exclusion on the same terms as other secondary materials. API's abated challenge to EPA's asserted authority over catalysts has now been reinstated and consolidated with petitions challenging the 2015 rule, having become—with the repeal of the transfer-based exclusion and as this Court predicted, "concrete and straightforward." *Id.* at 388.

IV. The Primary Metals Sector, Like Many Others, Involves The Productive Use And Reuse Of Secondary Materials To Which RCRA Was Never Intended to Apply.

Many sectors of the U.S. economy, from chemical and industrial manufacturing to resource extraction, depend on the productive use and reuse of secondary materials—from reused chemical solvents to catalysts and partly-refined metals—to which RCRA was never intended to apply. In particular, many of this Court's prior decisions enforcing statutory limits on RCRA jurisdiction involve the mining and primary metals industries. These industries exemplify principles and processes of reuse and recycling that Congress has long sought to encourage. They typically employ continuous, incremental, and ongoing methods to transform low-value, naturally occurring raw materials into highly refined commodities. During

these often-extended production processes, low-concentration minerals are extracted from raw materials, and in-process intermediates are carefully managed to ensure that target metals are recovered, refined, and eventually put to productive use.

Petitioner Freeport-McMoRan Inc. ("Freeport"), for instance, extracts, concentrates, and processes naturally-occurring copper and molybdenum ores to produce pure metals and other valuable products, such as copper cathode, copper rod, molybdenum trioxide, and rhenium metal. *See* Freeport-McMoRan Copper & Gold Inc. Comments 3, EPA-HQ-RCRA-2010-0742-0363 (Oct. 20, 2011) ("2011 Freeport Comments"), JA __; Phelps Dodge Corporation Comments 10-15, EPA-RCRA-2002-0031-0087 (Feb. 24, 2004) ("2004 Freeport Comments"), JA __.

As is typical in the primary metals industry, Freeport's products cannot be created from ores in one step. *See* 2011 Freeport Comments 3, JA __; *accord American Mining*, 824 F.2d at 1181 ("Rome was not built in a day, and all metal cannot be extracted in one fell swoop"). Naturally-occurring ores contain target minerals in very low concentrations (e.g., 0.1%), typically bound in a complex mineral matrix (e.g., copper or molybdenum sulfide). Ores are physically crushed and separated into "concentrates," enriched (e.g., 30%) in the desired minerals. Concentrates are the main feedstock for production methods such as smelting and

refining, which purify and recover solid metals and other products from the mineral matrix.

These methods create numerous valuable in-process materials and intermediates with much higher target-metal levels than raw ores. Freeport maximizes its recovery and reprocessing of these materials. Freeport also recovers other valuable substances, such as sulfur compounds used to create sulfuric acid, and precious metals such as silver and gold. *See* 2011 Freeport Comments 3, JA __.

Some in-process materials and intermediates are also important operationally. For example, Freeport's copper smelter in Miami, Arizona, uses cooled chunks of partially refined copper metal (so-called "revert") to moderate the temperature of molten copper. *See* 2011 Freeport Comments 18, JA __. Similarly, a weak sulfuric acid solution is used to produce copper through hydrometallurgy. *See id.* at 31, JA __.

At the Miami facility, Freeport processes, reprocesses, or produces dozens of in-process materials and products potentially subject to regulation under the 2015 rule. Freeport-McMoRan Inc., *Impacts of EPA's 'Solid Waste' Rule on Primary Mineral Processing & Recycling* 14-15 (Dec. 5, 2013) ("Freeport Presentation"), EPA-HQ-RCRA-2010-0742-0379, JA __-__. The practical consequences would be severe: under RCRA, hazardous wastes cannot be generated, transported,

treated, stored, or disposed of except in compliance with strict management and permitting requirements. If EPA asserts RCRA jurisdiction over even one such stream, Freeport could not continue its current production activities without major management, production, permitting, and operational changes. Some production activities might become economically or practically unviable.

SUMMARY OF ARGUMENT

EPA's regulations unlawfully and arbitrarily assert RCRA authority over materials that are not discarded.

First, the 2015 rule's mandatory legitimacy factors exceed EPA's statutory authority because they (1) impose handling, storage, and chemical-composition standards on non-discarded materials; and (2) deem the reuse or recycling of many non-discarded, in-process materials to be "sham recycling" because, *e.g.*, the materials are reused or recycled in a different process than the one that generated them. The 2015 rule also unlawfully applied the legitimacy factors to pre-2008 exclusions without record support, and to used-oil recycling without notice and contrary to statute.

Second, although the verified recycler exclusion purports to define "solid waste" in the context of secondary materials sent to third parties for reclamation, at least two of its conditions bear no reasonable relation to "discard." Instead, those conditions constitute affirmative regulation of materials (including petroleum

refinery catalysts) that are not discarded—thus effectively rendering the exclusion a "sham" definition of "solid waste."

Underlying this overreach is EPA's presumption that all materials sent off-site to third parties for reclamation are discarded. That presumption is invalid because it conflicts with this Court's holding in *Safe Food* that mere transfer of secondary materials for recycling is not a good indicator of "discard"; because the studies upon which EPA expressly relies do not support the presumption; because EPA declined to engage commenters' challenges to EPA's data—even though the record shows EPA believed the commenters had valid concerns; and because EPA's presumption arbitrarily conflicts with EPA's historical position that transfer is of little or no relevance. This Court's unpublished judgment in *Solvay USA Inc. v. EPA*, 608 F. App'x 10 (D.C. Cir. 2015) does not govern the transfer issue in this case.

Third, in responding to comments, EPA asserted RCRA authority over off-specification fuels and other products that are used in a normal manner, or further processed for such use. Thus, manufacturers may be compelled to prove that their products are products. Not only does RCRA forbid this result, EPA's present position inexplicably conflicts with its historical position dating to 1985.

STANDING

Petitioners comprise several trade associations and Freeport. Because association members and Freeport are the object of the regulations, their Article III standing is self-evident. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). For the same reason, they "fall[] within the class of plaintiffs whom Congress has authorized to sue." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386-88 (2014).

The associations have standing because (1) their members have standing to sue in their own right; (2) the interests they seek to protect are germane to their associational purposes; and (3) neither the claims asserted nor the relief requested requires any individual member's participation. *See Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002).

API's standing is further supported by the Declaration of Mark Deese (*see* Addendum 2). To summarize, Phillips 66 Company is injured because its spent catalysts are subject to more stringent (and costly) regulation than petitioners maintain is lawful or justified in the record. Vacating the challenged regulatory requirements would redress that injury. EPA's assertion of RCRA authority over burning or reclamation of off-specification fuels would cause Phillips 66 Company to incur additional costs to ensure its practices meet the new legitimacy factors. Vacatur of EPA's assertion of authority would redress this injury.

Freeport's standing is supported by the Declaration of William E. Cobb (*see* Addendum 2). As it explains (¶¶ 13-39), Freeport: (1) is directly regulated because it must modify its use and management of certain non-discarded, in-process secondary materials to comply with the 2015 rule's mandatory legitimacy factors and document that compliance, (2) is effectively regulated because the challenged rule, *e.g.*, imposes caps on the concentration of certain chemical constituents, and (3) now faces a dramatically increased enforcement risk.

ARGUMENT

I. Standard Of Review

RCRA incorporates the Administrative Procedure Act's standard of review, which requires setting aside agency action that, *inter alia*: is arbitrary, capricious or otherwise unlawful; exceeds statutory jurisdiction; or does not observe procedures required by law. 42 U.S.C. §6976(a) (citing 5 U.S.C. § 706). In determining whether EPA exceeded its statutory jurisdiction, "the court . . . must give effect to the unambiguously expressed intent of Congress," *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984), and set aside agency interpretations that are unreasonable or "arbitrary or capricious in substance," *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 53 (2011).

II. EPA Cannot Lawfully Impose The New Mandatory Legitimacy Factors.

A. By Subjecting *All* "Hazardous Secondary Materials," Including Material Covered By Pre-2008 RCRA Exclusions, To Mandatory "Legitimacy" Factors, EPA Unlawfully Regulates Non-Discarded Materials.

RCRA unambiguously limits EPA jurisdiction to materials that are "discarded" in the ordinary sense of that term. *See* 42 U.S.C. § 6903(27); *American Mining*, 824 F.2d at 1192-93. Unless and until a material is "disposed of, thrown away, or abandoned," EPA cannot regulate it or the process using it, under RCRA. *American Mining*, 824 F.2d at 1190.

This Court has consistently held that secondary materials cannot be "discarded" if they are destined for beneficial reuse or recycling, including in an ongoing industrial process, and has repeatedly rejected EPA's efforts to impose legal conditions and duties on such materials. In *American Mining*, EPA sought to regulate certain "in-process secondary materials" in the petroleum and mining industries. *Id.* at 1181. These materials included ores that were reprocessed in an ongoing refining process, and dusts that were recycled or reused in processes other than the process that created them. *Id.* This Court held that those secondary materials were not "discarded" because "they are destined for beneficial reuse or recycling in a continuous process by the generating industry." *Id.* at 1186 (emphasis omitted). This Court refused to defer to EPA's interpretation of RCRA

because "the term 'discarded' is neither inherently difficult to define nor [] so intimately tied to knowledge of the industry and the practicalities of regulation that definition requires agency expertise." *Id.* at 1184 n.7.

This Court again corrected EPA's overreach in *Association of Battery Recyclers v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000). There, EPA sought to regulate "residual or secondary materials generated in mining and mineral processing operations." *Id.* at 1050. It classified such materials as "solid waste," unless they were stored in certain "tanks, containers, buildings, or on properly maintained pads"—regardless of how long materials were stored. *Id.* at 1051. This Court held, as a matter of "clear [statutory] meaning," that EPA exceeded its jurisdiction because "*at least some* of the secondary material EPA seeks to regulate as solid waste is destined for reuse as part of a continuous industrial process and thus is not abandoned or thrown away." *Id.* at 1052, 1056 (emphasis added). This Court rejected, and refused to defer to, EPA's interpretation that secondary materials should presumptively be considered "discarded" unless they are recirculated into a recovery process with "no interdiction in time." *Id.* at 1052.

This Court has repeatedly affirmed these holdings. *See, e.g.*, *Safe Food*, 350 F.3d at 1268; *API II*, 216 F.3d at 55-56. To be sure, it has granted EPA some deference when applying the term "discarded" in other circumstances, where discard actually appeared to be occurring. *See Battery Recyclers*, 208 F.3d at

1056. For example, this Court sustained EPA's interpretation for materials that are "*not* part of ongoing industrial processes" and had "become part of the waste disposal problem." *American Mining Cong. v. EPA*, 907 F.2d 1179, 1186 (D.C. Cir. 1990) (wastewater "sludges" stored for potential future recycling); *API v. EPA*, 906 F.2d 729, 741 (D.C. Cir. 1990) ("*API I*") (sludges sent for reclamation "as part of a mandatory waste treatment plan"). But EPA receives no deference when seeking to regulate secondary materials destined for recycling or reuse "as part of a continuous industrial process and thus [] not abandoned or thrown away." *Battery Recyclers*, 208 F.3d at 1054-56.

The 2015 rule violates these principles and precedents in numerous ways.

1. *The Third Legitimacy Factor Exceeds EPA's Statutory Authority By Regulating Materials That Are Not "Discarded."*

Battery Recyclers held that EPA cannot define "solid waste" in a manner that imposes substantive requirements on non-discarded materials. *Id.* at 1052. But the 2015 rule does precisely that.

The third legitimacy factor effectively imposes EPA-crafted standards for handling and storing non-discarded material.[4] For instance, it provides that recycling hazardous secondary materials with "no analogous raw material" is

[4] *See* 2011 Freeport Comments 13 & n.55, JA __ & __; National Mining Association Comments 5, 13 (Oct. 19, 2011), EPA-HQ-RCRA-2010-0742-0111, JA __, __; Freeport Presentation 6, JA __.

"legitimate" only if the materials are "contained." 40 C.F.R. § 260.43(a)(3). To avoid being deemed "discarded" and thus "solid waste," materials must be "held in a unit" meeting EPA's specifications, including being "in good condition, with no leaks or other . . . releases," "designed . . . to prevent [such] release[s]," and "properly labeled." *Id.* § 260.10.

These provisions are impermissible under *Battery Recyclers*, 208 F.3d at 1051. First, they make the "manner of storage" the "dividing line between 'waste' and nonwaste," without any connection to the concept of "discard." *Id.* Thus, EPA is regulating the handling and storage of "secondary material held for recycling in production," even though the materials "are obviously" not discarded. *Id.* Indeed, under the third factor, being "contained" is a *condition* of qualifying as not discarded, on an ongoing basis. Second, the 2015 rule makes no distinction based on "[h]ow long the materials are stored" and therefore applies even if the materials are "placed on the ground for only a few minutes before being put back into the production process." *Id.* EPA thus imposes obligations on how hazardous secondary materials are handled before any recycling activity (legitimate or sham) occurs, regulating materials part of a "continuous industrial process" without reference to whether they are "discarded." *See id.* at 1056.

2. *The Fourth Legitimacy Factor Unlawfully Regulates, and Deems "Sham Recycled," Materials That Are Not Discarded*

The fourth legitimacy factor has related defects. In the guise of defining "solid waste," it prescribes the acceptable chemical composition of products and intermediates involved in production processes—materials even EPA admits are not "discarded." It does so by allowing recycling to be "legitimate" only if "[t]he product of the recycling process" is "comparable to a legitimate product or intermediate." 40 C.F.R. § 260.43(a)(4). EPA effectively imposes substantive regulation through a jurisdictional backdoor, dictating the composition of both primary "product[s] of recycling" and "secondary materials" used in their production, and thereby limiting what products or intermediates can enter or exit the recycling process. EPA asserts wide discretion to select a particular "product" or "analogous product," choose particular chemical constituents for comparison, and deem secondary materials "discarded."

In particular, the fourth factor exceeds EPA's statutory authority in at least four ways.

One: Subparagraph (i)(B) allows EPA (or state regulators acting by delegation) to deem recycling activities a "sham" if the "product of the recycling process" has a slightly different chemical composition than an "analogous

product."[5] *Id.* § 260.43(a)(4)(i)(B). Similarly, subparagraph (i)(A) allows EPA to deem recycling activities illegitimate if the "product" exhibits a hazardous characteristic not exhibited by an analogous product. *Id.* § 260.43(a)(4)(i)(A). EPA can select the "analogous product" and use a difference in chemical composition (or hazardous characteristic) to deem recycling a "sham"—*e.g.*, if the concentration level of "any" one of 400 potential hazardous constituents is higher than and not "comparable to" the level in the "analogous product." *Id.*[6] For instance, if sulfuric acid from a copper smelter contains trace concentrations of constituent "X" (present in naturally occurring ores), and EPA selects a grade of sulfuric acid without X (produced from different raw materials), EPA can declare the smelter's acid-production to be "sham recycling." That is so, even though the sulfuric acid is never disposed of, abandoned, or thrown away—but rather used or sold as a valuable commodity. *See id.* § 261.2(b)(4), (g).

Alternatively under subparagraph (i)(B), if "recognized commodity standards and specifications" "specifically address" the "levels" of relevant

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[5] *See*, *e.g.*, 2011 Freeport Comments at 31-32, JA __-__; Comments of Society of Chemical Manufacturers & Affiliates at 19-20 (Oct. 20, 2011), EPA-HQ-RCRA-2010-0742-0158, JA __-__; National Mining Association Comments at 9-10 & n.6, 12-13, 16, JA __-__.

[6] Even where materials can satisfy subparagraph (i)(B), regulated entities apparently must sample and analyze their products, and analogous products of their competitors, for relevant constituents at the single digit part-per-million range, *see* 80 Fed. Reg. at 1727.

hazardous constituents, *id.* § 260.43(a)(4)(i)(B), the 2015 rule frees EPA to select the most restrictive standard, effectively capping the maximum acceptable level of that constituent.[7]

The fourth factor thus puts industry to an impossible choice: either change production processes to generate hazardous secondary materials with less or none of a particular constituent (if that is even possible), or face full-blown RCRA regulation. And it unlawfully allows EPA to impose de facto ceilings on the chemical composition of not-yet (or not-ever) discarded secondary materials and products of recycling.

Two: Even where there is no "analogous product," subparagraph (ii)(A) of the fourth factor again allows EPA to deem recycling illegitimate if the "product of the recycling" does not meet "widely recognized commodity standards and specifications." *Id.* § 260.43(a)(4)(ii). EPA can again impose de facto ceilings on chemical constituents by selecting standards and specifications with slightly different composition and thereby deeming recycling to be illegitimate.

Three: Subparagraph (ii)(B) allows EPA to deem recycling illegitimate if a hazardous secondary material is not "returned to the original process or processes

[7] In reality, commodity standards are typically framed in terms of target *purity* levels (e.g., 18 karat refers to 75% pure gold), rather than setting levels for *impurities*—particularly not low concentration levels of non-key constituents. Accordingly, the "commodity standard" alternative in subparagraph (i)(B) often is illusory.

from which [it] w[as] generated." *Id.* §260.43(a)(4)(ii)(B). This requirement is akin to that struck down in *American Mining*, which held that certain mining dusts had not been "discarded," even though they were recycled "in production processes different from the one from which the dusts were originally emitted." 824 F.2d at 1181, 1193. Essential to that holding is the principle that secondary materials cannot be deemed "discarded" simply because the generating industry recycles them in a different process. *Battery Recyclers* explained that an "ongoing industrial process" could include reclaiming mineral-bearing dust that was not "returned to the zinc production process" that produced it, but instead used in other "on-site cadmium recovery operations." 208 F.3d at 1053-54.

But subparagraph (ii)(B) of the fourth legitimacy factor does just that.[8] If a product of recycling has no "analogous product" and does not meet "widely recognized commodity standards and specifications," it will now be deemed "discarded" unless the hazardous secondary material is "returned to the original process or processes from which [it] w[as] generated." 40 C.F.R. § 260.43(a)(4)(ii)(B). Effectively, EPA has stated that only "closed loop recycling" (a term which triggers a bevy of regulatory conditions and requirements

[8] *See* 2011 Freeport Comments 3, 31, JA __, __; Precious Metal Producers Comments 12, 15-16 (Oct. 20, 2011), EPA-HQ-RCRA-2010-0742-0340, JA __, __-__; Newmont Mining Corp. Comments 21-22 (Oct. 20, 2011), EPA-HQ-RCRA-2010-0742-0220, JA __-__; Freeport Presentation 13, JA __.

associated with "hazardous waste" recycling, *see id.* § 261.4(a)(8)) counts as legitimate. *Id.* That exceeds EPA's authority. *See American Mining*, 824 F.2d at 1181, 1193.

Four: Even subparagraph (iii) unlawfully dictates the composition of non-discarded materials.[9] *See* 40 C.F.R. § 260.43(a)(4)(iii). Though presented as an alternate means for companies to "demonstrate" that a particular recycling activity is "legitimate," it requires recyclers to show a "lack of exposure from toxics in the product," a "lack of the bioavailability of the toxics," or lack of "a significant human health or environmental risk." *Id.* As a practical matter, these requirements regulate the composition and characteristics of deliberately created "products" that are not "discarded," and thus beyond RCRA jurisdiction.

Worse still, EPA's criteria for differentiating "legitimate" from "sham" recycling—such as risk to human health—have no relation to whether material is "discarded," and are therefore unlawful and arbitrary. *See Battery Recyclers*, 208 F.3d at 1051; *cf. Int'l All. of Theatrical & Stage Employees v. NLRB*, 334 F.3d 27, 34-35 (D.C. Cir. 2003) (rejecting agency interpretation that "upsets the statutory balance . . . and leads to irrational results"). The mere fact that a recycling process produces or involves a substance (e.g., a valuable industrial solvent) that is

[9] *See* 2011 Freeport Comments 25-26, 31, JA __-__; National Mining Association Comments 14, JA __.

bioavailable or may affect health or the environment does not mean that—and indeed, has no connection to whether—the substance is "discarded." For instance, many pharmaceuticals are valuable precisely *because* they are bioavailable and have toxic properties that affect target receptors (e.g., bacteria); the mere fact of bioavailability is not an indicator of "discard."[10] Finally, any supposed flexibility is ultimately *illusory*, because compliance with subparagraph (iii) means only that material "*may*" or "*can* be shown" to be legitimate—not that it will be presumed or deemed legitimate. 40 C.F.R. § 260.43(a)(4)(iii) (emphases added). An agency cannot reserve such discretion, or offer illusory "relief," when it lacks jurisdiction to regulate in the first instance.

* * *

The practical effect of these provisions is indistinguishable from direct regulation, because industry is put to the choice of either: (1) changing its production processes to yield secondary materials or "product[s] of . . . recycling" with different chemical composition, while also meeting an array of duties and conditions; or (2) having recycling activity deemed a "sham" and subject to full-blown RCRA regulation—despite the fact that the secondary material is not actually "discarded."

[10] Under subparagraph(iii) , a pharmaceutical pill produced with recycled hazardous secondary materials (e.g., a recycled solvent) would evidently be deemed "hazardous waste," but not the same pill produced with virgin materials.

B. The New Legitimacy Factors Unlawfully Assert RCRA Jurisdiction Over Numerous In-Process Materials That Are Not Discarded.

The extent of EPA's jurisdictional overreach is highlighted by considering how the 2015 rule regulates certain in-process secondary materials that cannot be understood (and have never been understood, even by EPA) as "discarded."

1. *Copper Smelters Produce Valuable "Copper Revert" That Is Effectively Regulated, And Could Be Deemed "Hazardous Waste," Under The 2015 Rule.*

a. Smelting copper ore to produce commercial-grade pure copper metal creates "revert"—partly-refined pieces of copper that are fed back ("reverted") into the smelting process. Revert is typically 50-95% pure copper, as compared to the 0.1% copper concentration in ores. *See* Freeport Presentation 13, JA __. Revert includes metal that has cooled on the inside of ladles, drips, splashes, and spills. At Freeport's facilities, reverts are stored on the ground for cooling, then crushed or otherwise re-sized and fed back into the smelting process.

In 2002, EPA concluded that because reverts "contain copper values several orders of magnitude higher than ore," material that "could be considered 'waste-like' in other industries" is instead a crucial "means of recovering copper." EPA, Warning Letter and Certification of Violation Correction 8 (Apr. 9, 2002) ("Inspection Report"; Exhibit 1 to Freeport Presentation), JA __.

Revert has significant market value, and Freeport stores, buys, and sells it depending on business needs. *See* Inspection Report 9, JA __. Revert also serves an important operational role. The Miami smelter cannot operate without cooled, partially-processed copper to moderate smelter furnace temperatures—essentially, "ice cubes" for the exothermic chemical reactions occurring in baths of molten copper. *Id.*, JA __. Given their commercial and operational value, copper reverts are not "discarded"; rather, in EPA's words, "they are pieces of copper being used as copper." *Id.*, JA __.[11]

b. Under the 2015 rule, however, it is doubtful whether copper revert could satisfy the legitimacy factors—and even if it does, the rule imposes duties and conditions on its use. Under the third factor, recycling activity is a "sham" unless the secondary material is managed consistent with an "analogous raw material" or, where there is no such analogous raw material, is "contained." 40 C.F.R. § 260.43(a)(3). The 2015 rule does not define "analogous raw material," but as a matter of plain meaning, there are no obvious "analogous raw material[s]" to revert—which has a copper concentration orders of magnitude higher than ores. As a result, revert evidently must be "contained."

[11] Freeport's Miami smelter produced and recycled more than 35 million pounds of copper revert in 2012. The disposal of that revert as "hazardous waste," rather than use in production, would have lost $165 million in copper that year—*excluding* the cost of purchasing millions of pounds of replacement copper to cool the furnaces. *See* Freeport Presentation 15, JA __.

EPA's definition of "contained" includes "land-based unit[s]," but does not appear to fit with storage of partly-refined copper revert. Under the rule's text, revert must be stored in a "unit" that prohibits "leaks or other continuing or intermittent unpermitted releases" (including "releases through surface transport by precipitation runoff, releases to soil and groundwater, [and] wind-blown dust") and the "unit" must be "designed . . . to prevent releases of hazardous secondary materials." 40 C.F.R. § 260.10. For operational and technical reasons, Freeport handles revert on the ground. Revert is generated at very high temperatures, and must cool before being manipulated, resized, or re-introduced into the smelting process. Large pieces must be crushed or broken, using heavy equipment. Even assuming "containment" units could be built, these temperatures and handling practices would quickly damage them.

Nothing in the rule, however, constrains EPA from asserting that copper revert is not "contained." Although the *Frequent Questions* document contains favorable discussion of "scrap metal" generally, it provides no assurance—simply stating that metal stored on the ground "*could be* considered 'contained.'" *Frequent Questions* at 9. Moreover, the document does not "substitute for the actual laws and regulations themselves." *Id.* at 1 n.1. Even if revert is in a qualifying "unit," it must still be "labeled" or logged continuously. 40 C.F.R.

§ 260.10. And even if revert satisfies all four legitimacy factors, the Rule requires continuous documentation. *See* 80 Fed. Reg. at 1755-56.

Essentially, EPA has asserted authority to regulate in-process material that is 50-95% pure copper and necessary to ongoing production. *See Battery Recyclers*, 208 F.3d at 1051. Indeed, *Battery Recyclers* explicitly identified copper revert "at [the] Miami smelter" as "[a]n example" of legitimate "reclaiming" of valuable "secondary material." *Id.* at 1054 n.2; *see also id.* ("The revert inventory is constantly in process of being reused."). Finally, EPA itself has concluded that reverts "are not solid wastes" because they "are typically used by returning them directly into the ongoing smelting process." Inspection Report 9, JA __.

Despite these clear authorities, EPA's latest rule appears to require Freeport to change its management and use of revert, and to comply with EPA's new conditions and legal duties to ensure it qualifies as "contained." EPA lacks authority to mandate such changes, because revert is not "discarded."

2. *Freeport Also Produces And Uses A Valuable Weak Sulfuric Acid Solution To Produce Copper Through Hydrometallurgy.*

a. At the Miami smelter, gases generated during the smelting process are routed to an "acid plant"—i.e., a facility designed to purify those gases and convert sulfur dioxide into sulfuric acid. *See* 2004 Freeport Comments 12, JA __. This approach prevents emissions that might otherwise contribute to air pollution, while

generating a valuable commodity—i.e., commercial-grade concentrated sulfuric acid. The acid plant also produces a less-concentrated "weak" acid solution, containing water, sulfuric acid, and copper, as well as other constituents from the naturally occurring ore. *Id.* at 14-15, JA __-__.[12]

Weak acid is a valuable input for Freeport's land-based "heap leaching" production facilities. The in-process weak acid extracts the copper metal into liquid solution; the liquid is then collected and copper "electroplated" out of solution, to create pure, solid copper. *E.g.*, 2007 Freeport Comments 7-8, JA __-__.

In 2002, EPA determined that this production and use of "weak acid" was entirely legitimate under then-applicable (and non-mandatory) guidance. *See* Inspection Report 16-20, JA __-__. EPA said the "weak acid" substitutes for acid and water that Freeport would otherwise purchase, derives "all of its acid value and toxic metals from the sulfates and metals originally in the furnace [ore] feedstock," and is used to leach copper, not dispose of the toxic metals present in the solution. *Id.* at 18-20, JA __-__.

The 2015 rule, however, imposes new conditions and duties on the use of weak acid, and as explained below, appears to deem weak acid a "hazardous

[12] *See* 2011 Freeport Comments 31-32, JA __-__; Freeport-McMoRan Inc. Comments 7-8 (June 25, 2007), EPA-HQ-RCRA-2002-0031-0528 ("2007 Freeport Comments"), JA __-__.

waste," implicating full-blown RCRA regulation. The latter outcome would impose significant operational and financial costs: in 2013, Freeport estimated that disposing of weak acid as "hazardous waste" (instead of re-using it) would involve significant costs: e.g., construction of a $30 million on-site treatment plant. *See* Freeport Presentation 15, JA __.

b. By imposing the fourth legitimacy factor on all recycling, including Freeport's production and use of the in-process weak acid solution, the 2015 rule upsets EPA's longstanding regulatory regime and exceeds the Agency's authority.

EPA's fourth legitimacy factor appears to give EPA wide berth to select sulfuric acid from other sources as the relevant "analogous" product to weak acid. Section 260.43(a)(4) deems recycling activity to be a "sham" if the relevant "product of the recycling" (which EPA apparently could designate as weak sulfuric acid) "exhibit[s] a hazardous characteristic . . . that analogous products do not exhibit," or has concentrations of hazardous constituents that are not "comparable to or lower than" the "analogous product" or in qualifying "commodity standards." *Id.*[13]

Because weak acid at Miami derives from raw copper ores, it contains trace constituents (including copper, which itself is later recovered through the heap

[13] Under § 260.43(a)(4)(i)(B), commodity standards must "include levels that specifically address th[e] [relevant] hazardous constituents." To Freeport's knowledge, no such standard exists for its weak sulfuric acid solution.

leach process) that are absent in acids produced from different feedstocks (e.g., raw sulfur). The rule does not appear to prevent EPA from selecting such acids as the relevant "analogous product," thereby forcing Freeport either to (1) undertake an "assessment" of the weak acid under § 260.43(a)(4)(iii), (2) modify production processes (if possible) to change the weak acid's composition; or (3) accept full-blown RCRA regulation because its weak acid contains constituents EPA's "analogous product" does not.

The same is true for the concentrated, commercial-grade sulfuric acid that is a *co-product* of the Miami smelter. While extremely pure, this acid contains trace constituents (e.g., copper) not present in acid from other raw materials. Because sulfuric acid from different feedstocks is often fungible in the marketplace, EPA could select one such acid as the "analogous product," potentially deeming a smelter's acid *production* process as illegitimate "sham recycling" because the constituents levels are not "comparable to or lower than" those in EPA's chosen acid.[14]

[14] Similarly, the rule apparently permits EPA to treat pure sulfuric acid and water as the "analogous product," and weak acid as a "product of the recycling process" that is used as a substitute for pure acid and water in the leaching process. Because Freeport cannot control the chemical composition of naturally occurring ores, weak acid would appear to fail the fourth legitimacy factor under this approach.

EPA's *Frequent Questions* document does not remedy this defect. It addresses only materials "returned to the original production process," such as metal "ores." It is silent about whether weak acid generated during copper smelting qualifies as "returned to the original production process" when used for the heap-leach, not the smelting operation. And by its terms, the document does not bind EPA prospectively.

Even if Freeport developed a regulatory assessment and self-certified that the sulfuric acid "recycling" process is "legitimate" under 40 C.F.R. § 260.43(a)(4)(iii), Freeport would expend time and resources to satisfy those new regulatory obligations. The 2015 rule provides no assurance that such a determination would be sustained. Regulators might disagree with Freeport about whether sulfuric acid satisfies the rule's new standards focused on "exposure," "bioavailability," and the presence of any hypothetical "significant human health or environmental risk." The permissive, ambiguous language ("may be shown," "can be shown," and "significant") gives regulators discretion to reject such determinations and self-certifications, and subject the materials to full-blown RCRA regulation as "hazardous waste." Even if in-process weak acid satisfies all the legitimacy factors, it must still be "labeled" or logged, 40 C.F.R. § 260.10, and Freeport must perform sampling and analysis for comparability determinations, *id.* § 260.43(a)(4)(i)-(ii), and document compliance, 80 Fed. Reg. at 1755-56.

In short, EPA is regulating reverts and weak acid under RCRA, even though they are not "discarded," but rather are valuable inputs that Freeport would have to replace with other materials. *See* Inspection Report 16-20, JA __-__. The end result of treating reverts and weak acid as "sham" recycled would be perverse: to avoid potentially crippling RCRA liability, enforcement actions, and citizen suits, *see* 42 U.S.C. § 6972(a), Freeport would likely have to start managing these valuable in-process materials as "hazardous waste," instead of re-using them. In other words, in attempting to reduce the amount of hazardous waste, EPA has achieved precisely the opposite result, exacerbating the problem Congress sought to solve by enacting the Resource *Conservation* and Recovery Act.

C. The Administrative Record Does Not Support Applying The Legitimacy Factors To All Pre-2008 Exclusions.

Over several decades, EPA adopted numerous regulatory exclusions, each based on exhaustive analysis, record support, and the Agency's conclusion that certain materials, when recycled in the manner detailed by regulation, should not be regulated as solid waste. *E.g.*, 40 C.F.R. § 261.4(a)(8) (closed-loop reclamation). EPA has not previously made mandatory legitimacy factors a precondition for these exclusions. Moreover, in the 2015 rulemaking, EPA conceded that the current administrative record does not support imposing mandatory conditions on all pre-2008 exclusions. *See* 80 Fed. Reg. at 1741 ("more

information is needed prior to taking final action on specific conditions of the pre-2008 recycling provisions."); *Frequent Questions* at 4 (record "not adequate" for "across-the-board conditions"). Inexplicably, EPA did exactly that, imposing the codified legitimacy factors on *all* recycling of hazardous secondary materials—including the pre-2008 exclusions. 40 C.F.R. § 260.43. Such "internally inconsistent" reasoning, and the lack of record support, is arbitrary and capricious. *General Chem. Corp. v. United States*, 817 F.2d 844, 846 (D.C. Cir. 1987).

D. EPA Applied The Legitimacy Factors To Used-Oil Recycling Without Notice Or Opportunity For Comment And Contrary To Statutory Authority.

The 2015 rule applies the legitimacy factors to the recycling of *all* hazardous secondary materials, including used oil. *See* 40 C.F.R. § 260.43. But the 2011 proposed rule listed only a specific group of 32 hazardous waste exemptions, to which the legitimacy factors would apply. *See* 76 Fed. Reg. 44,093, 44,139 (July 22, 2011), JA __, __. The list omitted 40 C.F.R. § 261.6(a)(4), applicable to used oil exhibiting a hazardous characteristic but otherwise regulated under 40 C.F.R. part 279. The 2011 proposed rule therefore did not provide notice or opportunity to comment on whether the legitimacy factors should apply to recycling that subset of used oil. This procedural defect was prejudicial, and requires vacating EPA's application of the legitimacy factors to this subset of used-oil recycling.

The 2015 rule violates the Used Oil Recycling Act, which directs EPA to ensure that its regulations do not "discourage" used-oil recycling, consistent with the protection of human health and the environment. 42 U.S.C. § 6935(a). Under the 2015 rule, however, recyclers must assess whether used oil is a secondary material and exhibits a hazardous waste characteristic. If so, recyclers must determine whether it meets the legitimacy criteria, including whether the recycled product has hazardous characteristics comparable to a legitimate product or intermediate. These analyses and requirements go beyond the specific requirements for used-oil recycling in 40 C.F.R. § 279.11, and must be performed prior to managing the used oil under the comprehensive standards in 40 C.F.R. part 279. Imposing these additional restrictions on used-oil recycling violates Congress's directive that EPA "not discourage the recovery or recycling of used oil." 42 U.S.C. § 6935(a).

III. In The Guise Of Defining "Solid Waste," The Verified Recycler Exclusion Unlawfully Regulates Materials Transferred For Recycling That Are Not "Discarded."

A. EPA's Presumption That Materials Transferred For Recycling Are Discarded Is Contrary To Law And Arbitrary.

Underlying EPA's assertion of RCRA authority over secondary materials transferred for reclamation (in lieu of disposal)—manifest in the conditions

imposed upon the 2015 verified recycler exclusion—is the broad presumption that such transfers constitute "discard." In the preamble, EPA found it

> reasonable to conclude that transfers of hazardous secondary materials to third-party recyclers generally involve discard except for instances where EPA has evaluated and promulgated a case-specific exclusion that a hazardous secondary material is not a solid waste.

80 Fed. Reg. at 1707. This presumption not only conflicts with this Court's precedent, but also rests upon speculation, unproved theories, and unanswered challenges from commenters.

1. *EPA's Presumption Conflicts With This Court's Precedent.*

In *Safe Food*, this Court held that "firm-to-firm transfers are hardly good indicia of a 'discard' as the term is ordinarily understood." 350 F.3d at 1268. The petitioners there challenged EPA's conditional exclusion of certain secondary materials that were transferred to third parties for use in producing fertilizer. Petitioners claimed that "as a matter of plain meaning, the materials in question are 'discarded' even though they are recycled in a useful product." *Id.* Petitioners further claimed that this Court's cases on "solid waste" had held that "material that is transferred to another firm or industry for subsequent recycling must always" be discarded. *Id.*

The Court denied that it had ever held that transferred materials must be considered discarded. *Id.* As for whether transfer equals "discard" as a matter of "plain meaning" (versus a matter of precedent), this Court concluded:

> Although ordinary language seems inconsistent with treating immediate reuse within an industry's ongoing industrial process as a "discard," . . . *the converse is not true*. . . . [F]irm-to-firm transfers are hardly good indicia of a "discard" as the term is ordinarily understood.

Id. (emphasis added).

This Court's conclusion that transfer is not a good indicator of "discard" was integral to its decision not to reverse EPA on statutory grounds, as the *Safe Food* petitioners requested. Thus, that conclusion was a holding, which EPA may not ignore. *See Aamer v. Obama*, 742 F.3d 1023, 1035 (D.C. Cir. 2014) (statement that is "integral to our ultimate disposition of the case . . . constitutes binding precedent.").

It is true that under *API I* and *Safe Food*, EPA may determine that particular secondary materials sent to third-parties have become "part of the waste disposal problem" and thus are "discarded" and "solid wastes." But under *Safe Food*, EPA may not create a broad presumption that mere transfer equals discard, as it has done here.

2. *EPA's Presumption Rests Upon Speculation, Unproved Theories, And Unanswered Comments.*

Assuming *arguendo* that *Safe Food* would permit EPA to create the broad presumption that transfer equals discard, EPA would need a very strong record to do so. No such record exists here.

a. Problems Study

EPA relies primarily upon two studies. *See* 80 Fed. Reg. at 1707. The first, entitled *An Assessment of Environmental Problems Associated with Recycling of Hazardous Secondary Materials* ("Problems Study"), went through several iterations, the most recent of which is dated December 10, 2014. EPA-HQ-RCRA-2010-0742-0370, JA __.

As of the 2014 iteration, the Problems Study identified 250 instances where recycling had caused some form of environmental damage. Problems Study 5, JA __. But the study never attempted to address whether this number has any significance.

According to the other study upon which EPA relies, the Problems Study's "goal" was "to identify and characterize as many cases of environmental damage as possible that have [*sic*] attributed to some type of hazardous material recycling activity and have occurred after 1982." EPA, *A Study of Potential Effects of Market Forces on the Management of Hazardous Secondary Materials Intended*

for Recycling ("Market Study") 44 n.12 (2006), EPA-HQ-RCRA-2002-0031-0358, JA __. So the Problems Study's goal was not to determine how big a part of the recycling universe any cases of environmental damage involving recycling might be—but simply to find "as many cases of environmental damage as possible." *Id.*

Commenters observed that the 250 cases did not prove anything in isolation, and urged EPA to place them in perspective. Referring to the 223 cases in an earlier iteration of the Problems Study, API asked "[W]hat percentage of all facilities engaged in recycling during the 25-year period do those . . . cases represent? What percentage, by volume, of total hazardous secondary materials recycled . . . did *not* result in any apparent environmental damage?" API Comments 11 (Oct. 20, 2011), EPA-HQ-RCRA-2010-0742-0175, JA __.

API pointed out that the 223 identified damage cases EPA identified "would represent just two percent of 10,254 facilities involved in recycling" and thus "it could be said that well over 98 percent of recycling operations do not result in environmental damage." *Id.* at 12, JA __-__. Additionally, API cited statistics from the National Response Center showing that *each year* the Center receives over 30,000 environmental incident reports, the vast majority of which presumably involve raw materials or products. *Id.* at 12-13, JA __-__. API queried

> [I]f EPA believes the potential for causing environmental damage characterizes an activity as involving discard (a premise API disputes), should EPA not test its belief against a complete set of

> facts? If management of indisputably *non-discarded* materials (raw materials, products, etc.) has similar potential for causing environmental harm, how can EPA conclude that such potential tends to *define* discard?

Id. at 12, JA __.

Other commenters raised similar concerns. The Federal Recycling and Remediation Coalition pointed out that a mere 223 damage cases, out of the thousands of facilities transferring material for recycling, did not support EPA's conclusion that "most transfers of hazardous secondary material for recycling do involve discard." Federal Recycling and Remediation Coalition Comments 6 (Oct. 20, 2011), EPA-HQ-RCRA-2010-0742-0255, JA __. Others observed that "[t]he damage cases demonstrate that only a very small percentage of recycling activities result in environmental harm." American Foundry Society Comments 4 (Oct. 20, 2011), EPA-HQ-RCRA-2010-0742-0246, JA __.

Moreover, while EPA ultimately condemned third-party, off-site recycling, the Problems Study upon which EPA relies did not reach any conclusion about whether such recycling poses greater environmental risks than generator-controlled recycling. The study noted that 92 percent of the damage cases involved off-site recycling—but cautioned that the significance of this was unclear:

> The small number of on-site recycling damage cases may indicate that this type of recycling is inherently less environmentally risky than recycling at off-site commercial facilities. *However, it may also be that on-site recycling is simply a less common practice, or that these*

> *types of damage cases are less well documented, and thus more difficult to identify than cases involving commercial recyclers.* In any case, . . . several of the *on-site* damage cases . . . were apparently among the most expensive cleanup sites that we documented.

Problems Study 8 (emphasis added), JA __.

In fact, the Market Study presents data suggesting that the vast majority (75 percent) of recycled secondary materials *are* recycled *off-site*, Market Study 14, JA __, which would confirm that "on-site recycling is simply a less common practice," Problems Study 8, JA __. Additionally, yet another EPA analysis concluded—at least qualitatively—that "[t]he hazards for off-site recycling facilities are generally the same as those for on-site recycling processes." 1 EPA, *Potential Adverse Impacts Under the Definition of Solid Waste Exclusions* 28 (2014), EPA-HQ-RCRA-2010-0742-0371(2), JA __.

Thus, on the current record, EPA does not know whether recycling is a particularly risky activity—much less whether off-site or on-site recycling is substantially riskier. EPA's presumption that transfer equals "discard" is based upon speculation, and therefore arbitrary and capricious.

Moreover, EPA did not provide a reasoned response to commenters' concerns about the data. EPA apparently thought the commenters had a good point, but dodged it by treating the comments as limited to questioning EPA's proposal to add conditions to the pre-2008 exclusions:

> Regarding other comments . . . including comments . . . on comparing the number of damage cases to the total number of affected entities, EPA agrees with commenters that more information is needed prior to taking final action on specific conditions of the pre-2008 recycling provisions.

80 Fed. Reg. at 1741.

But the comments were not so limited. *See* API Comments 2, 12-13, JA __, __-__; Federal Recycling and Remediation Coalition Comments 6, JA __; American Foundry Society Comments 1, 3-5, JA __, __-__. The Agency's failure to respond cogently to the commenters' concerns about a central aspect of the proposal was arbitrary and capricious. *Delaware Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 13-14 (D.C. Cir. 2015).

Because EPA's reliance upon the Problems Study was arbitrary and capricious, the Court must set aside EPA's presumption that transfer equals discard. 5 U.S.C. § 706(2)(A). While EPA also relied upon the Market Study (discussed below), it is not clear from the record that EPA would have reached the same conclusion without the Problems Study. Accordingly, the Court may not uphold EPA on the basis of the Market Study alone:

> "[W]hen an agency relies on multiple grounds for its decision, some of which are invalid," we may only "sustain the decision [where] one is valid and the agency would clearly have acted on that ground even if the other were unavailable."

Williams Gas Processing-Gulf Coast Co., L.P. v. FERC, 475 F.3d 319, 330 (D.C. Cir. 2006) (quoting *Casino Airlines, Inc. v. NTSB*, 439 F.3d 715, 717-18 (D.C. Cir. 2006)).

Nonetheless, as shown below, EPA's reliance upon the Market Study was itself arbitrary and capricious.

b. Market Study

EPA says the Market Study "supports the conclusion that the *pattern of discard* at off-site third-party reclaimers is a result of inherent differences between commercial recycling and normal manufacturing." 80 Fed. Reg. at 1707 (emphasis added). As shown above, EPA has no basis to find any such "pattern of discard."

Moreover—although EPA does not announce it—the Market Study was purely theoretical, and did not apply broadly to third-party recycling. First, the study disclaims any empirical support:

> In order to provide further information and support of the ideas expressed in this theoretical analysis, we conducted an in-depth empirical analysis of five selected, commonly recycled hazardous wastes. The original goal of the empirical analysis was to test the various hypotheses that are presented in the theoretical analysis. *However, limitations on the availability and quality of data prevented us from conducting these empirical tests*.

Market Study 43 (emphasis added), JA __. The study makes a similar disclaimer with specific reference to so-called "market failure":

> In addition to those characteristics of firms and recycling markets that would be potentially observable, this paper also discussed kinds of market failure that could contribute to sub-optimal hazardous waste recycling outcomes. *While the sources of market failure discussed in the paper are important, they do not necessarily correlate directly to observable characteristics of the firm or market.*

Id. at 48 (emphasis added), JA __.

Appendix II to the study is entitled "Empirical Analysis." Notwithstanding the title, the text discloses that "[d]ue to data limitations, this section does not present any empirical tests of the hypotheses laid out in the theoretical section." *Id.* at 54, JA __.

Appendix II does provide some background and statistics for five "hazardous wastes" that are often recycled—just nothing that would validate the study's hypotheses.[15] It also cautions that "[t]he selected five materials are not necessarily representative of all hazardous wastes." *Id.*, JA __. Then, although the study's "conclusions" are all purely theoretical anyway, the appendix adds that "the conclusions reached in this paper are not necessarily valid for hazardous wastes, industries and markets other than those analyzed here." *Id.*, JA __.

Thus, again, EPA's conclusion that transfer equals discard rests upon speculation or untested theory. Moreover, in applying the "conclusions" of the Market Study to recycling generally—even though the study says such

[15] The five "hazardous wastes" or secondary materials were lead-acid batteries, brass dust, spent pickle liquor, spent solvents, and used drums.

generalization would not be valid—EPA's conclusion conflicts with the record. For these reasons, EPA's conclusion is arbitrary and capricious.

3. *EPA's Presumption Arbitrarily Conflicts With EPA's Historical Position That Transfer Is Irrelevant.*

Historically, whether a secondary material is recycled on-site by the generator or transferred to a third-party has been of little, if any, importance in EPA's definition of "solid waste." "EPA's presumption of discard [thus] conflicts with EPA's historical approach, dating to 1983." API Comments 20, JA __.

In seeking to justify repealing the 2008 transfer-based exclusion, EPA said

> EPA has developed many . . . conditional exclusions (found in 40 CFR 261.4(a)). In each of these cases, EPA did so by examining the specific hazardous secondary material or the specific recycling practice, or both, before making a determination that the hazardous secondary material is not solid waste. However . . . the 2008 transfer-based exclusion . . . did not focus on the chemical or physical properties of any particular type of hazardous secondary material or on how it is typically managed.

80 Fed. Reg. at 1708.

While this explanation may have superficial appeal, it does not bear scrutiny for two reasons. First, it begged the question of the significance of transfer, because even though EPA asserted that it examined the specifics of each material under previous exclusions, EPA pointed to nothing showing that the issue of transfer had been of particular relevance.

Second, EPA's explanation failed to address major aspects of the historical regulatory definition of "solid waste." It ignored the longstanding provisions that *all* non-listed sludges, *all* non-listed by-products, and *all* commercial chemical products being reclaimed are excluded from EPA's definition of "solid waste." *See* 40 C.F.R. § 261.2(c)(3) and Table 1 (2014).[16] Whether reclamation occurs on-site or off-site has never been relevant to these broad provisions, and EPA certainly did not specially study each material and or reclamation practice covered by these provisions.

Indeed, in promulgating the core of its definition of "solid waste" in 1985, EPA identified only two relevant factors:

> The Agency again emphasizes that to determine if a secondary material is a RCRA solid waste when recycled, one must examine both the material and the recycling activity involved.

50 Fed. Reg. 614, 619 (Jan. 4, 1985). EPA said nothing to suggest the *location* of recycling was important or even relevant.

Thus, EPA's current presumption that transfer equals discard conflicts with EPA's historical position that transfer is of little or no importance to the "discard" inquiry. Commenters challenged EPA on this very point, *see, e.g.*, API Comments 20, JA __, but EPA failed to provide a reasoned explanation for the conflict.

[16] As shown in section IV, below, commercial chemical products historically have not even been considered "secondary materials" when reclaimed, unless used contrary to their normal manner.

Accordingly, EPA's adoption of its current presumption was arbitrary and capricious. *Williams Gas Processing*, 475 F.3d at 326-27. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) ("an agency changing its course must supply a reasoned analysis.").

4. *Solvay Does Not Govern Here.*

On June 3, 2015, a panel of this Court issued an unpublished judgment in *Solvay USA Inc. v. EPA*, 608 F. App'x 10 (D.C. Cir. 2015). That case involved an EPA rule providing procedures for classifying *non-hazardous* secondary materials as "solid wastes" for purposes of Clean Air Act regulation.

Citing *American Chemistry Council v. EPA*, 337 F.3d 1060, 1066 (D.C. Cir. 2003), the panel said, "[U]nder RCRA, Congress wanted EPA 'to err on the side of caution.'" *Solvay*, 608 F. App'x at *13. Further, it said

> EPA is well within its statutory authority to assume that transferred material is solid waste until an interested party demonstrates that the material "has not been discarded and is indistinguishable in all relevant aspects from a fuel product."

Id. For several reasons, *Solvay* does not govern here.

First, *Solvay* is unpublished, meaning that the panel saw "no precedential value" in the decision. Circuit Rule 36(e)(2). It therefore should not be accorded such value here.

Second, *Solvay* involved a different rule and administrative record, and is otherwise distinguishable. *Solvay* dealt with non-hazardous secondary materials, whereas the present rule involves hazardous secondary materials. *Solvay* dealt with transfer of materials to be combusted as fuels, whereas the verified recycler exclusion here does not apply to materials so combusted. The rule in *Solvay* identified materials that when combusted would be considered wastes, subjecting resulting emissions to a specific Clean Air Act section – whereas the present rule governs regulation under Subtitle C of RCRA. Moreover, *Solvay* addressed only the Agency's purported authority to establish a presumption, not the bald speculation upon which EPA based its presumption here.

Third, to the extent *Solvay* may be read to say that RCRA allows the presumption that transfer equals discard, petitioners respectfully submit that the *Solvay* panel erred. The panel's reliance upon *American Chemistry Council* was misplaced. That case dealt with EPA's authority to consider mixtures and derivatives of listed hazardous waste as retaining their status as hazardous wastes. 337 F.3d at 1062. There was no issue of what makes a material "discarded," and therefore, a "solid waste."

Well before *Solvay* and *American Chemistry Council*, it was the law of the Circuit that the term "solid waste" *restrict*s EPA's regulatory authority under RCRA. *American Mining* rested, in part, on the proposition that "[t]he very care

evidenced by Congress in defining RCRA's scope certainly suggests that Congress was concerned about delineating and thus *cabining* EPA's jurisdictional reach." 824 F.2d at 1189 (emphasis added).

In later cases, the Court applied *American Mining* and made clear that EPA bears the burden to establish that a material is "discarded"—if EPA intends to exercise jurisdiction. Occasionally, EPA acknowledges this: "[T]he D.C. Circuit . . . has been very clear that EPA needs to show that materials are discarded to consider them solid wastes." EPA 2014 Response To Comments 14, EPA-HQ-RCRA-2010-0742-0372, JA __.

API II vacated EPA's refusal to exclude in-process oil-bearing refinery wastewaters from the definition of "solid waste," adding that on remand EPA must provide a reasoned explanation of when discard occurs "if EPA wishes to assert jurisdiction." 216 F.3d at 58. Similarly, in *Battery Recyclers*, the Court set aside the regulation of certain mineral processing materials, because "at least some" of the material was not abandoned or thrown away. 208 F.3d at 1056, 1060.

These prior decisions are incompatible with *Solvay's* finding that EPA may "assume" that transferred material is "solid waste" and place the burden upon regulated entities to show their materials should not be regulated. Accordingly, *Solvay* cannot be given effect: "One three-judge panel . . . does not have the

authority to overrule another three-judge panel of the court." *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996).

Petitioners submit that Congress had a very good reason for "cabining" EPA's RCRA authority. Congress wanted to encourage recycling of materials that would otherwise be "needlessly buried" in landfills. *See* 42 U.S.C. § 6901(c). Accordingly, Congress did not want EPA to impose regulatory burdens upon materials *solely* because of their residual nature, but only where they were part of the waste *disposal* problem. The relevant 1976 committee report explained that

> Waste itself is a misleading word . . . . Much industrial and agricultural waste is reclaimed or put to new use and is therefore *not a part of the discarded materials disposal problem the committee addresses.*

H.R. Rep. No. 1491, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6240 (emphasis added). *See American Mining*, 824 F.2d at 1192 (legislative history "refers time and again to the problem motivating the enactment of RCRA as the *disposal* of waste.").

B. In Determining Which Materials Transferred For Reclamation Are "Solid Wastes," EPA May Not Impose Regulatory Requirements Upon Materials That Are Not Discarded.

As shown above, EPA's broad presumption that secondary materials transferred for reclamation are "discarded" is both contrary to law and unsupported

by the record. Thus, EPA may not simply impose whatever requirements it deems appropriate upon such materials.

This Court has made clear that while transfer of secondary materials is not by itself a good indicator of "'discard' as the term is ordinarily understood," *Safe Food*, 350 F.3d at 1268, specific types of transferred materials may be considered "solid wastes" if they "can reasonably be considered part of the waste disposal problem," *id.* *See API I*, 906 F.2d at 740-41. However, in replacing the transfer-based exclusion with the verified recycler exclusion, EPA has gone far beyond defining "discard" (or its absence). Instead, in the guise of defining "solid waste," EPA has imposed highly specific regulatory requirements upon materials that are not "discarded."

No matter how carefully a spent material sent to a third party for reclamation is managed, no matter how valuable the material or its products are, no matter how long the recycling practice has existed—the 2015 rule deems it "discarded," unless the third party either has a RCRA hazardous waste management permit, or has gone through another process of prior government approval for a variance—essentially another permitting process. 80 Fed. Reg. at 1772, 1774, 1775-76 (codified at 40 C.F.R. §§ 260.31(d), 261.2(c)(3) and Table 1, 261.4(a)(24)(v)(B)).

Moreover, the standard for obtaining a variance as a "verified reclamation facility" is vague. The applicant must "*address* the risk . . . to proximate

populations from unpermitted releases" and "must include *consideration* of potential cumulative risks from other nearby potential stressors." 80 Fed. Reg. at 1772 (emphasis added) (codified at 40 C.F.R. § 260.31(d)(6)).

What level of "risk" (if any) will prove acceptable to the Agency is unknowable in advance. In the preamble, EPA said that "[t]he steps the petitioner would take to address this criterion would depend on case-specific circumstances," and that "EPA recommends that the petitioner engage the potentially affected community . . . to ensure that they have addressed the concerns expressed by the community." 80 Fed. Reg. at 1715.

This is *not* a definition of "discard" or its absence. It is a regulatory mandate and an open-ended permitting process. And EPA has imposed it upon materials that EPA has arbitrarily *presumed* are "discarded" merely because they are of a residual nature and have been transferred to third parties for reclamation. Indeed, materials that meet all of the conditions of the 2008 transfer-based exclusion—*but that are reclaimed at a facility that lacks prior government approval*—are treated as solid and hazardous wastes, even though they cannot reasonably be considered part of the "waste disposal problem."

Similarly, the 2015 rule mandates compliance with highly prescriptive emergency response and preparedness requirements. 80 Fed. Reg. at 1772, 1775,

1780-83 (codified at 40 C.F.R. §§ 260.31(d)(4), 261.4(a)(24)(v)(E), 261.400–420). Again, this is a regulatory mandate posing as a definition of "solid waste."

In finalizing the 2008 transfer-based exclusion, EPA recognized that the exclusion's terms adequately served to define the absence of "discard":

> The final rule sets conditions and restrictions that appropriately define when a hazardous secondary material intended for reclamation is being discarded and are appropriate for a wide range of reclamation processes.

EPA 2008 Response To Comments 572, EPA-HQ-RCRA-2002-0031-0604, JA __. In finalizing the 2015 rule, EPA did not withdraw this finding. In fact, EPA said the transfer-based exclusion's conditions had been "developed in a reasoned manner," and cited the 2008 Regulatory Impact Analysis, EPA-HQ-RCRA-2002-0031-0602[1], JA __-__, which contained an analysis of how those conditions addressed environmental risks. 80 Fed. Reg. 1708 & n.10.

What EPA said was missing from the transfer-based exclusion was "oversight and public participation." *Id.* at 1708. So, EPA substituted the verified recycler exclusion (with its permitting requirements) for the transfer-based exclusion so that EPA could regulate *non-discarded* materials to *prevent* their possible *future* discard.

The record makes crystal clear that this is what EPA has done. The preamble states:

> By adding the condition of requiring the recycler to obtain a solid waste variance or have a RCRA permit, EPA is *addressing the potential for future discard*, while allowing the legitimate recycling activities that are already occurring to continue.

Id. at 1706 (emphasis added). Similarly, EPA conceded the additional conditions of the verified recycler exclusion "will address the *potential for discard happening in the future*." EPA 2014 Response To Comments 76 (emphasis added), JA __.

EPA went even farther, saying the 2015 rule was designed to "protect human health and the environment from *potential* mismanagement of hazardous secondary materials, for example, if such hazardous materials destined for recycling *instead become discarded or otherwise mismanaged.*" Regulatory Impact Analysis ii (2014) (emphasis added), EPA-HQ-RCRA-2010-0742-0369, JA __.

But RCRA does not provide such authority to EPA. Instead, Congress limited EPA's authority to materials that are actually "discarded."

Under EPA's view, even "primary materials" (such as raw materials or unused products) would logically be subject to RCRA regulation. Primary materials can be hazardous, and also can be mismanaged—as demonstrated by all the incident reports the National Response Center receives. API Comments 12-13, JA __.

Unashamedly, EPA takes this expansive view of its authority, even though it continues to pay lip service to the law of this Circuit. In the EPA 2014 Response

To Comments (at 14), JA __, EPA said "the D.C. Circuit, which is the primary court that deals with these issues, has been very clear that EPA needs to show that materials are discarded to consider them solid wastes."

Indeed, as early as *American Mining*, EPA argued that RCRA should be broadly construed to effectuate its remedial purpose, and EPA must have regulatory authority over materials destined for recycling in order to *prevent* future harm. EPA Br. at 30-31, *American Mining*, 824 F.2d 1177. This Court was not persuaded. *See American Mining*, 824 F.2d at 1186 n.11.

In sum, EPA's repeal of the transfer-based exclusion (which according to EPA sufficed to define the absence of "discard") and substitution of the verified recycler exclusion (to the extent it contains conditions that operate to regulate non-discarded materials) was arbitrary and capricious, and in excess of EPA's RCRA authority.

C. EPA's Continued Assertion Of RCRA Authority Over Recycled Refinery Catalysts Is In Excess Of Statutory Authority And Arbitrary.

Petroleum refinery hydrotreating and hydrorefining catalysts exemplify EPA's overreach when approaching transferred materials. The catalysts are used in refinery reactors to remove sulfur and nitrogen from various process streams. *See API III*, 683 F.3d at 385. The catalysts are generally composed of nickel, cobalt, and/or molybdenum compounds supported on an alumina matrix. *See id.*

Over time, the catalysts become deactivated and must be replaced. *See id.* Historically, the vast majority of spent catalysts from petroleum refinery hydroprocessing units have been sent to metals extraction facilities or regeneration facilities—not discarded. API Comments 45, JA __. "Spent catalyst recycling has been practiced in the petroleum refining industry since the 1950's." 60 Fed. Reg. 57,747, 57,780 (Nov. 20, 1995).

The metals extraction facilities produce valuable products. API Comments 45, JA __. "Vanadium extracted from catalysts comes from the crude oil processed at the refineries," and accounts for a substantial portion of U.S. raw vanadium production. *Id.* The regeneration facilities re-manufacture the catalysts so that they can substitute for virgin catalysts at refineries. *Id.* at 46, JA __.

The 2008 rule made the catalysts ineligible for the exclusions. 73 Fed. Reg. at 64,714, 64,760, 64,761. The 2011 proposed rulemaking gave API the opportunity to submit evidence supporting the exclusion of the catalysts. *See* API Comments 45-54 and Attachments B-H, J-L, JA __-__, __-__, __-__.[17]

[17] API entered into the administrative record the specific documents that were the subject of API's Motion For An Order Directing That A Corrected Or Supplemental Index To The Record Be Filed [Doc. #1266272]. Accordingly, the relief requested in API's motion is no longer necessary.

In the 2015 rule, EPA removed the language disqualifying the catalysts from exclusion. Accordingly, the catalysts are eligible for the exclusions on the same terms as other materials.

However, as discussed above, in imposing a *permitting* requirement and *highly prescriptive* emergency preparedness requirements in the verified recycler exclusion, EPA acted arbitrarily and beyond its statutory authority. EPA effectively pronounced that catalysts meeting all of the conditions of the transfer-based exclusion, the legitimacy factors, and the new definition of "contained" are still "discarded"—unless they are sent to a RCRA permitted facility or a facility that has obtained a permit-like variance subject to unknowable standards. "Discard" status cannot rationally be defined by whether someone has a permit or meets similar requirements.

This is not an incidental overreach. It is plainly in excess of EPA's authority, as well as arbitrary and capricious, and the Court should set it aside.

IV. EPA Arbitrarily And Unlawfully Asserts RCRA Authority Over Off-Specification Commercial Products Used In Their Normal Manner.

According to 40 C.F.R. § 260.43(a) as proposed in 2011, the legitimacy factors would apply to recycling of "hazardous *secondary materials*." 76 Fed. Reg. at 44,150 (emphasis added). In the preamble to that 2011 proposal, EPA proposed to apply the legitimacy factors to "[c]ommercial chemical products being

reclaimed." 76 Fed. Reg. at 44,139 (citing 40 C.F.R. § 261.2 Table 1). But as API pointed out, EPA had never before considered commercial chemical products (including off-specification products) to be "secondary materials," *except* where—*contrary to their normal manner of use*—they are placed on the land or burned as fuels. API Comments 42-44, JA __-__.

Under the final 2015 version of 40 C.F.R. § 260.43(a), the legitimacy factors also apply only to recycling of "hazardous *secondary materials*." 80 Fed. Reg. at 1773 (emphasis added). In adopting the final rule, EPA did not respond to API's comments, but did, without reasoned explanation and contrary to EPA's longstanding policy, adopt the position that off-specification commercial chemical products being reclaimed are "secondary materials." EPA 2014 Response To Comments 314, JA __.

EPA's 1985 definition of "solid waste"—which as relevant here remains in effect—provided that "commercial chemical products listed in 40 C.F.R. § 261.33" are "solid wastes" only when burned for energy recovery or "used in a manner constituting disposal" (*i.e.*, used on the land), and further, only when those uses were contrary to the products' normal manner of use. *Id.* §§ 261.2(c)(1), (c)(2) & Table 1. Thus, a commercial chemical product such as jet fuel would not be a "solid waste" when burned for energy recovery. *Id.* § 261.2(c)(2)(ii). Also, commercial chemical products being reclaimed (such as an off-specification jet

fuel processed to produce on-specification fuel) were not "solid wastes." *Id.* § 261.2(c)(3) & Table 1.

Under 40 C.F.R. § 261.33, commercial chemical products include products that are "off-specification." *Id.* § 261.33(b). Also, EPA has long interpreted the definition to operate identically as to commercial chemical products that are *not* listed in section 261.33, but that exhibit a RCRA hazardous characteristic. 50 Fed. Reg. 14,216, 14,219 (Apr. 11, 1985).

The 1985 definition of "solid waste" did not define "secondary materials." However, the preamble explained that the term includes "*commercial chemical products recycled in ways that differ from their normal use*." 50 Fed. Reg. at 616 n.4 (emphasis added).

EPA's implementing guidance confirmed that commercial chemical products were not "secondary materials" unless they were burned or used on the land—contrary to their normal manner of use. In 1986, EPA issued its *Guidance Manual On The RCRA Regulation Of Recycled Hazardous Wastes* ("Guidance Manual"). Exhibit 3 listed "Types Of Secondary Materials Defined As Solid And Hazardous Wastes When Recycled." The list included "Commercial Chemical Products (both listed and nonlisted/characteristic; *not ordinarily applied to the land or burned as fuels*." Guidance Manual, Exh. 3 (emphasis added), JA __.

The Guidance Manual discussed many categories of materials and recycling methods. One of those categories was "Other – Non-Secondary Material." Guidance Manual 229-58, JA __-__. One example of a "*non*-secondary material" was "[u]nused propulsion fuel from a torpedo that has been fired and retrieved must be reclaimed before reuse for its original purpose because it has been contaminated with salt water." *Id.* at 229, JA __. The manual explained that

> The fuel is not a secondary material, but unreacted raw material (an unburned fuel). Because it is not a secondary material, it cannot be a solid waste, and is not subject to RCRA subtitle C regulation.

Id. at 230, JA __.

In subsequent guidance, EPA repeatedly has concluded that off-specification fuels are not "solid wastes"— even if they are reclaimed—when they are burned for energy recovery.

> [C]ommercial chemical products (or off-spec commercial chemical products) that are reclaimed are not solid waste even if the material is used to produce a fuel if that is the materials intended purpose. Thus, this off-spec jet fuel, if used to produce jet fuel, is not a solid waste (i.e., an off-spec fuel is being reclaimed to be used as a fuel—its intended purpose). Although . . . 40 CFR 261.2(c)(2)(ii) . . . only addresses commercial chemical products listed in section 261.33, it is implicit in the . . . rules that the same reasoning applies to commercial chemical products that are not listed.

Letter from D. Barnes (EPA) to J. Haake (McDonnell Douglas) 1-2 (July 31, 1988), RCRA Online No. 11360, JA __-__. *See also* Letter from D. Bussard (EPA) to D. Gable (W.Va. Div. of Envtl. Prot.) 1 (1994), RCRA Online No.

11848, JA __-__ ("off-specification fuels, including gasoline, jet fuel, kerosene, diesel, etc., that exhibit a hazardous characteristic and are burned for energy recovery" are products and not "solid wastes").

In its 1988 proposed response to *American Mining*, EPA summarized the fuels aspect of its "solid waste" definition:

> Current EPA rules state that when hazardous *secondary materials* are used directly as fuels or used to produce fuels, both the hazardous *secondary material* and any fuel produced from these materials are solid wastes, and, if hazardous, hazardous wastes. *See* 40 CFR 261.2(c)(2).

53 Fed. Reg. 519, 522 (Jan. 8, 1988) (emphasis added). That statement was correct only if off-specification fuels burned as fuel or processed for such use were *not* "secondary materials," because section 261.2(c)(2)(ii) stated then (as now), "commercial chemical products . . . are not solid wastes if they are themselves fuels."

EPA has never (at least until now) revoked its policy that off-specification fuels used in their normal manner (even with reclamation) are not "secondary materials." In the 2008 rule, EPA adopted a regulatory definition of "hazardous secondary material," which does not mention commercial chemical products:

> *Hazardous secondary material* means a secondary material (e.g., spent material, by-product, or sludge) that, when discarded, would be identified as hazardous waste under part 261 of this chapter.

73 Fed. Reg. at 64,757 (codified at 40 C.F.R. § 260.10). Nothing in that definition changed EPA's longstanding policy that commercial chemical products are not "secondary materials" unless they are used contrary to their normal manner of use. *See* API Comments 43, JA __.

In the EPA 2014 Response To Comments (at 314), JA __, EPA interpreted the term "hazardous secondary material" to include commercial chemical products that are "off-specification or otherwise unable to be sold as a product," implying that the specific, regulatory legitimacy factors of 40 C.F.R. § 260.43 (which apply *only* to recycling of "hazardous secondary materials") apply to such products. EPA did so arbitrarily and without providing a reasoned response to API's comments on the issue. In response to a request to clarify that the term "hazardous secondary material" did *not* include commercial chemical products,[18] EPA simply said

> [A] commercial chemical product listed in 40 CFR 261.33 could be considered a hazardous secondary material if it is off-specification or otherwise unable to be sold as a product.

EPA 2014 Response To Comments 313-14, JA __.

[18] *See* Bryan Cave Comments 5 (Oct. 20, 2011), EPA-HQ-RCRA-2010-0742-0256, JA __.

EPA did not acknowledge that it was *changing* its interpretation. *See id.* EPA spoke as though it was addressing the question for the first time and offered a nonsensical justification:

> [T]he practical implication of including commercial chemical products listed in 40 CFR 261.33 as hazardous secondary materials is that these materials would be eligible for the generator controlled exclusion and verified recycler exclusions at 40 CFR 261.4(a)(23) and (24).

Id.

EPA did not explain why anyone would ever choose highly conditioned exclusions (such as the generator-controlled and verified recycler exclusions) over the unconditional exclusion for commercial chemical products that are used in a normal manner (or reclaimed before being so used). Nor did EPA explicitly address the implications of its new interpretation for the applicability of the legitimacy factors—which, as discussed above, only apply to "hazardous secondary materials."

EPA's failure to respond to API's comments was arbitrary and capricious. *Delaware Dep't of Nat. Res. & Envtl. Control*, 785 F.3d at 13-14, 15-17. Independently, EPA's reversal of its longstanding interpretation that commercial chemical products are "secondary materials" only when burned or used on the land contrary to their normal manner of use—without providing a reasoned explanation

for doing so—was arbitrary and capricious. *Williams Gas Processing*, 475 F.3d at 326-27.

Moreover, petitioners submit that EPA got it right the first time (*i.e.*, in the 1985 definition of "solid waste"). That is, commercial products (including off-specification products) that are used in their normal manner or further processed for such use, are products. They cannot reasonably be viewed as part of the "waste disposal problem" that Congress addressed in RCRA. EPA cannot require manufacturers to prove that their products are products—via the legitimacy factors or otherwise. EPA's position to the contrary in the 2015 rule was in excess of statutory authority and should be reversed.

CONCLUSION

For the foregoing reasons, the Court should:

(1) Vacate EPA's unlawful assertion of RCRA jurisdiction over hazardous secondary materials and products that are not discarded, consistent with *American Mining* and *Battery Recyclers*;

(2) Vacate the legitimacy factors in 40 C.F.R. § 260.43, which: (i) unlawfully assert jurisdiction over material that is not "discarded"; (ii) do not rationally define "discard"; and unlawfully apply to (iii) pre-2008 exclusions and (iv) used-oil recycling.

(3) Vacate EPA's assertion of RCRA authority over those secondary materials (including refinery catalysts) that meet the conditions of the verified recycler exclusion, EXCEPT 40 C.F.R. §§ 260.31(d), 261.4(a)(24)(v)(B) and (E), (vi)(G), and 261.400–.420 (*or, in the alternative*, vacate 40 C.F.R. §§ 260.31(d), 261.4(a)(24)(v)(B) and (E), (vi)(G), and 261.400–.420); and

(4) Vacate EPA's assertion of RCRA authority over commercial chemical products (including off-specification products) that are used in their normal manner or reclaimed for such use.

Date: December 9, 2015

Respectfully submitted,

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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) and this Court's briefing order of September 4, 2015, because this brief contains 13,967 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1).

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 Word 2010 in Times New Roman 14-point font.

DATED: December 9, 2015 /s/ Jeremy C. Marwell

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 25(c), I hereby certify that I have this 9th day of December 2015, served a copy of the foregoing *Opening Brief of Industry Petitioners*, including the Addenda thereto, on all counsel of record electronically through the Court's CM/ECF system or by U.S. mail, postage prepaid.

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No. 09-1038
(and consolidated cases Nos. 15-1083, 15-1085, 15-1088, 15-1089, and 15-1094)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN PETROLEUM INSTITUTE, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

ON PETITION FOR REVIEW OF FINAL REGULATIONS PROMULGATED BY THE ENVIRONMENTAL PROTECTION AGENCY

ADDENDUM 1:

PERTINENT STATUTES AND REGULATIONS

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injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(a).	June 11, 1946, ch. 324, § 10(a), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976—Pub. L. 94–574 removed the defense of sovereign immunity as a bar to judicial review of Federal administrative action otherwise subject to judicial review.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(b).	June 11, 1946, ch. 324, § 10(b), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976—Pub. L. 94–574 provided that if no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(c).	June 11, 1946, ch. 324, § 10(c), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(d).	June 11, 1946, ch. 324, § 10(d), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, §10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: ''This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title].''

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

§ 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

(i) a complete copy of the cost-benefit analysis of the rule, if any;

(ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;

(iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B).

(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).

(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of—

(A) the later of the date occurring 60 days after the date on which—

(i) the Congress receives the report submitted under paragraph (1); or

(ii) the rule is published in the Federal Register, if so published;

(B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date—

(i) on which either House of Congress votes and fails to override the veto of the President; or

(ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

(C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted).

(4) Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress under paragraph (1).

(5) Notwithstanding paragraph (3), the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under section 802.

(b)(1) A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.

(2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

(c)(1) Notwithstanding any other provision of this section (except subject to paragraph (3)), a rule that would not take effect by reason of subsection (a)(3) may take effect, if the President makes a determination under paragraph (2) and submits written notice of such determination to the Congress.

SUBCHAPTER I—GENERAL PROVISIONS

§ 6901. Congressional findings

(a) Solid waste

The Congress finds with respect to solid waste—

(1) that the continuing technological progress and improvement in methods of manufacture, packaging, and marketing of consumer products has resulted in an ever-mounting increase, and in a change in the characteristics, of the mass material discarded by the purchaser of such products;

(2) that the economic and population growth of our Nation, and the improvements in the standard of living enjoyed by our population, have required increased industrial production to meet our needs, and have made necessary the demolition of old buildings, the construction of new buildings, and the provision of highways and other avenues of transportation, which, together with related industrial, commercial, and agricultural operations, have resulted in a rising tide of scrap, discarded, and waste materials;

(3) that the continuing concentration of our population in expanding metropolitan and other urban areas has presented these communities with serious financial, management, intergovernmental, and technical problems in the disposal of solid wastes resulting from the industrial, commercial, domestic, and other activities carried on in such areas;

(4) that while the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies, the problems of waste disposal as set forth above have become a matter national in scope and in concern and necessitate Federal action through financial and technical assistance and leadership in the development, demonstration, and application of new and improved methods and processes to reduce the amount of waste and unsalvageable materials and to provide for proper and economical solid waste disposal practices.

(b) Environment and health

The Congress finds with respect to the environment and health, that—

(1) although land is too valuable a national resource to be needlessly polluted by discarded materials, most solid waste is disposed of on land in open dumps and sanitary landfills;

(2) disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment;

(3) as a result of the Clean Air Act [42 U.S.C. 7401 et seq.], the Water Pollution Control Act [33 U.S.C. 1251 et seq.], and other Federal and State laws respecting public health and the environment, greater amounts of solid waste (in the form of sludge and other pollution treatment residues) have been created. Similarly, inadequate and environmentally unsound practices for the disposal or use of solid waste have created greater amounts of air and water pollution and other problems for the environment and for health;

(4) open dumping is particularly harmful to health, contaminates drinking water from underground and surface supplies, and pollutes the air and the land;

(5) the placement of inadequate controls on hazardous waste management will result in substantial risks to human health and the environment;

(6) if hazardous waste management is improperly performed in the first instance, corrective action is likely to be expensive, complex, and time consuming;

(7) certain classes of land disposal facilities are not capable of assuring long-term containment of certain hazardous wastes, and to avoid substantial risk to human health and the envi-

ronment, reliance on land disposal should be minimized or eliminated, and land disposal, particularly landfill and surface impoundment, should be the least favored method for managing hazardous wastes; and

(8) alternatives to existing methods of land disposal must be developed since many of the cities in the United States will be running out of suitable solid waste disposal sites within five years unless immediate action is taken.

(c) Materials

The Congress finds with respect to materials, that—

(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.

(d) Energy

The Congress finds with respect to energy, that—

(1) solid waste represents a potential source of solid fuel, oil, or gas that can be converted into energy;

(2) the need exists to develop alternative energy sources for public and private consumption in order to reduce our dependence on such sources as petroleum products, natural gas, nuclear and hydroelectric generation; and

(3) technology exists to produce usable energy from solid waste.

(Pub. L. 89–272, title II, §1002, as added Pub. L. 94–580, §2, Oct. 21, 1976, 90 Stat. 2796; amended Pub. L. 95–609, §7(a), Nov. 8, 1978, 92 Stat. 3081; Pub. L. 98–616, title I, §101(a), Nov. 8, 1984, 98 Stat. 3224.)

REFERENCES IN TEXT

The Clean Air Act, referred to in subsec. (b)(3), is act July 14, 1955, ch. 360, 69 Stat. 322, as amended, which is classified generally to chapter 85 (§7401 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 7401 of this title and Tables.

The Water Pollution Control Act, referred to in subsec. (b)(3), is act June 30, 1948, ch. 758, as amended generally by Pub. L. 92–500, §2, Oct. 18, 1972, 86 Stat. 816, which is classified generally to chapter 26 (§1251 et seq.) of Title 33, Navigation and Navigable Waters. For complete classification of this Act to the Code, see Short Title note set out under section 1251 of Title 33 and Tables.

CODIFICATION

The statutory system governing the disposal of solid wastes set out in this chapter is found in Pub. L. 89–272, title II, as amended in its entirety and completely revised by section 2 of Pub. L. 94–580, Oct. 21, 1976, 90 Stat. 2795. See Short Title of 1976 Amendment note below.

The act, as set out in this chapter, carries a statutory credit showing the sections as having been added by Pub. L. 94–580, without reference to amendments to the act between its original enactment in 1965 and its complete revision in 1976. The act, as originally enacted in 1965, was classified to section 3251 et seq. of this title. For a recapitulation of the provisions of the act as originally enacted, see notes in chapter 39 (§3251 et seq.) of this title where the act was originally set out.

PRIOR PROVISIONS

Provisions similar to those in this section were contained in section 3251 of this title prior to the general amendment of the Solid Waste Disposal Act by Pub. L. 94–580.

AMENDMENTS

1984—Subsec. (b)(5) to (8). Pub. L. 98–616 added pars. (5) to (7), struck out former par. (5) providing that ''hazardous waste presents, in addition to the problems associated with non-hazardous solid waste, special dangers to health and requires a greater degree of regulation than does non-hazardous solid waste; and'', redesignated former par. (6) as (8), and substituted a period for the semicolon at end.

1978—Subsec. (a)(4). Pub. L. 95–609 substituted ''solid waste'' for ''solid-waste''.

SHORT TITLE OF 2005 AMENDMENT

Pub. L. 109–58, title XV, §1521, Aug. 8, 2005, 119 Stat. 1092, provided that: ''This subtitle [subtitle B (§§1521–1533) of title XV of Pub. L. 109–58, enacting sections 6991j to 6991m of this title, amending sections 6991 to 6991f, 6991h, and 6991i of this title, and enacting provisions set out as notes under section 6991b of this title] may be cited as the 'Underground Storage Tank Compliance Act'.''

SHORT TITLE OF 1996 AMENDMENT

Pub. L. 104–119, §1, Mar. 26, 1996, 110 Stat. 830, provided that: ''This Act [amending sections 6921, 6924, 6925, 6947, and 6949a of this title and enacting provisions set out as a note under section 6949a of this title] may be cited as the 'Land Disposal Program Flexibility Act of 1996'.''

SHORT TITLE OF 1992 AMENDMENT

Pub. L. 102–386, title I, §101, Oct. 6, 1992, 106 Stat. 1505, provided that: ''This title [enacting sections 6908, 6939c to 6939e, and 6965 of this title, amending sections 6903, 6924, 6927, and 6961 of this title, and enacting provisions set out as notes under sections 6939c and 6961 of this title] may be cited as the 'Federal Facility Compliance Act of 1992'.''

SHORT TITLE OF 1988 AMENDMENT

Pub. L. 100–582, §1, Nov. 1, 1988, 102 Stat. 2950, provided that: ''This Act [enacting sections 6992 to 6992k of this title and section 3063 of Title 18, Crimes and Criminal Procedure, and amending section 6903 of this title] may be cited as the 'Medical Waste Tracking Act of 1988'.''

SHORT TITLE OF 1984 AMENDMENT

Section 1 of Pub. L. 98–616 provided that: ''This Act [enacting sections 6917, 6936 to 6939a, 6949a, 6979a, 6979b, and 6991 to 6991i of this title, amending this section and sections 6902, 6905, 6912, 6915, 6916, 6921 to 6933, 6935, 6941 to 6945, 6948, 6956, 6962, 6972, 6973, 6976, 6982 and 6984 of this title and enacting provisions set out as notes under sections 6905, 6921 and 6926 of this title] may be cited as 'The Hazardous and Solid Waste Amendments of 1984'.''

SHORT TITLE OF 1980 AMENDMENTS

Pub. L. 96–482, §1, Oct. 21, 1980, 94 Stat. 2334, provided: ''This Act [enacting sections 6933, 6934, 6941a, 6955, and 6956 of this title, amending sections 6903, 6905, 6911, 6912, 6916, 6921, 6922, 6924, 6925, 6927 to 6931, 6941 to 6943, 6945, 6946, 6948, 6949, 6952, 6953, 6962, 6963, 6964, 6971, 6973, 6974, 6976, 6979, and 6982 of this title; and enacting and repealing provisions set out as a note under section 6981 of this title] may be cited as the 'Solid Waste Disposal Act Amendments of 1980'.''

Pub. L. 96–463, §1, Oct. 15, 1980, 94 Stat. 2055, provided: ''This Act [enacting sections 6901a, 6914a and 6932 of this title, amending sections 6903, 6943 and 6948 of this title, and enacting provisions set out as notes under

sections 6363 and 6932 of this title] may be cited as the 'Used Oil Recycling Act of 1980'.''

SHORT TITLE OF 1976 AMENDMENT

Section 1 of Pub. L. 94–580 provided that: ''This Act [enacting this chapter and provisions set out as notes under this section and section 6981 of this title] may be cited as the 'Resource Conservation and Recovery Act of 1976'.''

SHORT TITLE

Pub. L. 89–272, title II, § 1001, as added by Pub. L. 94–580, § 2, Oct. 21, 1976, 90 Stat. 2795, provided that: ''This title (hereinafter in this title referred to as 'this Act'), together with the following table of contents, may be cited as the 'Solid Waste Disposal Act' '' [table of contents omitted].

FEDERAL COMPLIANCE WITH POLLUTION CONTROL STANDARDS

For provisions relating to the responsibility of the head of each Executive agency for compliance with applicable pollution control standards, see Ex. Ord. No. 12088, Oct. 13, 1978, 43 F.R. 47707, set out as a note under section 4321 of this title.

NATIONAL COMMISSION ON MATERIALS POLICY

Pub. L. 91–512, title II, §§ 201–206, Oct. 26, 1970, 84 Stat. 1234, known as the ''National Materials Policy Act of 1970'', provided for the establishment of the National Commission on Materials Policy to make a full investigation and study for the purpose of developing a national materials policy to utilize present resources and technology more efficiently and to anticipate the future materials requirements of the Nation and the world, the Commission to submit to the President and Congress a report on its findings and recommendations no later than June 30, 1973, ninety days after the submission of which it should cease to exist.

§ 6901a. Congressional findings: used oil recycling

The Congress finds and declares that—

(1) used oil is a valuable source of increasingly scarce energy and materials;

(2) technology exists to re-refine, reprocess, reclaim, and otherwise recycle used oil;

(3) used oil constitutes a threat to public health and the environment when reused or disposed of improperly; and

that, therefore, it is in the national interest to recycle used oil in a manner which does not constitute a threat to public health and the environment and which conserves energy and materials.

(Pub. L. 96–463, § 2, Oct. 15, 1980, 94 Stat. 2055.)

CODIFICATION

Section was enacted as part of the Used Oil Recycling Act of 1980, and not as part of the Solid Waste Disposal Act which comprises this chapter.

§ 6902. Objectives and national policy

(a) Objectives

The objectives of this chapter are to promote the protection of health and the environment and to conserve valuable material and energy resources by—

(1) providing technical and financial assistance to State and local governments and interstate agencies for the development of solid waste management plans (including resource recovery and resource conservation systems) which will promote improved solid waste management techniques (including more effective organizational arrangements), new and improved methods of collection, separation, and recovery of solid waste, and the environmentally safe disposal of nonrecoverable residues;

(2) providing training grants in occupations involving the design, operation, and maintenance of solid waste disposal systems;

(3) prohibiting future open dumping on the land and requiring the conversion of existing open dumps to facilities which do not pose a danger to the environment or to health;

(4) assuring that hazardous waste management practices are conducted in a manner which protects human health and the environment;

(5) requiring that hazardous waste be properly managed in the first instance thereby reducing the need for corrective action at a future date;

(6) minimizing the generation of hazardous waste and the land disposal of hazardous waste by encouraging process substitution, materials recovery, properly conducted recycling and reuse, and treatment;

(7) establishing a viable Federal-State partnership to carry out the purposes of this chapter and insuring that the Administrator will, in carrying out the provisions of subchapter III of this chapter, give a high priority to assisting and cooperating with States in obtaining full authorization of State programs under subchapter III of this chapter;

(8) providing for the promulgation of guidelines for solid waste collection, transport, separation, recovery, and disposal practices and systems;

(9) promoting a national research and development program for improved solid waste management and resource conservation techniques, more effective organizational arrangements, and new and improved methods of collection, separation, and recovery, and recycling of solid wastes and environmentally safe disposal of nonrecoverable residues;

(10) promoting the demonstration, construction, and application of solid waste management, resource recovery, and resource conservation systems which preserve and enhance the quality of air, water, and land resources; and

(11) establishing a cooperative effort among the Federal, State, and local governments and private enterprise in order to recover valuable materials and energy from solid waste.

(b) National policy

The Congress hereby declares it to be the national policy of the United States that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment.

(Pub. L. 89–272, title II, § 1003, as added Pub. L. 94–580, § 2, Oct. 21, 1976, 90 Stat. 2798; amended Pub. L. 98–616, title I, § 101(b), Nov. 8, 1984, 98 Stat. 3224.)

PRIOR PROVISIONS

Provisions similar to those in this section were contained in section 3251 of this title, prior to the general amendment of the Solid Waste Disposal Act by Pub. L. 94–580.

AMENDMENTS

1984—Subsec. (a). Pub. L. 98–616, §101(b)(1), designated existing provisions as subsec. (a).

Subsec. (a)(4) to (11). Pub. L. 98–616, §101(b)(2), struck out par. (4) which provided for regulating the treatment, storage, transportation, and disposal of hazardous wastes which have adverse effects on health and the environment, added pars. (4) to (7), and redesignated former pars. (5) to (8) as (8) to (11), respectively.

Subsec. (b). Pub. L. 98–616, §101(b)(1), added subsec. (b).

§ 6903. Definitions

As used in this chapter:

(1) The term ''Administrator'' means the Administrator of the Environmental Protection Agency.

(2) The term ''construction,'' with respect to any project of construction under this chapter, means (A) the erection or building of new structures and acquisition of lands or interests therein, or the acquisition, replacement, expansion, remodeling, alteration, modernization, or extension of existing structures, and (B) the acquisition and installation of initial equipment of, or required in connection with, new or newly acquired structures or the expanded, remodeled, altered, modernized or extended part of existing structures (including trucks and other motor vehicles, and tractors, cranes, and other machinery) necessary for the proper utilization and operation of the facility after completion of the project; and includes preliminary planning to determine the economic and engineering feasibility and the public health and safety aspects of the project, the engineering, architectural, legal, fiscal, and economic investigations and studies, and any surveys, designs, plans, working drawings, specifications, and other action necessary for the carrying out of the project, and (C) the inspection and supervision of the process of carrying out the project to completion.

(2A) The term ''demonstration'' means the initial exhibition of a new technology process or practice or a significantly new combination or use of technologies, processes or practices, subsequent to the development stage, for the purpose of proving technological feasibility and cost effectiveness.

(3) The term ''disposal'' means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

(4) The term ''Federal agency'' means any department, agency, or other instrumentality of the Federal Government, any independent agency or establishment of the Federal Government including any Government corporation, and the Government Printing Office.

(5) The term ''hazardous waste'' means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

(6) The term ''hazardous waste generation'' means the act or process of producing hazardous waste.

(7) The term ''hazardous waste management'' means the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes.

(8) For purposes of Federal financial assistance (other than rural communities assistance), the term ''implementation'' does not include the acquisition, leasing, construction, or modification of facilities or equipment or the acquisition, leasing, or improvement of land.

(9) The term ''intermunicipal agency'' means an agency established by two or more municipalities with responsibility for planning or administration of solid waste.

(10) The term ''interstate agency'' means an agency of two or more municipalities in different States, or an agency established by two or more States, with authority to provide for the management of solid wastes and serving two or more municipalities located in different States.

(11) The term ''long-term contract'' means, when used in relation to solid waste supply, a contract of sufficient duration to assure the viability of a resource recovery facility (to the extent that such viability depends upon solid waste supply).

(12) The term ''manifest'' means the form used for identifying the quantity, composition, and the origin, routing, and destination of hazardous waste during its transportation from the point of generation to the point of disposal, treatment, or storage.

(13) The term ''municipality'' (A) means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law, with responsibility for the planning or administration of solid waste management, or an Indian tribe or authorized tribal organization or Alaska Native village or organization, and (B) includes any rural community or unincorporated town or village or any other public entity for which an application for assistance is made by a State or political subdivision thereof.

(14) The term ''open dump'' means any facility or site where solid waste is disposed of which is not a sanitary landfill which meets the criteria promulgated under section 6944 of this title and which is not a facility for disposal of hazardous waste.

(15) The term ''person'' means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body and shall include each depart-

ment, agency, and instrumentality of the United States.

(16) The term ''procurement item'' means any device, good, substance, material, product, or other item whether real or personal property which is the subject of any purchase, barter, or other exchange made to procure such item.

(17) The term ''procuring agency'' means any Federal agency, or any State agency or agency of a political subdivision of a State which is using appropriated Federal funds for such procurement, or any person contracting with any such agency with respect to work performed under such contract.

(18) The term ''recoverable'' refers to the capability and likelihood of being recovered from solid waste for a commercial or industrial use.

(19) The term ''recovered material'' means waste material and byproducts which have been recovered or diverted from solid waste, but such term does not include those materials and byproducts generated from, and commonly reused within, an original manufacturing process.

(20) The term ''recovered resources'' means material or energy recovered from solid waste.

(21) The term ''resource conservation'' means reduction of the amounts of solid waste that are generated, reduction of overall resource consumption, and utilization of recovered resources.

(22) The term ''resource recovery'' means the recovery of material or energy from solid waste.

(23) The term ''resource recovery system'' means a solid waste management system which provides for collection, separation, recycling, and recovery of solid wastes, including disposal of nonrecoverable waste residues.

(24) The term ''resource recovery facility'' means any facility at which solid waste is processed for the purpose of extracting, converting to energy, or otherwise separating and preparing solid waste for reuse.

(25) The term ''regional authority'' means the authority established or designated under section 6946 of this title.

(26) The term ''sanitary landfill'' means a facility for the disposal of solid waste which meets the criteria published under section 6944 of this title.

(26A) The term ''sludge'' means any solid, semisolid or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant, water supply treatment plant, or air pollution control facility or any other such waste having similar characteristics and effects.

(27) The term ''solid waste'' means 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, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923) [42 U.S.C. 2011 et seq.].

(28) The term ''solid waste management'' means the systematic administration of activities which provide for the collection, source separation, storage, transportation, transfer, processing, treatment, and disposal of solid waste.

(29) The term ''solid waste management facility'' includes—

(A) any resource recovery system or component thereof,

(B) any system, program, or facility for resource conservation, and

(C) any facility for the collection, source separation, storage, transportation, transfer, processing, treatment or disposal of solid wastes, including hazardous wastes, whether such facility is associated with facilities generating such wastes or otherwise.

(30) The terms ''solid waste planning'', ''solid waste management'', and ''comprehensive planning'' include planning or management respecting resource recovery and resource conservation.

(31) The term ''State'' means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(32) The term ''State authority'' means the agency established or designated under section 6947 of this title.

(33) The term ''storage'', when used in connection with hazardous waste, means the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous waste.

(34) The term ''treatment'', when used in connection with hazardous waste, means any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous.

(35) The term ''virgin material'' means a raw material, including previously unused copper, aluminum, lead, zinc, iron, or other metal or metal ore, any undeveloped resource that is, or with new technology will become, a source of raw materials.

(36) The term ''used oil'' means any oil which has been—

(A) refined from crude oil,

(B) used, and

(C) as a result of such use, contaminated by physical or chemical impurities.

(37) The term ''recycled oil'' means any used oil which is reused, following its original use, for any purpose (including the purpose for which the oil was originally used). Such term includes oil which is re-refined, reclaimed, burned, or reprocessed.

(38) The term ''lubricating oil'' means the fraction of crude oil which is sold for purposes of reducing friction in any industrial or mechanical device. Such term includes re-refined oil.

(39) The term ''re-refined oil'' means used oil from which the physical and chemical contaminants acquired through previous use have been removed through a refining process.

(40) Except as otherwise provided in this paragraph, the term ''medical waste'' means any solid waste which is generated in the diagnosis, treatment, or immunization of human beings or animals, in research pertaining thereto, or in the production or testing of biologicals. Such term does not include any hazardous waste identified or listed under subchapter III of this chapter or any household waste as defined in regulations under subchapter III of this chapter.

(41) The term ''mixed waste'' means waste that contains both hazardous waste and source, special nuclear, or by-product material subject to the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.).

(Pub. L. 89–272, title II, §1004, as added Pub. L. 94–580, §2, Oct. 21, 1976, 90 Stat. 2798; amended Pub. L. 95–609, §7(b), Nov. 8, 1978, 92 Stat. 3081; Pub. L. 96–463, §3, Oct. 15, 1980, 94 Stat. 2055; Pub. L. 96–482, §2, Oct. 21, 1980, 94 Stat. 2334; Pub. L. 100–582, §3, Nov. 1, 1988, 102 Stat. 2958; Pub. L. 102–386, title I, §§103, 105(b), Oct. 6, 1992, 106 Stat. 1507, 1512.)

REFERENCES IN TEXT

The Atomic Energy Act of 1954, referred to in pars. (27) and (41), is act Aug. 1, 1946, ch. 724, as added by act Aug. 30, 1954, ch. 1073, §1, 68 Stat. 921, and amended, which is classified generally to chapter 23 (§2011 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2011 of this title and Tables.

PRIOR PROVISIONS

Provisions similar to those in this section were contained in section 3252 of this title, prior to the general amendment of the Solid Waste Disposal Act by Pub. L. 94–580.

AMENDMENTS

1992—Par. (15). Pub. L. 102–386, §103, inserted before period at end ''and shall include each department, agency, and instrumentality of the United States''.

Par. (41). Pub. L. 102–386, §105(b), added par. (41).

1988—Par. (40). Pub. L. 100–582 added par. (40).

1980—Par. (14). Pub. L. 96–482, §2(a), defined ''open dump'' to include a facility, substituted requirement that disposal facility or site not be a sanitary landfill meeting section 6944 of this title criteria for prior requirement that disposal site not be a sanitary landfill within meaning of section 6944 of this title, and required that the disposal facility or site not be a facility for disposal of hazardous waste.

Par. (19). Pub. L. 96–482, §2(b), defined ''recovered material'' to cover byproducts, substituted provision for recovery or diversion of waste material and byproducts from solid waste for prior provision for collection or recovery of material from solid waste, and excluded materials and byproducts generated from and commonly reused within an original manufacturing process.

Pars. (36) to (39). Pub. L. 96–463, §3, added pars. (36) to (39).

1978—Par. (8). Pub. L. 95–609, §7(b)(1), struck out provision stating that employees' salaries due pursuant to subchapter IV of this chapter would not be included after Dec. 31, 1979.

Par. (10). Pub. L. 95–609, §7(b)(2), substituted ''management'' for ''disposal''.

Par. (29)(C). Pub. L. 95–609, §7(b)(3), substituted ''the collection, source separation, storage, transportation, transfer, processing, treatment or disposal'' for ''the treatment''.

TRANSFER OF FUNCTIONS

Enforcement functions of Administrator or other official of Environmental Protection Agency related to compliance with resource conservation and recovery permits used under this chapter with respect to preconstruction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas transferred to Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, until first anniversary of date of initial operation of Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, eff. July 1, 1979, §§102(a), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, set out in the Appendix to Title 5, Government Organization and Employees. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102–486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15, Commerce and Trade. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

§ 6904. Governmental cooperation

(a) Interstate cooperation

The provisions of this chapter to be carried out by States may be carried out by interstate agencies and provisions applicable to States may apply to interstate regions where such agencies and regions have been established by the respective States and approved by the Administrator. In any such case, action required to be taken by the Governor of a State, respecting regional designation shall be required to be taken by the Governor of each of the respective States with respect to so much of the interstate region as is within the jurisdiction of that State.

(b) Consent of Congress to compacts

The consent of the Congress is hereby given to two or more States to negotiate and enter into agreements or compacts, not in conflict with any law or treaty of the United States, for—

(1) cooperative effort and mutual assistance for the management of solid waste or hazardous waste (or both) and the enforcement of their respective laws relating thereto, and

(2) the establishment of such agencies, joint or otherwise, as they may deem desirable for making effective such agreements or compacts.

No such agreement or compact shall be binding or obligatory upon any State a party thereto unless it is agreed upon by all parties to the agreement and until it has been approved by the Administrator and the Congress.

(Pub. L. 89–272, title II, §1005, as added Pub. L. 94–580, §2, Oct. 21, 1976, 90 Stat. 2801.)

TRANSFER OF FUNCTIONS

For transfer of certain enforcement functions of Administrator or other official of Environmental Protection Agency under this chapter to Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, and subsequent transfer to Secretary of Energy, then to Federal Coordinator for Alaska Natural Gas Transportation Projects, see note set out under section 6903 of this title.

TRANSFER OF FUNCTIONS

For transfer of certain enforcement functions of Administrator or other official of Environmental Protection Agency under this chapter to Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, and subsequent transfer to Secretary of Energy, then to Federal Coordinator for Alaska Natural Gas Transportation Projects, see note set out under section 6903 of this title.

§ 6935. Restrictions on recycled oil

(a) In general

Not later than one year after October 15, 1980, the Administrator shall promulgate regulations establishing such performance standards and other requirements as may be necessary to protect the public health and the environment from hazards associated with recycled oil. In developing such regulations, the Administrator shall conduct an analysis of the economic impact of the regulations on the oil recycling industry. The Administrator shall ensure that such regulations do not discourage the recovery or recycling of used oil, consistent with the protection of human health and the environment.

(b) Identification or listing of used oil as hazardous waste

Not later than twelve months after November 8, 1984, the Administrator shall propose whether to list or identify used automobile and truck crankcase oil as hazardous waste under section 6921 of this title. Not later than twenty-four months after November 8, 1984, the Administrator shall make a final determination whether to list or identify used automobile and truck crankcase oil and other used oil as hazardous wastes under section 6921 of this title.

(c) Used oil which is recycled

(1) With respect to generators and transporters of used oil identified or listed as a hazardous waste under section 6921 of this title, the standards promulgated under section[1] 6921(d), 6922, and 6923 of this title shall not apply to such used oil if such used oil is recycled.

(2)(A) In the case of used oil which is exempt under paragraph (1), not later than twenty-four months after November 8, 1984, the Administrator shall promulgate such standards under this subsection regarding the generation and transportation of used oil which is recycled as may be necessary to protect human health and the environment. In promulgating such regulations with respect to generators, the Administrator shall take into account the effect of such regulations on environmentally acceptable types of used oil recycling and the effect of such regulations on small quantity generators and generators which are small businesses (as defined by the Administrator).

(B) The regulations promulgated under this subsection shall provide that no generator of used oil which is exempt under paragraph (1) from the standards promulgated under section[1] 6921(d), 6922, and 6923 of this title shall be subject to any manifest requirement or any associated recordkeeping and reporting requirement with respect to such used oil if such generator—

(i) either—

(I) enters into an agreement or other arrangement (including an agreement or arrangement with an independent transporter or with an agent of the recycler) for delivery of such used oil to a recycling facility which has a permit under section 6925(c) of this title (or for which a valid permit is deemed to be in effect under subsection (d) of this section), or

(II) recycles such used oil at one or more facilities of the generator which has such a permit under section 6925 of this title (or for which a valid permit is deemed to have been issued under subsection (d) of this section);

(ii) such used oil is not mixed by the generator with other types of hazardous wastes; and

(iii) the generator maintains such records relating to such used oil, including records of agreements or other arrangements for delivery of such used oil to any recycling facility referred to in clause (i)(I), as the Administrator deems necessary to protect human health and the environment.

(3) The regulations under this subsection regarding the transportation of used oil which is exempt from the standards promulgated under section[1] 6921(d), 6922, and 6923 of this title under paragraph (1) shall require the transporters of such used oil to deliver such used oil to a facility which has a valid permit under section 6925 of this title or which is deemed to have a valid permit under subsection (d) of this section. The Administrator shall also establish other standards for such transporters as may be necessary to protect human health and the environment.

(d) Permits

(1) The owner or operator of a facility which recycles used oil which is exempt under subsection (c)(1) of this section, shall be deemed to have a permit under this subsection for all such treatment or recycling (and any associated tank or container storage) if such owner and operator comply with standards promulgated by the Administrator under section 6924 of this title; except that the Administrator may require such owners and operators to obtain an individual permit under section 6925(c) of this title if he determines that an individual permit is necessary to protect human health and the environment.

(2) Notwithstanding any other provision of law, any generator who recycles used oil which is exempt under subsection (c)(1) of this section shall not be required to obtain a permit under section 6925(c) of this title with respect to such used oil until the Administrator has promulgated standards under section 6924 of this title regarding the recycling of such used oil.

(Pub. L. 89–272, title II, § 3014, formerly § 3012, as added Pub. L. 96–463, § 7(a), Oct. 15, 1980, 94 Stat. 2057, and renumbered and amended Pub. L. 98–616, title II, §§ 241(a), 242, title V, § 502(g)(1), Nov. 8, 1984, 98 Stat. 3258, 3260, 3277.)

CODIFICATION

Section was formerly classified to section 6932 of this title.

AMENDMENTS

1984—Subsec. (a). Pub. L. 98–616, §§ 241(a), 242, designated existing provisions as subsec. (a) and inserted

[1] So in original. Probably should be ''sections''.

'', consistent with the protection of human health and the environment'' at end.

Subsecs. (b) to (d). Pub. L. 98–616, § 241(a), added subsecs. (b) to (d).

TRANSFER OF FUNCTIONS

For transfer of certain enforcement functions of Administrator or other official of Environmental Protection Agency under this chapter to Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, and subsequent transfer to Secretary of Energy, then to Federal Coordinator for Alaska Natural Gas Transportation Projects, see note set out under section 6903 of this title.

§ 6936. Expansion during interim status

(a) Waste piles

The owner or operator of a waste pile qualifying for the authorization to operate under section 6925(e) of this title shall be subject to the same requirements for liners and leachate collection systems or equivalent protection provided in regulations promulgated by the Administrator under section 6924 of this title before October 1, 1982, or revised under section 6924(*o*) of this title (relating to minimum technological requirements), for new facilities receiving individual permits under subsection (c) of section 6925 of this title, with respect to each new unit, replacement of an existing unit, or lateral expansion of an existing unit that is within the waste management area identified in the permit application submitted under section 6925 of this title, and with respect to waste received beginning six months after November 8, 1984.

(b) Landfills and surface impoundments

(1) The owner or operator of a landfill or surface impoundment qualifying for the authorization to operate under section 6925(e) of this title shall be subject to the requirements of section 6924(*o*) of this title (relating to minimum technological requirements), with respect to each new unit, replacement of an existing unit, or lateral expansion of an existing unit that is within the waste management area identified in the permit application submitted under this section, and with respect to waste received beginning 6 months after November 8, 1984.

(2) The owner or operator of each unit referred to in paragraph (1) shall notify the Administrator (or the State, if appropriate) at least sixty days prior to receiving waste. The Administrator (or the State) shall require the filing, within six months of receipt of such notice, of an application for a final determination regarding the issuance of a permit for each facility submitting such notice.

(3) In the case of any unit in which the liner and leachate collection system has been installed pursuant to the requirements of this section and in good faith compliance with the Administrator's regulations and guidance documents governing liners and leachate collection systems, no liner or leachate collection system which is different from that which was so installed pursuant to this section shall be required for such unit by the Administrator when issuing the first permit under section 6925 of this title to such facility, except that the Administrator shall not be precluded from requiring installation of a new liner when the Administrator has reason to believe that any liner installed pursuant to the requirements of this section is leaking. The Administrator may, under section 6924 of this title, amend the requirements for liners and leachate collection systems required under this section as may be necessary to provide additional protection for human health and the environment.

(Pub. L. 89–272, title II, § 3015, as added Pub. L. 98–616, title II, § 243(a), Nov. 8, 1984, 98 Stat. 3260.)

§ 6937. Inventory of Federal agency hazardous waste facilities

(a) Program requirement; submission; availability; contents

Each Federal agency shall undertake a continuing program to compile, publish, and submit to the Administrator (and to the State in the case of sites in States having an authorized hazardous waste program) an inventory of each site which the Federal agency owns or operates or has owned or operated at which hazardous waste is stored, treated, or disposed of or has been disposed of at any time. The inventory shall be submitted every two years beginning January 31, 1986. Such inventory shall be available to the public as provided in section 6927(b) of this title. Information previously submitted by a Federal agency under section 9603 of this title, or under section 6925 or 6930 of this title, or under this section need not be resubmitted except that the agency shall update any previous submission to reflect the latest available data and information. The inventory shall include each of the following:

(1) A description of the location of each site at which any such treatment, storage, or disposal has taken place before the date on which permits are required under section 6925 of this title for such storage, treatment, or disposal, and where hazardous waste has been disposed, a description of hydrogeology of the site and the location of withdrawal wells and surface water within one mile of the site.

(2) Such information relating to the amount, nature, and toxicity of the hazardous waste in each site as may be necessary to determine the extent of any health hazard which may be associated with any site.

(3) Information on the known nature and extent of environmental contamination at each site, including a description of the monitoring data obtained.

(4) Information concerning the current status of the site, including information respecting whether or not hazardous waste is currently being treated, stored, or disposed of at such site (and if not, the date on which such activity ceased) and information respecting the nature of any other activity currently carried out at such site.

(5) A list of sites at which hazardous waste has been disposed and environmental monitoring data has not been obtained, and the reasons for the lack of monitoring data at each site.

(6) A description of response actions undertaken or contemplated at contaminated sites.

(7) An identification of the types of techniques of waste treatment, storage, or disposal which have been used at each site.

Office of Federal Inspector for the Alaska Natural Gas Transportation System, and subsequent transfer to Secretary of Energy, then to Federal Coordinator for Alaska Natural Gas Transportation Projects, see note set out under section 6903 of this title.

§ 6975. Separability

If any provision of this chapter, or the application of any provision of this chapter to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances, and the remainder of this chapter, shall not be affected thereby.

(Pub. L. 89–272, title II, § 7005, as added Pub. L. 94–580, § 2, Oct. 21, 1976, 90 Stat. 2827.)

§ 6976. Judicial review

(a) Review of final regulations and certain petitions

Any judicial review of final regulations promulgated pursuant to this chapter and the Administrator's denial of any petition for the promulgation, amendment, or repeal of any regulation under this chapter shall be in accordance with sections 701 through 706 of title 5, except that—

(1) a petition for review of action of the Administrator in promulgating any regulation, or requirement under this chapter or denying any petition for the promulgation, amendment or repeal of any regulation under this chapter may be filed only in the United States Court of Appeals for the District of Columbia, and such petition shall be filed within ninety days from the date of such promulgation or denial, or after such date if such petition for review is based solely on grounds arising after such ninetieth day; action of the Administrator with respect to which review could have been obtained under this subsection shall not be subject to judicial review in civil or criminal proceedings for enforcement; and

(2) in any judicial proceeding brought under this section in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if a party seeking review under this chapter applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that the information is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, and to be adduced upon the hearing in such manner and upon such terms and conditions as the court may deem proper; the Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken, and he shall file with the court such modified or new findings and his recommendation, if any, for the modification or setting aside of his original order, with the return of such additional evidence.

(b) Review of certain actions under sections 6925 and 6926 of this title

Review of the Administrator's action (1) in issuing, denying, modifying, or revoking any permit under section 6925 of this title (or in modifying or revoking any permit which is deemed to have been issued under section 6935(d)(1)[1] of this title), or (2) in granting, denying, or withdrawing authorization or interim authorization under section 6926 of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such issuance, denial, modification, revocation, grant, or withdrawal, or after such date only if such application is based solely on grounds which arose after such ninetieth day. Action of the Administrator with respect to which review could have been obtained under this subsection shall not be subject to judicial review in civil or criminal proceedings for enforcement. Such review shall be in accordance with sections 701 through 706 of title 5.

(Pub. L. 89–272, title II, § 7006, as added Pub. L. 94–580, § 2, Oct. 21, 1976, 90 Stat. 2827; amended Pub. L. 96–482, § 27, Oct. 21, 1980, 94 Stat. 2349; Pub. L. 98–616, title II, § 241(b)(1), title IV, § 403(d)(5), Nov. 8, 1984, 98 Stat. 3259, 3273.)

REFERENCES IN TEXT

Section 6935(d)(1) of this title, referred to in subsec. (b), was in the original a reference to section 3012(d)(1) of Pub. L. 89–272, which was renumbered section 3014(d)(1) of Pub. L. 89–272 by Pub. L. 98–616 and is classified to section 6935(d)(1) of this title.

AMENDMENTS

1984—Pub. L. 98–616 inserted ''(or in modifying or revoking any permit which is deemed to have been issued under section 6935(d)(1) of this title)'' and inserted ''Action of the Administrator with respect to which review could have been obtained under this subsection shall not be subject to judicial review in civil or criminal proceedings for enforcement.''

1980—Pub. L. 96–482, § 27(a), designated existing provisions as subsec. (a), in provision preceding par. (1), included judicial review of Administrator's denial of any petition for promulgation, amendment, or repeal of any regulation in par. (1), included review of Administrator's denial of any petition for promulgation, amendment, or repeal of any regulation, and substituted ''District of Columbia, and'' for ''District of Columbia. Any'', ''date of such promulgation or denial'' for ''date of such promulgation'', ''petition for review is based'' for ''petition is based'', and ''; action'' for ''. Action'', and in par. (2), substituted ''proper; the'' for ''proper. The'', and added subsec. (b).

TRANSFER OF FUNCTIONS

For transfer of certain enforcement functions of Administrator or other official of Environmental Protection Agency under this chapter to Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, and subsequent transfer to Secretary of Energy, then to Federal Coordinator for Alaska Natural Gas Transportation Projects, see note set out under section 6903 of this title.

§ 6977. Grants or contracts for training projects

(a) General authority

The Administrator is authorized to make grants to, and contracts with any eligible orga-

[1] See References in Text note below.

Uppermost aquifer means the geologic formation nearest the natural ground surface that is an aquifer, as well as lower aquifers that are hydraulically interconnected with this aquifer within the facility's property boundary.

Used oil means any oil that has been refined from crude oil, or any synthetic oil, that has been used and as a result of such use is contaminated by physical or chemical impurities.

User of the electronic manifest system means a hazardous waste generator, a hazardous waste transporter, an owner or operator of a hazardous waste treatment, storage, recycling, or disposal facility, or any other person that:

(1) Is required to use a manifest to comply with:

(i) Any federal or state requirement to track the shipment, transportation, and receipt of hazardous waste or other waste material that is shipped from the site of generation to an off-site designated facility for treatment, storage, recycling, or disposal; or

(ii) Any federal or state requirement to track the shipment, transportation, and receipt of rejected wastes or regulated container residues that are shipped from a designated facility to an alternative facility, or returned to the generator; and

(2) Elects to use the system to obtain, complete and transmit an electronic manifest format supplied by the EPA electronic manifest system, or

(3) Elects to use the paper manifest form and submits to the system for data processing purposes a paper copy of the manifest (or data from such a paper copy), in accordance with §264.71(a)(2)(v) or §265.71(a)(2)(v) of this chapter. These paper copies are submitted for data exchange purposes only and are not the official copies of record for legal purposes.

Vessel includes every description of watercraft, used or capable of being used as a means of transportation on the water.

Wastewater treatment unit means a device which:

(1) Is part of a wastewater treatment facility that is subject to regulation under either section 402 or 307(b) of the Clean Water Act; and

(2) Receives and treats or stores an influent wastewater that is a hazardous waste as defined in §261.3 of this chapter, or that generates and accumulates a wastewater treatment sludge that is a hazardous waste as defined in §261.3 of this chapter, or treats or stores a wastewater treatment sludge which is a hazardous waste as defined in §261.3 of this Chapter; and

(3) Meets the definition of tank or tank system in §260.10 of this chapter.

Water (bulk shipment) means the bulk transportation of hazardous waste which is loaded or carried on board a vessel without containers or labels.

Well means any shaft or pit dug or bored into the earth, generally of a cylindrical form, and often walled with bricks or tubing to prevent the earth from caving in.

Well injection: (See ''underground injection''.)

Zone of engineering control means an area under the control of the owner/operator that, upon detection of a hazardous waste release, can be readily cleaned up prior to the release of hazardous waste or hazardous constituents to ground water or surface water.

Wipe means a woven or non-woven shop towel, rag, pad, or swab made of wood pulp, fabric, cotton, polyester blends, or other material.

[45 FR 33073, May 19, 1980]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §260.10, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov*.

EFFECTIVE DATE NOTE: At 80 FR 1771, Jan. 13, 2015, §260.10 was amended by adding in alphabetical order the definition of ''Contained'' and removing the definition of ''Hazardous secondary material generated and reclaimed under the control of the generator'' and adding in alphabetical order the definition of ''Remanufacturing'', effective July 13, 2015. For the convenience of the user, the added text is set forth as follows:

§260.10 Definitions

* * * * *

Contained means held in a unit (including a land-based unit as defined in this subpart) that meets the following criteria:

(1) The unit is in good condition, with no leaks or other continuing or intermittent unpermitted releases of the hazardous secondary materials to the environment, and is designed, as appropriate for the hazardous

secondary materials, to prevent releases of hazardous secondary materials to the environment. Unpermitted releases are releases that are not covered by a permit (such as a permit to discharge to water or air) and may include, but are not limited to, releases through surface transport by precipitation runoff, releases to soil and groundwater, wind-blown dust, fugitive air emissions, and catastrophic unit failures;

(2) The unit is properly labeled or otherwise has a system (such as a log) to immediately identify the hazardous secondary materials in the unit; and

(3) The unit holds hazardous secondary materials that are compatible with other hazardous secondary materials placed in the unit and is compatible with the materials used to construct the unit and addresses any potential risks of fires or explosions.

(4) Hazardous secondary materials in units that meet the applicable requirements of 40 CFR parts 264 or 265 are presumptively contained.

* * * * *

Remanufacturing means processing a higher-value hazardous secondary material in order to manufacture a product that serves a similar functional purpose as the original commercial-grade material. For the purpose of this definition, a hazardous secondary material is considered higher-value if it was generated from the use of a commercial-grade material in a manufacturing process and can be remanufactured into a similar commercial-grade material.

§ 260.11 References.

(a) When used in parts 260 through 268 and 278 of this chapter, the following publications are incorporated by reference. These incorporations by reference were approved by the Director of the Federal Register pursuant to 5 U.S.C. 552(a) and 1 CFR part 51. These materials are incorporated as they exist on the date of approval and a notice of any change in these materials will be published in the FEDERAL REGISTER. Copies may be inspected at the Library, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW. (3403T), Washington, DC 20460, *libraryhq@epa.gov;* or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal__register/code__of__federal__regulations/ibr__locations.html.*

(b) The following materials are available for purchase from the American Society for Testing and Materials, 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 19428–2959.

(1) ASTM D–93–79 or D–93–80, ''Standard Test Methods for Flash Point by Pensky-Martens Closed Cup Tester,'' IBR approved for § 261.21.

(2) ASTM D–1946–82, ''Standard Method for Analysis of Reformed Gas by Gas Chromatography,'' IBR approved for §§ 264.1033, 265.1033.

(3) ASTM D 2267–88, ''Standard Test Method for Aromatics in Light Naphthas and Aviation Gasolines by Gas Chromatography,'' IBR approved for § 264.1063.

(4) ASTM D 2382–83, ''Standard Test Method for Heat of Combustion of Hydrocarbon Fuels by Bomb Calorimeter (High-Precision Method),'' IBR approved for §§ 264.1033, 265.1033.

(5) ASTM D 2879–92, ''Standard Test Method for Vapor Pressure—Temperature Relationship and Initial Decomposition Temperature of Liquids by Isoteniscope,'' IBR approved for § 265.1084.

(6) ASTM D–3278–78, ''Standard Test Methods for Flash Point for Liquids by Setaflash Closed Tester,'' IBR approved for § 261.21(a).

(7) ASTM E 168–88, ''Standard Practices for General Techniques of Infrared Quantitative Analysis,'' IBR approved for § 264.1063.

(8) ASTM E 169–87, ''Standard Practices for General Techniques of Ultraviolet-Visible Quantitative Analysis,'' IBR approved for § 264.1063.

(9) ASTM E 260–85, ''Standard Practice for Packed Column Gas Chromatography,'' IBR approved for § 264.1063.

(10) ASTM E 926–88, ''Standard Test Methods for Preparing Refuse-Derived Fuel (RDF) Samples for Analyses of Metals,'' Test Method C—Bomb, Acid Digestion Method.

(c) The following materials are available for purchase from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161; or for purchase from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 512–1800.

(1) ''APTI Course 415: Control of Gaseous Emissions,'' EPA Publication

(c) Materials that have been reclaimed but must be reclaimed further before the materials are completely recovered.

(d) Hazardous secondary materials that are reclaimed in a continuous industrial process; and

(e) Hazardous secondary materials that are indistinguishable in all relevant aspects from a product or intermediate.

[50 FR 661, Jan. 4, 1985; 50 FR 14219, Apr. 11, 1985, as amended at 59 FR 48041, Sept. 19, 1994; 73 FR 64758, Oct. 30, 2008]

EFFECTIVE DATE NOTE: At 80 FR 1771, Jan. 13, 2015, §260.30 was amended by adding paragraph (f), effective July 13, 2015. For the convenience of the user, the added text is set forth as follows:

§ 260.30 Non-waste determinations and variances from classification as a solid waste.

* * * * *

(f) Hazardous secondary materials that are transferred for reclamation under §261.4(a)(24) and are managed at a verified reclamation facility or intermediate facility where the management of the hazardous secondary materials is not addressed under a RCRA Part B permit or interim status standards.

§ 260.31 Standards and criteria for variances from classification as a solid waste.

(a) The Administrator may grant requests for a variance from classifying as a solid waste those materials that are accumulated speculatively without sufficient amounts being recycled if the applicant demonstrates that sufficient amounts of the material will be recycled or transferred for recycling in the following year. If a variance is granted, it is valid only for the following year, but can be renewed, on an annual basis, by filing a new application. The Administrator's decision will be based on the following criteria:

(1) The manner in which the material is expected to be recycled, when the material is expected to be recycled, and whether this expected disposition is likely to occur (for example, because of past practice, market factors, the nature of the material, or contractual arrangements for recycling);

(2) The reason that the applicant has accumulated the material for one or more years without recycling 75 percent of the volume accumulated at the beginning of the year;

(3) The quantity of material already accumulated and the quantity expected to be generated and accumulated before the material is recycled;

(4) The extent to which the material is handled to minimize loss;

(5) Other relevant factors.

(b) The Administrator may grant requests for a variance from classifying as a solid waste those materials that are reclaimed and then reused as feedstock within the original production process in which the materials were generated if the reclamation operation is an essential part of the production process. This determination will be based on the following criteria:

(1) How economically viable the production process would be if it were to use virgin materials, rather than reclaimed materials;

(2) The extent to which the material is handled before reclamation to minimize loss;

(3) The time periods between generating the material and its reclamation, and between reclamation and return to the original primary production process;

(4) The location of the reclamation operation in relation to the production process;

(5) Whether the reclaimed material is used for the purpose for which it was originally produced when it is returned to the original process, and whether it is returned to the process in substantially its original form;

(6) Whether the person who generates the material also reclaims it;

(7) Other relevant factors.

(c) The Regional Administrator may grant requests for a variance from classifying as a solid waste those materials that have been reclaimed but must be reclaimed further before recovery is completed if, after initial reclamation, the resulting material is commodity-like (even though it is not yet a commercial product, and has to be reclaimed further). This determination will be based on the following factors:

(1) The degree of processing the material has undergone and the degree of further processing that is required;
(2) The value of the material after it has been reclaimed;
(3) The degree to which the reclaimed material is like an analogous raw material;
(4) The extent to which an end market for the reclaimed material is guaranteed;
(5) The extent to which the reclaimed material is handled to minimize loss;
(6) Other relevant factors.

[50 FR 662, Jan. 4, 1985, as amended at 59 FR 48041, Sept. 19, 1994; 71 FR 16902, Apr. 4, 2006]

EFFECTIVE DATE NOTE: At 80 FR 1771, Jan. 13, 2015, §260.31 was amended by revising paragraph (c) and adding paragraph (d), effective July 13, 2015. For the convenience of the user, the revised and added text is set forth as follows:

§260.31 Standards and criteria for variances from classification as a solid waste.

* * * * *

(c) The Administrator may grant requests for a variance from classifying as a solid waste those hazardous secondary materials that have been partially reclaimed, but must be reclaimed further before recovery is completed, if the partial reclamation has produced a commodity-like material. A determination that a partially-reclaimed material for which the variance is sought is commodity-like will be based on whether the hazardous secondary material is legitimately recycled as specified in §260.43 of this part and on whether all of the following decision criteria are satisfied:
(1) Whether the degree of partial reclamation the material has undergone is substantial as demonstrated by using a partial reclamation process other than the process that generated the hazardous waste;
(2) Whether the partially-reclaimed material has sufficient economic value that it will be purchased for further reclamation;
(3) Whether the partially-reclaimed material is a viable substitute for a product or intermediate produced from virgin or raw materials which is used in subsequent production steps;
(4) Whether there is a market for the partially-reclaimed material as demonstrated by known customer(s) who are further reclaiming the material (*e.g.*, records of sales and/or contracts and evidence of subsequent use, such as bills of lading);
(5) Whether the partially-reclaimed material is handled to minimize loss.

(d) The Administrator may grant requests for a variance from classifying as a solid waste those hazardous secondary materials that are transferred for reclamation under §261.4(a)(24) and are managed at a verified reclamation facility or intermediate facility where the management of the hazardous secondary materials is not addressed under a RCRA Part B permit or interim status standards. The Administrator's decision will be based on the following criteria:
(1) The reclamation facility or intermediate facility must demonstrate that the reclamation process for the hazardous secondary materials is legitimate pursuant to §260.43;
(2) The reclamation facility or intermediate facility must satisfy the financial assurance condition in §261.4(a)(24)(vi)(F);
(3) The reclamation facility or intermediate facility must not be subject to a formal enforcement action in the previous three years and not be classified as a significant non-complier under RCRA Subtitle C, or must provide credible evidence that the facility will manage the hazardous secondary materials properly. Credible evidence may include a demonstration that the facility has taken remedial steps to address the violations and prevent future violations, or that the violations are not relevant to the proper management of the hazardous secondary materials;
(4) The intermediate or reclamation facility must have the equipment and trained personnel needed to safely manage the hazardous secondary material and must meet emergency preparedness and response requirements under 40 CFR part 261 subpart M;
(5) If residuals are generated from the reclamation of the excluded hazardous secondary materials, the reclamation facility must have the permits required (if any) to manage the residuals, have a contract with an appropriately permitted facility to dispose of the residuals or present credible evidence that the residuals will be managed in a manner that is protective of human health and the environment, and
(6) The intermediate or reclamation facility must address the potential for risk to proximate populations from unpermitted releases of the hazardous secondary material to the environment (*i.e.*, releases that are not covered by a permit, such as a permit to discharge to water or air), which may include, but are not limited to, potential releases through surface transport by precipitation runoff, releases to soil and groundwater, wind-blown dust, fugitive air emissions, and catastrophic unit failures), and must include consideration of potential cumulative risks from other nearby potential stressors.

one or both of these factors is still legitimate, persons can consider the protectiveness of the storage methods, exposure from toxics in the product, the bioavailability of the toxics in the product, and other relevant considerations.

[73 FR 64759, Oct. 30, 2008]

EFFECTIVE DATE NOTE: At 80 FR 1772, Jan. 13, 2015, § 260.43 was amended by revising the section heading and paragraph (a) and removing and reserving paragraphs (b) and (c), effective July 13, 2015. For the convenience of the user, revised text is set forth as follows:

§ 260.43 Legitimate recycling of hazardous secondary materials.

(a) Recycling of hazardous secondary materials for the purpose of the exclusions or exemptions from the hazardous waste regulations must be legitimate. Hazardous secondary material that is not legitimately recycled is discarded material and is a solid waste. In determining if their recycling is legitimate, persons must address all the requirements of this paragraph.

(1) Legitimate recycling must involve a hazardous secondary material that provides a useful contribution to the recycling process or to a product or intermediate of the recycling process. The hazardous secondary material provides a useful contribution if it:

(i) Contributes valuable ingredients to a product or intermediate; or

(ii) Replaces a catalyst or carrier in the recycling process; or

(iii) Is the source of a valuable constituent recovered in the recycling process; or

(iv) Is recovered or regenerated by the recycling process; or

(v) Is used as an effective substitute for a commercial product.

(2) The recycling process must produce a valuable product or intermediate. The product or intermediate is valuable if it is:

(i) Sold to a third party; or

(ii) Used by the recycler or the generator as an effective substitute for a commercial product or as an ingredient or intermediate in an industrial process.

(3) The generator and the recycler must manage the hazardous secondary material as a valuable commodity when it is under their control. Where there is an analogous raw material, the hazardous secondary material must be managed, at a minimum, in a manner consistent with the management of the raw material or in an equally protective manner. Where there is no analogous raw material, the hazardous secondary material must be contained. Hazardous secondary materials that are released to the environment and are not recovered immediately are discarded.

(4) The product of the recycling process must be comparable to a legitimate product or intermediate:

(i) Where there is an analogous product or intermediate, the product of the recycling process is comparable to a legitimate product or intermediate if:

(A) The product of the recycling process does not exhibit a hazardous characteristic (as defined in part 261 subpart C) that analogous products do not exhibit, and

(B) The concentrations of any hazardous constituents found in appendix VIII of part 261 of this chapter that are in the product or intermediate are at levels that are comparable to or lower than those found in analogous products or at levels that meet widely-recognized commodity standards and specifications, in the case where the commodity standards and specifications include levels that specifically address those hazardous constituents.

(ii) Where there is no analogous product, the product of the recycling process is comparable to a legitimate product or intermediate if:

(A) The product of the recycling process is a commodity that meets widely recognized commodity standards and specifications (*e.g.*, commodity specification grades for common metals), or

(B) The hazardous secondary materials being recycled are returned to the original process or processes from which they were generated to be reused (*e.g.*, closed loop recycling).

(iii) If the product of the recycling process has levels of hazardous constituents that are not comparable to or unable to be compared to a legitimate product or intermediate per paragraph (a)(4)(i) or (ii) of this section, the recycling still may be shown to be legitimate, if it meets the following specified requirements. The person performing the recycling must conduct the necessary assessment and prepare documentation showing why the recycling is, in fact, still legitimate. The recycling can be shown to be legitimate based on lack of exposure from toxics in the product, lack of the bioavailability of the toxics in the product, or other relevant considerations which show that the recycled product does not contain levels of hazardous constituents that pose a significant human health or environmental risk. The documentation must include a certification statement that the recycling is legitimate and must be maintained on-site for three years after the recycling operation has ceased. The person performing the recycling must notify the Regional Administrator of this activity using EPA Form 8700–12.

(9) ''Excluded scrap metal'' is processed scrap metal, unprocessed home scrap metal, and unprocessed prompt scrap metal.

(10) ''Processed scrap metal'' is scrap metal which has been manually or physically altered to either separate it into distinct materials to enhance economic value or to improve the handling of materials. Processed scrap metal includes, but is not limited to scrap metal which has been baled, shredded, sheared, chopped, crushed, flattened, cut, melted, or separated by metal type (i.e., sorted), and, fines, drosses and related materials which have been agglomerated. (Note: shredded circuit boards being sent for recycling are not considered processed scrap metal. They are covered under the exclusion from the definition of solid waste for shredded circuit boards being recycled (§261.4(a)(14)).

(11) ''Home scrap metal'' is scrap metal as generated by steel mills, foundries, and refineries such as turnings, cuttings, punchings, and borings.

(12) ''Prompt scrap metal'' is scrap metal as generated by the metal working/fabrication industries and includes such scrap metal as turnings, cuttings, punchings, and borings. Prompt scrap is also known as industrial or new scrap metal.

[45 FR 33119, May 19, 1980, as amended at 48 FR 14293, Apr. 1, 1983; 50 FR 663, Jan. 4, 1985; 51 FR 10174, Mar. 24, 1986; 51 FR 40636, Nov. 7, 1986; 62 FR 26018, May 12, 1997; 73 FR 64760, Oct. 30, 2008; 75 FR 13001, Mar. 18, 2010]

EFFECTIVE DATE NOTE: At 80 FR 1773, Jan. 13, 2015, §261.1 was amended by revising paragraphs (c)(4) and (8), effective July 13, 2015. For the convenience of the user, the revised text is set forth as follows:

§261.1 Purpose and scope.

* * * * *

(c) * * *

(4) A material is ''reclaimed'' if it is processed to recover a usable product, or if it is regenerated. Examples are recovery of lead values from spent batteries and regeneration of spent solvents. In addition, for purposes of §261.4(a)(23) and (24), smelting, melting, and refining furnaces are considered to be solely engaged in metals reclamation if the metal recovery from the hazardous secondary materials meets the same requirements as those specified for metals recovery from hazardous waste found in §266.100(d)(1) through (3) of this chapter, and if the residuals meet the requirements specified in §266.112 of this chapter.

* * * * *

(8) A material is ''accumulated speculatively'' if it is accumulated before being recycled. A material is not accumulated speculatively, however, if the person accumulating it can show that the material is potentially recyclable and has a feasible means of being recycled; and that—during the calendar year (commencing on January 1)—the amount of material that is recycled, or transferred to a different site for recycling, equals at least 75 percent by weight or volume of the amount of that material accumulated at the beginning of the period. Materials must be placed in a storage unit with a label indicating the first date that the material began to be accumulated. If placing a label on the storage unit is not practicable, the accumulation period must be documented through an inventory log or other appropriate method. In calculating the percentage of turnover, the 75 percent requirement is to be applied to each material of the same type (*e.g.*, slags from a single smelting process) that is recycled in the same way (*i.e.*, from which the same material is recovered or that is used in the same way). Materials accumulating in units that would be exempt from regulation under §261.4(c) are not to be included in making the calculation. Materials that are already defined as solid wastes also are not to be included in making the calculation. Materials are no longer in this category once they are removed from accumulation for recycling, however.

§261.2 Definition of solid waste.

(a)(1) A *solid waste* is any discarded material that is not excluded under §261.4(a) or that is not excluded by a variance granted under §§260.30 and 260.31 or that is not excluded by a nonwaste determination under §§260.30 and 260.34.

(2)(i) A *discarded material* is any material which is:

(A) Abandoned, as explained in paragraph (b) of this section; or

(B) Recycled, as explained in paragraph (c) of this section; or

(C) Considered inherently waste-like, as explained in paragraph (d) of this section; or

(D) A military munition identified as a solid waste in §266.202.

(ii) A hazardous secondary material is not discarded if it is generated and

reclaimed under the control of the generator as defined in § 260.10, it is not speculatively accumulated as defined in § 261.1(c)(8), it is handled only in non-land-based units and is contained in such units, it is generated and reclaimed within the United States and its territories, it is not otherwise subject to material-specific management conditions under § 261.4(a) when reclaimed, it is not a spent lead acid battery (see § 266.80 and § 273.2), it does not meet the listing description for K171 or K172 in § 261.32, and the reclamation of the material is legitimate, as specified under § 260.43. (See also the notification requirements of § 260.42). (For hazardous secondary materials managed in land-based units, see § 261.4(a)(23)).

(b) Materials are solid waste if they are *abandoned* by being:

(1) Disposed of; or

(2) Burned or incinerated; or

(3) Accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated.

(c) Materials are solid wastes if they are *recycled*—or accumulated, stored, or treated before recycling—as specified in paragraphs (c)(1) through (4) of this section.

(1) *Used in a manner constituting disposal.* (i) Materials noted with a ''*'' in Column 1 of Table 1 are solid wastes when they are:

(A) Applied to or placed on the land in a manner that constitutes disposal; or

(B) Used to produce products that are applied to or placed on the land or are otherwise contained in products that are applied to or placed on the land (in which cases the product itself remains a solid waste).

(ii) However, commercial chemical products listed in § 261.33 are not solid wastes if they are applied to the land and that is their ordinary manner of use.

(2) *Burning for energy recovery.* (i) Materials noted with a ''*'' in column 2 of Table 1 are solid wastes when they are:

(A) Burned to recover energy;

(B) Used to produce a fuel or are otherwise contained in fuels (in which cases the fuel itself remains a solid waste).

(ii) However, commercial chemical products listed in § 261.33 are not solid wastes if they are themselves fuels.

(3) *Reclaimed.* Materials noted with a ''—'' in column 3 of Table 1 are not solid wastes when reclaimed. Materials noted with an ''*'' in column 3 of Table 1 are solid wastes when reclaimed unless they meet the requirements of §§ 261.2(a)(2)(ii), or 261.4(a)(17), or 261.4(a)(23), or 261.4(a)(24) or 261.4(a)(25).

(4) *Accumulated speculatively.* Materials noted with a ''*'' in column 4 of Table 1 are solid wastes when accumulated speculatively.

TABLE 1

	Use constituting disposal (§ 261.2(c)(1))	Energy recovery/ fuel (§ 261.2(c)(2))	Reclamation (261.2(c)(3)), except as provided in §§ 261.2(a)(2)(ii), 261.4(a)(17), 261.4(a)(23), 261.4(a)(24), or 261.4(a)(25)	Speculative accumulation (§ 261.2(c)(4))
	1	2	3	4
Spent Materials	(*)	(*)	(*)	(*)
Sludges (listed in 40 CFR Part 261.31 or 261.32)	(*)	(*)	(*)	(*)
Sludges exhibiting a characteristic of hazardous waste	(*)	(*)	—	(*)
By-products (listed in 40 CFR 261.31 or 261.32)	(*)	(*)	(*)	(*)
By-products exhibiting a characteristic of hazardous waste	(*)	(*)	—	(*)
Commercial chemical products listed in 40 CFR 261.33	(*)	(*)	—	—

TABLE 1—Continued

	Use constituting disposal (§261.2(c)(1))	Energy recovery/ fuel (§261.2(c)(2))	Reclamation (261.2(c)(3)), except as provided in §§261.2(a)(2)(ii), 261.4(a)(17), 261.4(a)(23), 261.4(a)(24), or 261.4(a)(25)	Speculative accumulation (§261.2(c)(4))
	1	2	3	4
Scrap metal that is not excluded under §261.4(a)(13)	(*)	(*)	(*)	(*)

Note: The terms "spent materials," "sludges," "by-products," and "scrap metal" and "processed scrap metal" are defined in §261.1.

(d) *Inherently waste-like materials.* The following materials are solid wastes when they are recycled in any manner:

(1) Hazardous Waste Nos. F020, F021 (unless used as an ingredient to make a product at the site of generation), F022, F023, F026, and F028.

(2) Secondary materials fed to a halogen acid furnace that exhibit a characteristic of a hazardous waste or are listed as a hazardous waste as defined in subparts C or D of this part, except for brominated material that meets the following criteria:

(i) The material must contain a bromine concentration of at least 45%; and

(ii) The material must contain less than a total of 1% of toxic organic compounds listed in appendix VIII; and

(iii) The material is processed continually on-site in the halogen acid furnace via direct conveyance (hard piping).

(3) The Administrator will use the following criteria to add wastes to that list:

(i)(A) The materials are ordinarily disposed of, burned, or incinerated; or

(B) The materials contain toxic constituents listed in appendix VIII of part 261 and these constituents are not ordinarily found in raw materials or products for which the materials substitute (or are found in raw materials or products in smaller concentrations) and are not used or reused during the recycling process; and

(ii) The material may pose a substantial hazard to human health and the environment when recycled.

(e) *Materials that are not solid waste when recycled.* (1) Materials are not solid wastes when they can be shown to be recycled by being:

(i) Used or reused as ingredients in an industrial process to make a product, provided the materials are not being reclaimed; or

(ii) Used or reused as effective substitutes for commercial products; or

(iii) Returned to the original process from which they are generated, without first being reclaimed or land disposed. The material must be returned as a substitute for feedstock materials. In cases where the original process to which the material is returned is a secondary process, the materials must be managed such that there is no placement on the land. In cases where the materials are generated and reclaimed within the primary mineral processing industry, the conditions of the exclusion found at §261.4(a)(17) apply rather than this paragraph.

(2) The following materials are solid wastes, even if the recycling involves use, reuse, or return to the original process (described in paragraphs (e)(1)(i) through (iii) of this section):

(i) Materials used in a manner constituting disposal, or used to produce products that are applied to the land; or

(ii) Materials burned for energy recovery, used to produce a fuel, or contained in fuels; or

(iii) Materials accumulated speculatively; or

(iv) Materials listed in paragraphs (d)(1) and (d)(2) of this section.

(f) *Documentation of claims that materials are not solid wastes or are conditionally exempt from regulation.* Respondents in actions to enforce regulations implementing subtitle C of RCRA who raise a claim that a certain material is not a solid waste, or is conditionally exempt from regulation, must demonstrate that there is a known market or disposition for the material, and that they meet the terms of the exclusion or exemption. In doing so, they must provide appropriate documentation (such as contracts showing that a second person uses the material as an ingredient in a production process) to demonstrate that the material is not a waste, or is exempt from regulation. In addition, owners or operators of facilities claiming that they actually are recycling materials must show that they have the necessary equipment to do so.

[50 FR 664, Jan. 4, 1985, as amended at 50 FR 33542, Aug. 20, 1985; 56 FR 7206, Feb. 21, 1991; 56 FR 32688, July 17, 1991; 56 FR 42512, Aug. 27, 1991; 57 FR 38564, Aug. 25, 1992; 59 FR 48042, Sept. 19, 1994; 62 FR 6651, Feb. 12, 1997; 62 FR 26019, May 12, 1997; 63 FR 28636, May 26, 1998; 64 FR 24513, May 11, 1999; 67 FR 11253, Mar. 13, 2002; 71 FR 40258, July 14, 2006; 73 FR 64760, Oct. 30, 2008; 75 FR 13001, Mar. 18, 2010]

EFFECTIVE DATE NOTE: At 80 FR 1774, Jan. 13, 2015, §261.2 was amended by removing and reserving paragraph (a)(2)(ii), revising paragraph (b)(3), adding paragraph (b)(4) revising paragraph (c)(3) and table 1 in paragraph (c)(4) and adding paragraph (g), effective July 13, 2015. For the convenience of the user, the added and revised text is set forth as follows:

§ 261.2 Definition of solid waste.

* * * * *

(b) * * *

(3) Accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned or incinerated; or

(4) Sham recycled, as explained in paragraph (g) of this section.

* * * * *

(c) * * *

(3) *Reclaimed.* Materials noted with a ''–'' in column 3 of Table 1 are not solid wastes when reclaimed. Materials noted with an ''*'' in column 3 of Table 1 are solid wastes when reclaimed unless they meet the requirements of §§261.4(a)(17), or 261.4(a)(23), 261.4(a)(24), or 261.4(a)(27).

(4) * * *

TABLE 1

	Use constituting disposal (§261.2(c)(1))	Energy recovery/fuel (§261.2(c)(2))	Reclamation (§261.2(c)(3)), except as provided in §§261.4(a)(17), 261.4(a)(23), 261.4(a)(24) or 261.4(a)(27)	Speculative accumulation (§261.2(c)(4))
	1	2	3	4
Spent Materials	(*)	(*)	(*)	(*)
Sludges (listed in 40 CFR Part 261.31 or 261.32)	(*)	(*)	(*)	(*)
Sludges exhibiting a characteristic of hazardous waste	(*)	(*)	–	(*)
By-products (listed in 40 CFR 261.31 or 261.32)	(*)	(*)	(*)	(*)
By-products exhibiting a characteristic of hazardous waste	(*)	(*)	–	(*)
Commercial chemical products listed in 40 CFR 261.33	(*)	(*)	–	–
Scrap metal that is not excluded under 40 CFR 261.4(a)(13)	(*)	(*)	(*)	(*)

Note: The terms "spent materials," "sludges," "by-products," and "scrap metal" and "processed scrap metal" are defined in §261.1.

* * * * *

(g) *Sham recycling.* A hazardous secondary material found to be sham recycled is considered discarded and a solid waste. Sham recycling is recycling that is not legitimate recycling as defined in §260.43.

§ 261.3 Definition of hazardous waste.

(a) A solid waste, as defined in §261.2, is a hazardous waste if:

(1) It is not excluded from regulation as a hazardous waste under §261.4(b); and

(2) It meets any of the following criteria:

(1) Transportation of the carbon dioxide stream must be in compliance with U.S. Department of Transportation requirements, including the pipeline safety laws (49 U.S.C. 60101 et seq.) and regulations (49 CFR Parts 190–199) of the U.S. Department of Transportation, and pipeline safety regulations adopted and administered by a state authority pursuant to a certification under 49 U.S.C. 60105, as applicable.

(2) Injection of the carbon dioxide stream must be in compliance with the applicable requirements for Class VI Underground Injection Control wells, including the applicable requirements in 40 CFR Parts 144 and 146;

(3) No hazardous wastes shall be mixed with, or otherwise co-injected with, the carbon dioxide stream; and

(4)(i) Any generator of a carbon dioxide stream, who claims that a carbon dioxide stream is excluded under this paragraph (h), must have an authorized representative (as defined in 40 CFR 260.10) sign a certification statement worded as follows:

I certify under penalty of law that the carbon dioxide stream that I am claiming to be excluded under 40 CFR 261.4(h) has not been mixed with hazardous wastes, and I have transported the carbon dioxide stream in compliance with (or have contracted with a pipeline operator or transporter to transport the carbon dioxide stream in compliance with) Department of Transportation requirements, including the pipeline safety laws (49 U.S.C. 60101 et seq.) and regulations (49 CFR Parts 190–199) of the U.S. Department of Transportation, and the pipeline safety regulations adopted and administered by a state authority pursuant to a certification under 49 U.S.C. 60105, as applicable, for injection into a well subject to the requirements for the Class VI Underground Injection Control Program of the Safe Drinking Water Act.

(ii) Any Class VI Underground Injection Control well owner or operator, who claims that a carbon dioxide stream is excluded under paragraph (h) of this section, must have an authorized representative (as defined in 40 CFR 260.10) sign a certification statement worded as follows:

I certify under penalty of law that the carbon dioxide stream that I am claiming to be excluded under 40 CFR 261.4(h) has not been mixed with, or otherwise co-injected with, hazardous waste at the Underground Injection Control (UIC) Class VI permitted facility, and that injection of the carbon dioxide stream is in compliance with the applicable requirements for UIC Class VI wells, including the applicable requirements in 40 CFR Parts 144 and 146.

(iii) The signed certification statement must be kept on-site for no less than three years, and must be made available within 72 hours of a written request from the Administrator, Regional Administrator, or state Director (if located in an authorized state), or their designee. The signed certification statement must be renewed every year that the exclusion is claimed, by having an authorized representative (as defined in 40 CFR 260.10) annually prepare and sign a new copy of the certification statement within one year of the date of the previous statement. The signed certification statement must also be readily accessible on the facility's publicly-available Web site (if such Web site exists) as a public notification with the title of ''Carbon Dioxide Stream Certification'' at the time the exclusion is claimed.

[45 FR 33119, May 19, 1980]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §261.4, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov*.

EFFECTIVE DATE NOTES: At 80 FR 1774, Jan. 13, 2015, §261.4 was amended by republishing paragraph (a) introductory text, revising paragraph (a)(23) and (24), removing and reserving paragraph (a)(25) and adding paragraph (a)(27), effective July 13, 2015. For the convenience of the user, the added and revised text is set forth as follows:

§261.4 Exclusions.

(a) Materials which are not solid wastes. The following materials are not solid wastes for the purpose of this part:

* * * * *

(23) Hazardous secondary material generated and legitimately reclaimed within the United States or its territories and under the control of the generator, provided that the material complies with paragraphs (a)(23)(i) and (ii) of this section:

(i)(A) The hazardous secondary material is generated and reclaimed at the generating facility (for purposes of this definition, generating facility means all contiguous property owned, leased, or otherwise controlled by the hazardous secondary material generator); or

(B) The hazardous secondary material is generated and reclaimed at different facilities, if the reclaiming facility is controlled by the generator or if both the generating facility and the reclaiming facility are controlled by a person as defined in § 260.10 of this chapter, and if the generator provides one of the following certifications: ''on behalf of [insert generator facility name], I certify that this facility will send the indicated hazardous secondary material to [insert reclaimer facility name], which is controlled by [insert generator facility name] and that [insert name of either facility] has acknowledged full responsibility for the safe management of the hazardous secondary material,'' or ''on behalf of [insert generator facility name], I certify that this facility will send the indicated hazardous secondary material to [insert reclaimer facility name], that both facilities are under common control, and that [insert name of either facility] has acknowledged full responsibility for the safe management of the hazardous secondary material.'' For purposes of this paragraph, ''control'' means the power to direct the policies of the facility, whether by the ownership of stock, voting rights, or otherwise, except that contractors who operate facilities on behalf of a different person as defined in § 260.10 shall not be deemed to ''control'' such facilities. The generating and receiving facilities must both maintain at their facilities for no less than three years records of hazardous secondary materials sent or received under this exclusion. In both cases, the records must contain the name of the transporter, the date of the shipment, and the type and quantity of the hazardous secondary material shipped or received under the exclusion. These requirements may be satisfied by routine business records (*e.g.*, financial records, bills of lading, copies of DOT shipping papers, or electronic confirmations); or

(C) The hazardous secondary material is generated pursuant to a written contract between a tolling contractor and a toll manufacturer and is reclaimed by the tolling contractor, if the tolling contractor certifies the following: ''On behalf of [insert tolling contractor name], I certify that [insert tolling contractor name] has a written contract with [insert toll manufacturer name] to manufacture [insert name of product or intermediate] which is made from specified unused materials, and that [insert tolling contractor name] will reclaim the hazardous secondary materials generated during this manufacture. On behalf of [insert tolling contractor name], I also certify that [insert tolling contractor name] retains ownership of, and responsibility for, the hazardous secondary materials that are generated during the course of the manufacture, including any releases of hazardous secondary materials that occur during the manufacturing process''. The tolling contractor must maintain at its facility for no less than three years records of hazardous secondary materials received pursuant to its written contract with the tolling manufacturer, and the tolling manufacturer must maintain at its facility for no less than three years records of hazardous secondary materials shipped pursuant to its written contract with the tolling contractor. In both cases, the records must contain the name of the transporter, the date of the shipment, and the type and quantity of the hazardous secondary material shipped or received pursuant to the written contract. These requirements may be satisfied by routine business records (*e.g.*, financial records, bills of lading, copies of DOT shipping papers, or electronic confirmations). For purposes of this paragraph, tolling contractor means a person who arranges for the production of a product or intermediate made from specified unused materials through a written contract with a toll manufacturer. Toll manufacturer means a person who produces a product or intermediate made from specified unused materials pursuant to a written contract with a tolling contractor.

(ii)(A) The hazardous secondary material is contained as defined in § 260.10 of this chapter. A hazardous secondary material released to the environment is discarded and a solid waste unless it is immediately recovered for the purpose of reclamation. Hazardous secondary material managed in a unit with leaks or other continuing or intermittent unpermitted releases is discarded and a solid waste.

(B) The hazardous secondary material is not speculatively accumulated, as defined in § 261.1(c)(8).

(C) Notice is provided as required by § 260.42 of this chapter.

(D) The material is not otherwise subject to material-specific management conditions under paragraph (a) of this section when reclaimed, and it is not a spent lead-acid battery (see § 266.80 and § 273.2 of this chapter).

(E) Persons performing the recycling of hazardous secondary materials under this exclusion must maintain documentation of their legitimacy determination on-site. Documentation must be a written description of how the recycling meets all four factors in § 260.43(a). Documentation must be maintained for three years after the recycling operation has ceased.

(F) The emergency preparedness and response requirements found in subpart M of this part are met.

(24) Hazardous secondary material that is generated and then transferred to a verified reclamation facility for the purpose of reclamation is not a solid waste, provided that:

(i) The material is not speculatively accumulated, as defined in § 261.1(c)(8);

(ii) The material is not handled by any person or facility other than the hazardous secondary material generator, the transporter, an intermediate facility or a reclaimer, and, while in transport, is not stored for more than 10 days at a transfer facility, as defined in §260.10 of this chapter, and is packaged according to applicable Department of Transportation regulations at 49 CFR parts 173, 178, and 179 while in transport;

(iii) The material is not otherwise subject to material-specific management conditions under this paragraph (a) when reclaimed, and it is not a spent lead-acid battery (see §§266.80 and 273.2 of this chapter);

(iv) The reclamation of the material is legitimate, as specified under §260.43 of this chapter;

(v) The hazardous secondary material generator satisfies all of the following conditions:

(A) The material must be contained as defined in §260.10. A hazardous secondary material released to the environment is discarded and a solid waste unless it is immediately recovered for the purpose of recycling. Hazardous secondary material managed in a unit with leaks or other continuing releases is discarded and a solid waste.

(B) The hazardous secondary material generator must arrange for transport of hazardous secondary materials to a verified reclamation facility (or facilities) in the United States. A verified reclamation facility is a facility that has been granted a variance under §260.31(d), or a reclamation facility where the management of the hazardous secondary materials is addressed under a RCRA Part B permit or interim status standards. If the hazardous secondary material will be passing through an intermediate facility, the intermediate facility must have been granted a variance under §260.31(d) or the management of the hazardous secondary materials at that facility must be addressed under a RCRA Part B permit or interim status standards, and the hazardous secondary material generator must make contractual arrangements with the intermediate facility to ensure that the hazardous secondary material is sent to the reclamation facility identified by the hazardous secondary material generator.

(C) The hazardous secondary material generator must maintain at the generating facility for no less than three (3) years records of all off-site shipments of hazardous secondary materials. For each shipment, these records must, at a minimum, contain the following information:

(*1*) Name of the transporter and date of the shipment;

(*2*) Name and address of each reclaimer and, if applicable, the name and address of each intermediate facility to which the hazardous secondary material was sent;

(*3*) The type and quantity of hazardous secondary material in the shipment.

(D) The hazardous secondary material generator must maintain at the generating facility for no less than three (3) years confirmations of receipt from each reclaimer and, if applicable, each intermediate facility for all off-site shipments of hazardous secondary materials. Confirmations of receipt must include the name and address of the reclaimer (or intermediate facility), the type and quantity of the hazardous secondary materials received and the date which the hazardous secondary materials were received. This requirement may be satisfied by routine business records (*e.g.*, financial records, bills of lading, copies of DOT shipping papers, or electronic confirmations of receipt);

(E) The hazardous secondary material generator must comply with the emergency preparedness and response conditions in subpart M of this part.

(vi) Reclaimers of hazardous secondary material excluded from regulation under this exclusion and intermediate facilities as defined in §260.10 of this chapter satisfy all of the following conditions:

(A) The reclaimer and intermediate facility must maintain at its facility for no less than three (3) years records of all shipments of hazardous secondary material that were received at the facility and, if applicable, for all shipments of hazardous secondary materials that were received and subsequently sent off-site from the facility for further reclamation. For each shipment, these records must at a minimum contain the following information:

(*1*) Name of the transporter and date of the shipment;

(*2*) Name and address of the hazardous secondary material generator and, if applicable, the name and address of the reclaimer or intermediate facility which the hazardous secondary materials were received from;

(*3*) The type and quantity of hazardous secondary material in the shipment; and

(*4*) For hazardous secondary materials that, after being received by the reclaimer or intermediate facility, were subsequently transferred off-site for further reclamation, the name and address of the (subsequent) reclaimer and, if applicable, the name and address of each intermediate facility to which the hazardous secondary material was sent.

(B) The intermediate facility must send the hazardous secondary material to the reclaimer(s) designated by the hazardous secondary materials generator.

(C) The reclaimer and intermediate facility must send to the hazardous secondary material generator confirmations of receipt for all off-site shipments of hazardous secondary materials. Confirmations of receipt must include the name and address of the reclaimer

(or intermediate facility), the type and quantity of the hazardous secondary materials received and the date which the hazardous secondary materials were received. This requirement may be satisfied by routine business records (*e.g.*, financial records, bills of lading, copies of DOT shipping papers, or electronic confirmations of receipt).

(D) The reclaimer and intermediate facility must manage the hazardous secondary material in a manner that is at least as protective as that employed for analogous raw material and must be contained. An ''analogous raw material'' is a raw material for which a hazardous secondary material is a substitute and serves the same function and has similar physical and chemical properties as the hazardous secondary material.

(E) Any residuals that are generated from reclamation processes will be managed in a manner that is protective of human health and the environment. If any residuals exhibit a hazardous characteristic according to subpart C of 40 CFR part 261, or if they themselves are specifically listed in subpart D of 40 CFR part 261, such residuals are hazardous wastes and must be managed in accordance with the applicable requirements of 40 CFR parts 260 through 272.

(F) The reclaimer and intermediate facility have financial assurance as required under subpart H of 40 CFR part 261,

(G) The reclaimer and intermediate facility have been granted a variance under § 260.31(d) or have a RCRA Part B permit or interim status standards that address the management of the hazardous secondary materials; and

(vii) All persons claiming the exclusion under this paragraph (a)(24) of this section provide notification as required under § 260.42 of this chapter.

* * * * *

(27) Hazardous secondary material that is generated and then transferred to another person for the purpose of remanufacturing is not a solid waste, provided that:

(i) The hazardous secondary material consists of one or more of the following spent solvents: Toluene, xylenes, ethylbenzene, 1,2,4-trimethylbenzene, chlorobenzene, n-hexane, cyclohexane, methyl tert-butyl ether, acetonitrile, chloroform, chloromethane, dichloromethane, methyl isobutyl ketone, NN-dimethylformamide, tetrahydrofuran, n-butyl alcohol, ethanol, and/or methanol;

(ii) The hazardous secondary material originated from using one or more of the solvents listed in paragraph (a)(27)(i) of this section in a commercial grade for reacting, extracting, purifying, or blending chemicals (or for rinsing out the process lines associated with these functions) in the pharmaceutical manufacturing (NAICS 325412), basic organic chemical manufacturing (NAICS 325199), plastics and resins manufacturing (NAICS 325211), and/or the paints and coatings manufacturing sectors (NAICS 325510).

(iii) The hazardous secondary material generator sends the hazardous secondary material spent solvents listed in paragraph (a)(27)(i) of this section to a remanufacturer in the pharmaceutical manufacturing (NAICS 325412), basic organic chemical manufacturing (NAICS 325199), plastics and resins manufacturing (NAICS 325211), and/or the paints and coatings manufacturing sectors (NAICS 325510).

(iv) After remanufacturing one or more of the solvents listed in paragraph (a)(27)(i) of this section, the use of the remanufactured solvent shall be limited to reacting, extracting, purifying, or blending chemicals (or for rinsing out the process lines associated with these functions) in the pharmaceutical manufacturing (NAICS 325412), basic organic chemical manufacturing (NAICS 325199), plastics and resins manufacturing (NAICS 325211), and the paints and coatings manufacturing sectors (NAICS 325510) or to using them as ingredients in a product. These allowed uses correspond to chemical functional uses enumerated under the Chemical Data Reporting Rule of the Toxic Substances Control Act (40 CFR parts 704, 710–711), including Industrial Function Codes U015 (solvents consumed in a reaction to produce other chemicals) and U030 (solvents become part of the mixture);

(v) After remanufacturing one or more of the solvents listed in paragraph (a)(27)(i) of this section, the use of the remanufactured solvent does not involve cleaning or degreasing oil, grease, or similar material from textiles, glassware, metal surfaces, or other articles. (These disallowed continuing uses correspond to chemical functional uses in Industrial Function Code U029 under the Chemical Data Reporting Rule of the Toxics Substances Control Act.); and

(vi) Both the hazardous secondary material generator and the remanufacturer must:

(A) Notify EPA or the State Director, if the state is authorized for the program, and update the notification every two years per 40 CFR 260.42;

(B) Develop and maintain an up-to-date remanufacturing plan which identifies:

(*1*) The name, address and EPA ID number of the generator(s) and the remanufacturer(s),

(*2*) The types and estimated annual volumes of spent solvents to be remanufactured,

(*3*) The processes and industry sectors that generate the spent solvents,

(*4*) The specific uses and industry sectors for the remanufactured solvents, and

(*5*) A certification from the remanufacturer stating ''on behalf of [insert remanufacturer facility name], I certify that this facility is a remanufacturer under pharmaceutical manufacturing (NAICS 325412), basic organic chemical manufacturing (NAICS 325199), plastics and resins manufacturing (NAICS 325211), and/or the paints and coatings manufacturing sectors (NAICS 325510), and will accept the spent solvent(s) for the sole purpose of remanufacturing into commercial-grade solvent(s) that will be used for reacting, extracting, purifying, or blending chemicals (or for rinsing out the process lines associated with these functions) or for use as product ingredient(s). I also certify that the remanufacturing equipment, vents, and tanks are equipped with and are operating air emission controls in compliance with the appropriate Clean Air Act regulations under 40 CFR part 60, part 61 or part 63, or, absent such Clean Air Act standards for the particular operation or piece of equipment covered by the remanufacturing exclusion, are in compliance with the appropriate standards in 40 CFR part 261, subparts AA (vents), BB (equipment) and CC (tank storage),'';

(C) Maintain records of shipments and confirmations of receipts for a period of three years from the dates of the shipments;

(D) Prior to remanufacturing, store the hazardous spent solvents in tanks or containers that meet technical standards found in subparts I and J of 40 CFR part 261, with the tanks and containers being labeled or otherwise having an immediately available record of the material being stored;

(E) During remanufacturing, and during storage of the hazardous secondary materials prior to remanufacturing, the remanufacturer certifies that the remanufacturing equipment, vents, and tanks are equipped with and are operating air emission controls in compliance with the appropriate Clean Air Act regulations under 40 CFR part 60, part 61 or part 63; or, absent such Clean Air Act standards for the particular operation or piece of equipment covered by the remanufacturing exclusion, are in compliance with the appropriate standards in 40 CFR part 261 subparts AA (vents), BB (equipment) and CC (tank storage); and

(F) Meet the requirements prohibiting speculative accumulation per 40 CFR 261.1(c)(8).

2. At 80 FR 21500, Apr. 17, 2015, §261.4, was amended by revising paragraph (b)(4), effective Oct. 14, 2015, the revised text is set forth to read as follows:

§261.4 Exclusions.

* * * * *

(b) * * *

(4)(i) Fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels, except as provided by §266.112 of this chapter for facilities that burn or process hazardous waste.

(ii) The following wastes generated primarily from processes that support the combustion of coal or other fossil fuels that are co-disposed with the wastes in paragraph (b)(4)(i) of this section, except as provided by §266.112 of this chapter for facilities that burn or process hazardous waste:

(A) *Coal pile run-off.* For purposes of paragraph (b)(4) of this section, coal pile run-off means any precipitation that drains off coal piles.

(B) *Boiler cleaning solutions.* For purposes of paragraph (b)(4) of this section, boiler cleaning solutions means water solutions and chemical solutions used to clean the fire-side and water-side of the boiler.

(C) *Boiler blowdown.* For purposes of paragraph (b)(4) of this section, boiler blowdown means water purged from boilers used to generate steam.

(D) *Process water treatment and demineralizer regeneration wastes.* For purposes of paragraph (b)(4) of this section, process water treatment and demineralizer regeneration wastes means sludges, rinses, and spent resins generated from processes to remove dissolved gases, suspended solids, and dissolved chemical salts from combustion system process water.

(E) *Cooling tower blowdown.* For purposes of paragraph (b)(4) of this section, cooling tower blowdown means water purged from a closed cycle cooling system. Closed cycle cooling systems include cooling towers, cooling ponds, or spray canals.

(F) *Air heater and precipitator washes.* For purposes of paragraph (b)(4) of this section, air heater and precipitator washes means wastes from cleaning air preheaters and electrostatic precipitators.

(G) *Effluents from floor and yard drains and sumps.* For purposes of paragraph (b)(4) of this section, effluents from floor and yard drains and sumps means wastewaters, such as wash water, collected by or from floor drains, equipment drains, and sumps located inside the power plant building; and wastewaters, such as rain runoff, collected by yard drains and sumps located outside the power plant building.

(H) *Wastewater treatment sludges.* For purposes of paragraph (b)(4) of this section, wastewater treatment sludges refers to sludges generated from the treatment of wastewaters specified in paragraphs (b)(4)(ii)(A) through (F) of this section.

the wastes are nonhazardous. The generator can then use knowledge of the wastes to support subsequent annual determinations.

(B) The annual testing requirements are reinstated if the manufacturing or waste treatment processes generating the wastes are significantly altered, resulting in an increase of the potential for the wastes to exceed the listing levels.

(C) If the annual testing requirements are suspended, the generator must keep records of the process knowledge information used to support a nonhazardous determination. If testing is reinstated, a description of the process change must be retained.

(4) *Recordkeeping for the landfill disposal and combustion exemptions.* For the purposes of meeting the landfill disposal and combustion condition set out in the K181 listing description, the generator must maintain on site for three years documentation demonstrating that each shipment of waste was received by a landfill unit that is subject to or meets the landfill design standards set out in the listing description, or was treated in combustion units as specified in the listing description.

(5) *Waste holding and handling.* During the interim period, from the point of generation to completion of the hazardous waste determination, the generator is responsible for storing the wastes appropriately. If the wastes are determined to be hazardous and the generator has not complied with the subtitle C requirements during the interim period, the generator could be subject to an enforcement action for improper management.

[46 FR 4618, Jan. 16, 1981]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 261.32, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov*.

§ 261.33 Discarded commercial chemical products, off-specification species, container residues, and spill residues thereof.

The following materials or items are hazardous wastes if and when they are discarded or intended to be discarded as described in § 261.2(a)(2)(i), when they are mixed with waste oil or used oil or other material and applied to the land for dust suppression or road treatment, when they are otherwise applied to the land in lieu of their original intended use or when they are contained in products that are applied to the land in lieu of their original intended use, or when, in lieu of their original intended use, they are produced for use as (or as a component of) a fuel, distributed for use as a fuel, or burned as a fuel.

(a) Any commercial chemical product, or manufacturing chemical intermediate having the generic name listed in paragraph (e) or (f) of this section.

(b) Any off-specification commercial chemical product or manufacturing chemical intermediate which, if it met specifications, would have the generic name listed in paragraph (e) or (f) of this section.

(c) Any residue remaining in a container or in an inner liner removed from a container that has held any commercial chemical product or manufacturing chemical intermediate having the generic name listed in paragraphs (e) or (f) of this section, unless the container is empty as defined in § 261.7(b) of this chapter.

[*Comment:* Unless the residue is being beneficially used or reused, or legitimately recycled or reclaimed; or being accumulated, stored, transported or treated prior to such use, re-use, recycling or reclamation, EPA considers the residue to be intended for discard, and thus, a hazardous waste. An example of a legitimate re-use of the residue would be where the residue remains in the container and the container is used to hold the same commercial chemical product or manufacturing chemical intermediate it previously held. An example of the discard of the residue would be where the drum is sent to a drum reconditioner who reconditions the drum but discards the residue.]

(d) Any residue or contaminated soil, water or other debris resulting from the cleanup of a spill into or on any land or water of any commercial chemical product or manufacturing chemical intermediate having the generic name listed in paragraph (e) or (f) of this section, or any residue or contaminated soil, water or other debris resulting from the cleanup of a spill, into or on any land or water, of any off-specification chemical product and manufacturing chemical intermediate

which, if it met specifications, would have the generic name listed in paragraph (e) or (f) of this section.

[*Comment:* The phrase ''commercial chemical product or manufacturing chemical intermediate having the generic name listed in . . .'' refers to a chemical substance which is manufactured or formulated for commercial or manufacturing use which consists of the commercially pure grade of the chemical, any technical grades of the chemical that are produced or marketed, and all formulations in which the chemical is the sole active ingredient. It does not refer to a material, such as a manufacturing process waste, that contains any of the substances listed in paragraph (e) or (f). Where a manufacturing process waste is deemed to be a hazardous waste because it contains a substance listed in paragraph (e) or (f), such waste will be listed in either § 261.31 or § 261.32 or will be identified as a hazardous waste by the characteristics set forth in subpart C of this part.]

(e) The commercial chemical products, manufacturing chemical intermediates or off-specification commercial chemical products or manufacturing chemical intermediates referred to in paragraphs (a) through (d) of this section, are identified as acute hazardous wastes (H) and are subject to the small quantity exclusion defined in § 261.5(e).

[*Comment:* For the convenience of the regulated community the primary hazardous properties of these materials have been indicated by the letters T (Toxicity), and R (Reactivity). Absence of a letter indicates that the compound only is listed for acute toxicity. Wastes are first listed in alphabetical order by substance and then listed again in numerical order by Hazardous Waste Number.]

These wastes and their corresponding EPA Hazardous Waste Numbers are:

Hazardous waste No.	Chemical abstracts No.	Substance
P023	107–20–0	Acetaldehyde, chloro-
P002	591–08–2	Acetamide, N-(aminothioxomethyl)-
P057	640–19–7	Acetamide, 2-fluoro-
P058	62–74–8	Acetic acid, fluoro-, sodium salt
P002	591–08–2	1-Acetyl-2-thiourea
P003	107–02–8	Acrolein
P070	116–06–3	Aldicarb
P203	1646–88–4	Aldicarb sulfone.
P004	309–00–2	Aldrin
P005	107–18–6	Allyl alcohol
P006	20859–73–8	Aluminum phosphide (R,T)
P007	2763–96–4	5-(Aminomethyl)-3-isoxazolol
P008	504–24–5	4-Aminopyridine
P009	131–74–8	Ammonium picrate (R)
P119	7803–55–6	Ammonium vanadate
P099	506–61–6	Argentate(1-), bis(cyano-C)-, potassium
P010	7778–39–4	Arsenic acid H_3 AsO_4
P012	1327–53–3	Arsenic oxide As_2 O_3
P011	1303–28–2	Arsenic oxide As_2 O_5
P011	1303–28–2	Arsenic pentoxide
P012	1327–53–3	Arsenic trioxide
P038	692–42–2	Arsine, diethyl-
P036	696–28–6	Arsonous dichloride, phenyl-
P054	151–56–4	Aziridine
P067	75–55–8	Aziridine, 2-methyl-
P013	542–62–1	Barium cyanide
P024	106–47–8	Benzenamine, 4-chloro-
P077	100–01–6	Benzenamine, 4-nitro-
P028	100–44–7	Benzene, (chloromethyl)-
P042	51–43–4	1,2-Benzenediol, 4-[1-hydroxy-2-(methylamino)ethyl]-, (R)-
P046	122–09–8	Benzeneethanamine, alpha,alpha-dimethyl-
P014	108–98–5	Benzenethiol
P127	1563–66–2	7-Benzofuranol, 2,3-dihydro-2,2-dimethyl-, methylcarbamate.
P188	57–64–7	Benzoic acid, 2-hydroxy-, compd. with (3aS-cis)-1,2,3,3a,8,8a-hexahydro-1,3a,8-trimethylpyrrolo[2,3-b]indol-5-yl methylcarbamate ester (1:1).
P001	[1] 81–81–2	2H-1-Benzopyran-2-one, 4-hydroxy-3-(3-oxo-1-phenylbutyl)-, & salts, when present at concentrations greater than 0.3%
P028	100–44–7	Benzyl chloride
P015	7440–41–7	Beryllium powder
P017	598–31–2	Bromoacetone
P018	357–57–3	Brucine
P045	39196–18–4	2-Butanone, 3,3-dimethyl-1-(methylthio)-, O-[(methylamino)carbonyl] oxime

§ 261.200 Air emission standards.

The remanufacturer or other person that stores or treats the hazardous secondary material shall manage all hazardous secondary material placed in a tank in accordance with the applicable requirements of subparts AA, BB, and CC of this part.

Subparts K–L [Reserved]

EFFECTIVE DATE NOTE: At 80 FR 1777, Jan. 13, 2015, Subparts K–L were added and reserved, effective July 13, 2015.

Subpart M—Emergency Preparedness and Response for Management of Excluded Hazardous Secondary Materials

SOURCE: 80 FR 1777, Jan. 13, 2015, unless otherwise noted.

EFFECTIVE DATE NOTE: At 80 FR 1777, Jan. 13, 2015, Subpart M was added, effective July 13, 2015.

§ 261.400 Applicability.

The requirements of this subpart apply to those areas of an entity managing hazardous secondary materials excluded under § 261.4(a)(23) and/or (24) where hazardous secondary materials are generated or accumulated on site.

(a) A generator of hazardous secondary material, or an intermediate or reclamation facility operating under a verified recycler variance under § 260.31(d), that accumulates 6000 kg or less of hazardous secondary material at any time must comply with §§ 261.410 and 261.411.

(b) A generator of hazardous secondary material, or an intermediate or reclamation facility operating under a verified recycler variance under § 260.31(d) that accumulates more than 6000 kg of hazardous secondary material at any time must comply with §§ 261.410 and 261.420.

§ 261.410 Preparedness and prevention.

(a) *Maintenance and operation of facility.* Facilities generating or accumulating hazardous secondary material must be maintained and operated to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous secondary materials or hazardous secondary material constituents to air, soil, or surface water which could threaten human health or the environment.

(b) *Required equipment.* All facilities generating or accumulating hazardous secondary material must be equipped with the following, *unless* none of the hazards posed by hazardous secondary material handled at the facility could require a particular kind of equipment specified below:

(1) An internal communications or alarm system capable of providing immediate emergency instruction (voice or signal) to facility personnel;

(2) A device, such as a telephone (immediately available at the scene of operations) or a hand-held two-way radio, capable of summoning emergency assistance from local police departments, fire departments, or state or local emergency response teams;

(3) Portable fire extinguishers, fire control equipment (including special extinguishing equipment, such as that using foam, inert gas, or dry chemicals), spill control equipment, and decontamination equipment; and

(4) Water at adequate volume and pressure to supply water hose streams, or foam producing equipment, or automatic sprinklers, or water spray systems.

(c) *Testing and maintenance of equipment.* All facility communications or alarm systems, fire protection equipment, spill control equipment, and decontamination equipment, where required, must be tested and maintained as necessary to assure its proper operation in time of emergency.

(d) *Access to communications or alarm system.* (1) Whenever hazardous secondary material is being poured, mixed, spread, or otherwise handled, all personnel involved in the operation must have immediate access to an internal alarm or emergency communication device, either directly or through visual or voice contact with another employee, unless such a device is not required under paragraph (b) of this section.

(2) If there is ever just one employee on the premises while the facility is operating, he must have immediate access to a device, such as a telephone (immediately available at the scene of operation) or a hand-held two-way radio, capable of summoning external emergency assistance, *unless* such a device is not required under paragraph (b) of this section.

(e) *Required aisle space.* The hazardous secondary material generator or intermediate or reclamation facility operating under a verified recycler variance under §260.31(d) must maintain aisle space to allow the unobstructed movement of personnel, fire protection equipment, spill control equipment, and decontamination equipment to any area of facility operation in an emergency, unless aisle space is not needed for any of these purposes.

(f) *Arrangements with local authorities.* (1) The hazardous secondary material generator or an intermediate or reclamation facility operating under a verified recycler variance under §260.31(d) must attempt to make the following arrangements, as appropriate for the type of waste handled at his facility and the potential need for the services of these organizations:

(i) Arrangements to familiarize police, fire departments, and emergency response teams with the layout of the facility, properties of hazardous secondary material handled at the facility and associated hazards, places where facility personnel would normally be working, entrances to roads inside the facility, and possible evacuation routes;

(ii) Where more than one police and fire department might respond to an emergency, agreements designating primary emergency authority to a specific police and a specific fire department, and agreements with any others to provide support to the primary emergency authority;

(iii) Agreements with state emergency response teams, emergency response contractors, and equipment suppliers; and

(iv) Arrangements to familiarize local hospitals with the properties of hazardous waste handled at the facility and the types of injuries or illnesses which could result from fires, explosions, or releases at the facility.

(2) Where state or local authorities decline to enter into such arrangements, the hazardous secondary material generator or an intermediate or reclamation facility operating under a verified recycler variance under §260.31(d) must document the refusal in the operating record.

§ 261.411 Emergency procedures for facilities generating or accumulating 6000 kg or less of hazardous secondary material.

A generator or an intermediate or reclamation facility operating under a verified recycler variance under §260.31(d) that generates or accumulates 6000 kg or less of hazardous secondary material must comply with the following requirements:

(a) At all times there must be at least one employee either on the premises or on call (*i.e.*, available to respond to an emergency by reaching the facility within a short period of time) with the responsibility for coordinating all emergency response measures specified in paragraph (d) of this section. This employee is the emergency coordinator.

(b) The generator or intermediate or reclamation facility operating under a verified recycler variance under §260.31(d) must post the following information next to the telephone:

(1) The name and telephone number of the emergency coordinator;

(2) Location of fire extinguishers and spill control material, and, if present, fire alarm; and

(3) The telephone number of the fire department, unless the facility has a direct alarm.

(c) The generator or an intermediate or reclamation facility operating under a verified recycler variance under §260.31(d) must ensure that all employees are thoroughly familiar with proper waste handling and emergency procedures, relevant to their responsibilities during normal facility operations and emergencies;

(d) The emergency coordinator or his designee must respond to any emergencies that arise. The applicable responses are as follows:

(1) In the event of a fire, call the fire department or attempt to extinguish it using a fire extinguisher;

(2) In the event of a spill, contain the flow of hazardous waste to the extent possible, and as soon as is practicable, clean up the hazardous waste and any contaminated materials or soil;

(3) In the event of a fire, explosion, or other release which could threaten human health outside the facility or when the generator or an intermediate or reclamation facility operating under a verified recycler variance under § 260.31(d) has knowledge that a spill has reached surface water, the generator or an intermediate or reclamation facility operating under a verified recycler variance under § 260.31(d) must immediately notify the National Response Center (using their 24-hour toll free number 800/424–8802). The report must include the following information:

(i) The name, address, and U.S. EPA Identification Number of the facility;

(ii) Date, time, and type of incident (*e.g.*, spill or fire);

(iii) Quantity and type of hazardous waste involved in the incident;

(iv) Extent of injuries, if any; and

(v) Estimated quantity and disposition of recovered materials, if any.

§ 261.420 Contingency planning and emergency procedures for facilities generating or accumulating more than 6000 kg of hazardous secondary material.

A generator or an intermediate or reclamation facility operating under a verified recycler variance under § 260.31(d) that generates or accumulates more than 6000 kg of hazardous secondary material must comply with the following requirements:

(a) *Purpose and implementation of contingency plan.* (1) Each generator or an intermediate or reclamation facility operating under a verified recycler variance under § 260.31(d) that accumulates more than 6000 kg of hazardous secondary material must have a contingency plan for his facility. The contingency plan must be designed to minimize hazards to human health or the environment from fires, explosions, or any unplanned sudden or non-sudden release of hazardous secondary material or hazardous secondary material constituents to air, soil, or surface water.

(2) The provisions of the plan must be carried out immediately whenever there is a fire, explosion, or release of hazardous secondary material or hazardous secondary material constituents which could threaten human health or the environment.

(b) *Content of contingency plan.* (1) The contingency plan must describe the actions facility personnel must take to comply with paragraphs (a) and (f) in response to fires, explosions, or any unplanned sudden or non-sudden release of hazardous secondary material or hazardous secondary material constituents to air, soil, or surface water at the facility.

(2) If the generator or an intermediate or reclamation facility operating under a verified recycler variance under § 260.31(d) accumulating more than 6000 kg of hazardous secondary material has already prepared a Spill Prevention, Control, and Countermeasures (SPCC) Plan in accordance with part 112 of this chapter, or some other emergency or contingency plan, he need only amend that plan to incorporate hazardous waste management provisions that are sufficient to comply with the requirements of this part. The hazardous secondary material generator or an intermediate or reclamation facility operating under a verified recycler variance under § 260.31(d) may develop one contingency plan which meets all regulatory requirements. EPA recommends that the plan be based on the National Response Team's Integrated Contingency Plan Guidance (''One Plan''). When modifications are made to non-RCRA provisions in an integrated contingency plan, the changes do not trigger the need for a RCRA permit modification.

(3) The plan must describe arrangements agreed to by local police departments, fire departments, hospitals, contractors, and State and local emergency response teams to coordinate emergency services, pursuant to § 262.410(f).

(4) The plan must list names, addresses, and phone numbers (office and home) of all persons qualified to act as emergency coordinator (see paragraph (e) of this section), and this list must

be kept up-to-date. Where more than one person is listed, one must be named as primary emergency coordinator and others must be listed in the order in which they will assume responsibility as alternates.

(5) The plan must include a list of all emergency equipment at the facility (such as fire extinguishing systems, spill control equipment, communications and alarm systems (internal and external), and decontamination equipment), where this equipment is required. This list must be kept up to date. In addition, the plan must include the location and a physical description of each item on the list, and a brief outline of its capabilities.

(6) The plan must include an evacuation plan for facility personnel where there is a possibility that evacuation could be necessary. This plan must describe signal(s) to be used to begin evacuation, evacuation routes, and alternate evacuation routes (in cases where the primary routes could be blocked by releases of hazardous waste or fires).

(c) *Copies of contingency plan.* A copy of the contingency plan and all revisions to the plan must be:

(1) Maintained at the facility; and

(2) Submitted to all local police departments, fire departments, hospitals, and State and local emergency response teams that may be called upon to provide emergency services.

(d) *Amendment of contingency plan.* The contingency plan must be reviewed, and immediately amended, if necessary, whenever:

(1) Applicable regulations are revised;

(2) The plan fails in an emergency;

(3) The facility changes—in its design, construction, operation, maintenance, or other circumstances—in a way that materially increases the potential for fires, explosions, or releases of hazardous secondary material or hazardous secondary material constituents, or changes the response necessary in an emergency;

(4) The list of emergency coordinators changes; or

(5) The list of emergency equipment changes.

(e) *Emergency coordinator.* At all times, there must be at least one employee either on the facility premises or on call (*i.e.,* available to respond to an emergency by reaching the facility within a short period of time) with the responsibility for coordinating all emergency response measures. This emergency coordinator must be thoroughly familiar with all aspects of the facility's contingency plan, all operations and activities at the facility, the location and characteristics of waste handled, the location of all records within the facility, and the facility layout. In addition, this person must have the authority to commit the resources needed to carry out the contingency plan. The emergency coordinator's responsibilities are more fully spelled out in paragraph (f). Applicable responsibilities for the emergency coordinator vary, depending on factors such as type and variety of hazardous secondary material(s) handled by the facility, and type and complexity of the facility.

(f) *Emergency procedures.* (1) Whenever there is an imminent or actual emergency situation, the emergency coordinator (or his designee when the emergency coordinator is on call) must immediately:

(i) Activate internal facility alarms or communication systems, where applicable, to notify all facility personnel; and

(ii) Notify appropriate State or local agencies with designated response roles if their help is needed.

(2) Whenever there is a release, fire, or explosion, the emergency coordinator must immediately identify the character, exact source, amount, and areal extent of any released materials. He may do this by observation or review of facility records or manifests and, if necessary, by chemical analysis.

(3) Concurrently, the emergency coordinator must assess possible hazards to human health or the environment that may result from the release, fire, or explosion. This assessment must consider both direct and indirect effects of the release, fire, or explosion (*e.g.,* the effects of any toxic, irritating, or asphyxiating gases that are generated, or the effects of any hazardous surface water run-offs from water or chemical agents used to control fire and heat-induced explosions).

(4) If the emergency coordinator determines that the facility has had a release, fire, or explosion which could threaten human health, or the environment, outside the facility, he must report his findings as follows:

(i) If his assessment indicates that evacuation of local areas may be advisable, he must immediately notify appropriate local authorities. He must be available to help appropriate officials decide whether local areas should be evacuated; and

(ii) He must immediately notify either the government official designated as the on-scene coordinator for that geographical area, or the National Response Center (using their 24-hour toll free number 800/424–8802). The report must include:

(A) Name and telephone number of reporter;

(B) Name and address of facility;

(C) Time and type of incident (*e.g.*, release, fire);

(D) Name and quantity of material(s) involved, to the extent known;

(E) The extent of injuries, if any; and

(F) The possible hazards to human health, or the environment, outside the facility.

(5) During an emergency, the emergency coordinator must take all reasonable measures necessary to ensure that fires, explosions, and releases do not occur, recur, or spread to other hazardous secondary material at the facility. These measures must include, where applicable, stopping processes and operations, collecting and containing released material, and removing or isolating containers.

(6) If the facility stops operations in response to a fire, explosion or release, the emergency coordinator must monitor for leaks, pressure buildup, gas generation, or ruptures in valves, pipes, or other equipment, wherever this is appropriate.

(7) Immediately after an emergency, the emergency coordinator must provide for treating, storing, or disposing of recovered secondary material, contaminated soil or surface water, or any other material that results from a release, fire, or explosion at the facility. Unless the hazardous secondary material generator can demonstrate, in accordance with § 261.3(c) or (d) of this chapter, that the recovered material is not a hazardous waste, the owner or operator becomes a generator of hazardous waste and must manage it in accordance with all applicable requirements of parts 262, 263, and 265 of this chapter.

(8) The emergency coordinator must ensure that, in the affected area(s) of the facility:

(i) No secondary material that may be incompatible with the released material is treated, stored, or disposed of until cleanup procedures are completed; and

(ii) All emergency equipment listed in the contingency plan is cleaned and fit for its intended use before operations are resumed.

(9) The hazardous secondary material generator must note in the operating record the time, date, and details of any incident that requires implementing the contingency plan. Within 15 days after the incident, he must submit a written report on the incident to the Regional Administrator. The report must include:

(i) Name, address, and telephone number of the hazardous secondary material generator;

(ii) Name, address, and telephone number of the facility;

(iii) Date, time, and type of incident (*e.g.*, fire, explosion);

(iv) Name and quantity of material(s) involved;

(v) The extent of injuries, if any;

(vi) An assessment of actual or potential hazards to human health or the environment, where this is applicable; and

(vii) Estimated quantity and disposition of recovered material that resulted from the incident.

Subparts N–Z [Reserved]

EFFECTIVE DATE NOTE: At 80 FR 1777, Jan. 13, 2015, Subparts N–Z were added and reserved, effective July 13, 2015.

Subpart AA—Air Emission Standards for Process Vents

SOURCE: 80 FR 1777, Jan. 13, 2015, unless otherwise noted.

(5) Used oil that is incidentally captured by a hydrocarbon recovery system or wastewater treatment system as part of routine process operations at a petroleum refining facility and inserted into the petroleum refining facility process is exempt from the requirements of this part. This exemption does not extend to used oil which is intentionally introduced into a hydrocarbon recovery system (e.g., by pouring collected used oil into the waste water treatment system).

(6) Tank bottoms from stock tanks containing exempt mixtures of used oil and crude oil or natural gas liquids are exempt from the requirements of this part.

(h) *Used oil on vessels.* Used oil produced on vessels from normal shipboard operations is not subject to this part until it is transported ashore.

(i) *Used oil containing PCBs.* Used oil containing PCBs (as defined at 40 CFR 761.3) at any concentration less than 50 ppm is subject to the requirements of this part unless, because of dilution, it is regulated under 40 CFR part 761 as a used oil containing PCBs at 50 ppm or greater. PCB-containing used oil subject to the requirements of this part may also be subject to the prohibitions and requirements found at 40 CFR part 761, including §761.20(d) and (e). Used oil containing PCBs at concentrations of 50 ppm or greater is not subject to the requirements of this part, but is subject to regulation under 40 CFR part 761. No person may avoid these provisions by diluting used oil containing PCBs, unless otherwise specifically provided for in this part or part 761 of this chapter.

[57 FR 41612, Sept. 10, 1992, as amended at 58 FR 26425, May 3, 1993; 59 FR 10559, Mar. 4, 1994; 59 FR 10559, Mar. 4, 1994; 61 FR 33693, June 28, 1996; 63 FR 24969, May 6, 1998; 63 FR 37782, July 14, 1998; 68 FR 44665, July 30, 2003; 70 FR 34591, June 14, 2005; 71 FR 40280, July 14, 2006]

§279.11 Used oil specifications.

Used oil burned for energy recovery, and any fuel produced from used oil by processing, blending, or other treatment, is subject to regulation under this part unless it is shown not to exceed any of the allowable levels of the constituents and properties shown in Table 1. Once used oil that is to be burned for energy recovery has been shown not to exceed any allowable level and the person making that showing complies with §§279.72, 279.73, and 279.74(b), the used oil is no longer subject to this part.

TABLE 1— USED OIL NOT EXCEEDING ANY ALLOWABLE LEVEL SHOWN BELOW IS NOT SUBJECT TO THIS PART WHEN BURNED FOR ENERGY RECOVERY[1]

Constituent/property	Allowable level
Arsenic	5 ppm maximum.
Cadmium	2 ppm maximum.
Chromium	10 ppm maximum.
Lead	100 ppm maximum.
Flash point	100 °F minimum.
Total halogens	4,000 ppm maximum.[2]
NOTE: Applicable standards for the burning of used oil containing PCBs are imposed by 40 CFR 761.20(e).	

[1] The allowable levels do not apply to mixtures of used oil and hazardous waste that continue to be regulated as hazardous waste (see §279.10(b)).

[2] Used oil containing more than 1,000 ppm total halogens is presumed to be a hazardous waste under the rebuttable presumption provided under §279.10(b)(1). Such used oil is subject to subpart H of part 266 of this chapter rather than this part when burned for energy recovery unless the presumption of mixing can be successfully rebutted.

[57 FR 41612, Sept. 10, 1992, as amended at 58 FR 26425, May 3, 1993; 71 FR 40280, July 14, 2006]

§279.12 Prohibitions.

(a) *Surface impoundment prohibition.* Used oil shall not be managed in surface impoundments or waste piles unless the units are subject to regulation under parts 264 or 265 of this chapter.

(b) *Use as a dust suppressant.* The use of used oil as a dust suppressant is prohibited, except when such activity takes place in one of the states listed in §279.82(c).

(c) *Burning in particular units.* Off-specification used oil fuel may be burned for energy recovery in only the following devices:

(1) Industrial furnaces identified in §260.10 of this chapter;

(2) Boilers, as defined in §260.10 of this chapter, that are identified as follows:

(i) Industrial boilers located on the site of a facility engaged in a manufacturing process where substances are

No. 09-1038
(and consolidated cases Nos. 15-1083, 15-1085, 15-1088, 15-1089, and 15-1094)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN PETROLEUM INSTITUTE, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

ON PETITION FOR REVIEW OF FINAL REGULATIONS PROMULGATED BY THE ENVIRONMENTAL PROTECTION AGENCY

ADDENDUM 2:

ADDITIONAL EVIDENCE OF STANDING FOR PETITIONERS AMERICAN PETROLEUM INSTITUTE AND FREEPORT-MCMORAN INC.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN PETROLEUM INSTITUTE, *et al.*, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Respondents.	No. 09-1038 (and consolidated cases)

DECLARATION OF MARK DEESE

I, Mark Deese, declare the following:

1. I am employed by Phillips 66 Company in the capacity of Senior Consultant for Waste and Water. In that capacity I am responsible for providing regulatory guidance for waste management at our refineries, terminals, lube oil plants, and other business units as requested. I am responsible to read all EPA proposed and final waste rules, provide comments as necessary, and assess impact on our business units. I have personal knowledge of the matters stated herein.

2. My qualifications include a MS in Engineering Management from Oklahoma State University, 25 years' experience in the petroleum industry, and over 30 years' experience in the environmental field. Besides my education and annual RCRA refresher courses, I spent eight years leading the waste management

team at Phillip 66's Sweeny Refinery, providing regulatory guidance and waste management oversight. I am familiar with the definition of solid waste in 40 C.F.R. Part 261, as amended by the rules at issue in this case (73 Fed. Reg. 64668 (Oct. 30, 2008) and 80 Fed. Reg. 1694 (Jan. 13, 2015)). I am also familiar with the regulations that currently apply to spent hydrotreating and hydrorefining catalysts in 40 C.F.R. Parts 261 through 265.

3. As explained below, Phillips 66 Company is directly affected by the rules at issue in this case.

4. Phillips 66 Company owns several petroleum refineries such as the Bayway Refinery in Linden, NJ and Sweeny Refinery in Old Ocean, TX. Periodically, these refineries generate spent hydrotreating and hydrorefining catalysts. Those spent catalysts currently are listed in 40 C.F.R. Part 261 as hazardous wastes K171 and K172, respectively.

5. Our refineries usually send their spent catalysts to an off-site facility owned by a third party, where valuable metals are recovered from the catalysts. Currently, we send those spent catalysts to Gulf Chemical and Metallurgical Company (GCMC) in Freeport, TX and Clean Harbors' Duratherm facility in San Leon, TX. It is my understanding that both GCMC and Duratherm are permitted under Subtitle C of the Resource Conservation and Recovery Act ("RCRA") to store hazardous waste.

6. In the 2008 rule, EPA refused to exclude recycled catalysts from the definition of "solid waste." In the 2015 rule, EPA allowed the catalysts to be excluded from the definition of "solid waste," but only if the catalysts met certain regulatory requirements (*e.g.*, transfer to a RCRA-permitted facility or a facility that applies for and obtains a variance as a "verified reclamation facility," and compliance with extensive, prescribed emergency preparedness and response requirements). EPA's continued assertion of RCRA regulatory authority over recycled catalysts in the rules at issue imposes costs upon Phillips 66's refineries that would not exist (or would be lower) if the catalysts were unconditionally excluded from the definition of "solid waste" or if their exclusion from the definition of "solid waste" were subject to fewer regulatory conditions or requirements.

7. If the spent catalysts were excluded from the regulatory definition of "solid waste" unconditionally, the overall costs to our refineries for handling the spent catalysts would likely be reduced because the catalysts would not be considered hazardous wastes and the regulatory burden upon the catalysts would be less.

8. For example, transporters tend to charge more to transport materials when those materials are considered hazardous wastes under RCRA than they do when those materials are not considered hazardous wastes under RCRA. Also, I

anticipate that because reclamation facilities would no longer be required to undergo the lengthy and costly process of obtaining a RCRA Subtitle C permit in order to handle the spent catalysts, new entities would likely enter the reclamation market, thereby increasing competition and placing downward pressure on recycling costs.

9. The "verified recycler exclusion" in the 2015 rule allows the catalysts to be excluded from the definition of "solid waste," but only upon compliance with very costly regulatory requirements that render the benefits of the exclusion illusory. For example, the catalysts must still be sent to a RCRA-permitted facility or else to a facility that has gone through a similar, alternative process of pre-approval as a "verified reclamation facility." These requirements continue to burden the recycling markets in which our refineries participate. I anticipate overall recycling costs would be lower if neither of these specific permitting requirements existed, because more facilities could enter the market and do so at lower cost. Also, the more entities that enter the market, the more likely some entities would open operations closer to many of our refineries than the limited existing operations are located, thereby reducing the transportation costs.

10. Additionally, while our refineries already employ emergency preparedness and response measures, compliance with the highly specific requirements in the verified recycler exclusion would increase compliance costs.

11. Our refineries are also directly affected by EPA's evident interpretation in the 2015 Response To Comments that off-specification products can be considered "secondary materials." Like all refineries, we occasionally produce fuels that are off-specification, and which are reprocessed on-site in normal refinery processes so as to meet specifications. However, off-specification fuels could be sold to re-refiners, like Intergulf Corporation, who considers these fuels to be products – not "secondary materials." If such fuels were considered "secondary materials," then our refineries could be subject to the unnecessary and costly regulatory burden of reviewing and ensuring conformance to the legitimacy criteria in 40 C.F.R. § 260.43. Substantial person-hours involving technical and legal disciplines must be expended when EPA imposes such criteria. Reversal of EPA's interpretation would ensure that this regulatory burden is not imposed.

12. Phillips 66 Company is a member of the American Petroleum Institute and has continuously been a member since May of 2012 and was a part of ConocoPhillips Company, also a member since a date before January 27, 2009.

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 8, 2015.

Mark Deese

Mark Deese

ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN PETROLEUM INSTITUTE, *et al.*, *Petitioners*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, *Respondents.*	No. 09-1038 (consolidated with Nos. 15-1083, 15-1085, 15-1088, 15-1089, and 15-1094)

DECLARATION OF WILLIAM E. COBB,
FREEPORT-MCMORAN CORPORATION

I, William E. Cobb, swear or affirm under penalty of perjury, the following:

1. I am the Vice President, Environmental Services and Sustainable Development, for Freeport-McMoRan Corporation, a wholly-owned subsidiary of Freeport-McMoRan Inc. (collectively, "Freeport"). Freeport-McMoRan Inc. is the petitioner in No. 15-1088, consolidated with the cases captioned above. I base this Declaration upon my first-hand knowledge of the matters described herein. I am over the age of 21 and competent to make this Declaration.

2. In 2011, the U.S. Environmental Protection Agency ("EPA") proposed amendments to its regulatory definition of "solid waste" under the Resource Conservation and Recovery Act ("RCRA"). *See* 76 Fed. Reg. 44,094 (July 22, 2011). Freeport submitted extensive comments on the proposed rule, explaining, among other things, that the changes expanded RCRA jurisdiction in a manner that exceeded EPA's statutory authority and would negatively affect Freeport's business operations. *See* Freeport-McMoRan Copper & Gold Inc. Comments, EPA-HQ-RCRA-2010-0742-0363 (Oct. 20, 2011). During the rulemaking process, representatives of Freeport also met with EPA officials to provide additional information and materials about its concerns regarding the proposed rule. *See* Summary of Meeting with Freeport-McMoRan Copper & Gold, EPA-HQ-RCRA-2010-0742-0379 (Dec. 5, 2013) (discussing Freeport presentation materials entitled "Impacts of EPA's 'Solid Waste' Rule on Primary Mineral Processing & Recycling").[1] For many years, I have been personally involved in the preparation of Freeport's comments on this subject, and participated in multiple meetings with EPA.

[1] Freeport and its predecessor entities have long been engaged with, and submitted comments on, past EPA rulemakings affecting the definition of "solid waste" under RCRA. *E.g.*, Freeport-McMoRan Copper & Gold Inc. Comments, EPA-HQ-RCRA-2009-0315-0243 (Aug. 13, 2009); Freeport-McMoRan Copper & Gold Inc. Comments, EPA-HQ-RCRA-2002-0031-0528 (June 25, 2007); Phelps Dodge Corporation Comments, EPA-RCRA-2002-0031-0087 (Feb. 24, 2004).

3. I am familiar with the final rule issued by EPA amending the definition of "solid waste" under RCRA. *See* 80 Fed. Reg. 1694 (Jan. 13, 2015) ("Final Rule"). I am familiar with RCRA's general requirements, implementing regulations, and compliance obligations—both as previously relevant to Freeport's business activities prior to the Final Rule, and as they now appear to apply to those activities, under the Final Rule.

A. Introduction to Freeport's Primary Metals Production Business

4. Freeport is in the business of extracting, concentrating, and processing naturally-occurring copper and molybdenum ores to produce pure metals and other valuable products. For example, a Freeport subsidiary operates a copper smelter in Miami, Arizona. Freeport produces several high-purity final products, including pure copper cathode, copper rod, molybdenum trioxide, and rhenium metal.

5. Although the specific production operations vary, Freeport's products cannot be produced from naturally-occurring ores in a single step. Rather, low-concentration ores are incrementally concentrated and refined in a continuous, multi-step process to enhance their mineral content and recover target metals, until the mineral content is high enough to produce final products, such as solid metal.

a. Freeport's production operations begin by mining naturally-occurring ores that contain desired minerals in very low concentrations, such as

tenths of one percent (e.g., 0.1%). Ores typically contain metal bound in a complex mineral matrix (e.g., copper sulfide).

b. Mined ores are physically crushed and concentrated into "ore concentrates," which contain much higher concentrations (e.g., 30%) of the desired minerals in chemical form, that have been separated from non-valuable rock.

c. Ore concentrates are the primary feedstock for the production operations (e.g., copper smelting) that Freeport uses to purify and recover solid metals and other products.

6. In addition to the primary target mineral (e.g., copper), Freeport also recovers other valuable minerals naturally present in ores, and generates other valuable products. For instance, in copper smelting, Freeport recovers sulfur-containing minerals and ultimately transforms them into commercial-grade sulfuric acid, which can be sold on the open market. Freeport also recovers precious metals and related compounds, such as silver, from copper ores.

7. Because of their incremental nature, mineral production operations necessarily generate valuable in-process intermediates and materials. Freeport carefully recovers and reprocesses these in-process intermediates and materials because they contain much higher concentrations of valuable minerals than naturally-occurring ores.

8. Some of these in-process intermediates and materials not only have commercial value, but play an important operational role. For example, Freeport uses a "weak" sulfuric acid solution generated in the copper smelter and acid plant as a valuable input for production of copper through "hydrometallurgy"—i.e., "leaching" copper from ore using solutions containing sulfuric acid and water. Also, Freeport's copper smelter cannot operate without using cooled, partially-refined pieces of copper (i.e., revert) to control smelter furnace temperatures, as explained below.

9. As part of its ongoing mineral production operations, Freeport currently processes or reprocesses dozens of kinds of valuable, in-process intermediates and materials at the Miami facility. Before EPA promulgated the Final Rule, these in-process materials were not considered "discarded," and thus did not constitute "solid waste" or "hazardous waste" subject to EPA's RCRA jurisdiction. However, the Final Rule asserts broad jurisdiction to regulate all of these in-process intermediates and materials under the guise of certain "legitimacy factors," which effectively impose new RCRA conditions and regulatory duties on Freeport's use and management of these in-process materials. Further, on its face, the Rule appears to designate some of these in-process intermediates and materials as "sham recycled," and therefore "discarded," because they apparently cannot satisfy all of the new RCRA conditions and regulatory duties in the "legitimacy

factors." Many of these in-process materials contain metals that are present in naturally-occurring mineral ores, or potentially-corrosive substances that are derived from constituents of naturally-occurring ores, and thereby can exhibit the "toxicity" or "corrosivity" characteristics in 40 C.F.R. §§ 261.22 and 261.24.

10. Deeming Freeport's in-process intermediates and materials to be "sham recycled," and therefore "discarded," under the Final Rule and subjecting them to full-blown "hazardous waste" regulation under RCRA would impose new and costly regulatory obligations on Freeport. Under RCRA, "hazardous wastes" cannot be generated, transported, treated, stored, or disposed of except in compliance with strict regulatory management and permitting requirements.

11. As explained below, the Final Rule affects Freeport in other ways, as well. Even if the production and reuse of every in-process material at every Freeport facility were to qualify as "legitimate recycling," the Final Rule effectively imposes RCRA regulatory duties and conditions on Freeport's production and reuse of those in-process materials. The Final Rule, for instance, specifies how such in-process materials may be stored, requires analysis and documentation, labeling or logging, and appears to impose caps on the permissible concentrations of certain chemical constituents. The Final Rule restricts Freeport's ability to produce and reuse those in-process materials in a manner that is most advantageous to its business.

12. Additionally, the Final Rule has created uncertainty about whether the production and use of certain in-process materials will be deemed "sham recycling." As a result, the Final Rule has increased Freeport's RCRA regulatory enforcement and compliance risks. To reduce the apparent scope of those risks, Freeport is compelled to consider less-favorable alternatives to its current beneficial production and reuse of these in-process materials.

B. The Final Rule Expanded the Definition of "Solid Waste" in Ways that Negatively Affect Freeport's Business

13. Prior to 2008, an informal, non-binding EPA memorandum was the "primary source of guidance" for primary metals producers "in distinguishing between legitimate [recycling]" that falls outside EPA's RCRA jurisdiction, and so-called "sham recycling," which actually involves "discard" of materials, and thus triggers RCRA jurisdiction. *See* 73 Fed. Reg. 64,668, 64,700 (Oct. 30, 2008) (discussing EPA Office of Solid Waste and Emergency Response Directive 9441.1989(19)). That memorandum contains a list of non-exclusive, non-mandatory "criteria" to consider in distinguishing between "sham" and "legitimate" recycling.

14. Between 2008 and 2015, EPA established four "legitimacy" factors (the third and fourth of which were not mandatory) in determining whether a specified class of materials under certain additional regulatory exclusions from RCRA regulation was truly "recycled." *See id.* at 64,759. Freeport does not rely

on those additional exclusions at the Freeport facilities at issue in this case. Therefore, prior to promulgation of the Final Rule in 2015, Freeport was not required to satisfy any "legitimacy" factors to determine that a particular in-process intermediate or material at Freeport's facilities was not "discarded," and therefore outside EPA's RCRA jurisdiction.

15. The Final Rule significantly expanded EPA's definition of "solid waste" by making three main changes.

a. First, the Final Rule states that *any* "hazardous secondary materials" that are "sham recycled" automatically are deemed "discarded and a solid waste." *See* 80 Fed. Reg. 1694, 1774 (Jan. 13, 2015) (codified at 40 C.F.R. § 261.2(b)(4), (g)).

b. Second, the Final Rule defines "sham recycling" as any recycling that does not meet EPA's definition of "legitimate recycling." *Id.* (codified at 40 C.F.R. § 261.2(g)).

c. Third, EPA amended its definition of "legitimate recycling" by drafting four "legitimacy factors," which actually contain new conditions and regulatory duties, and then making all four "factors" mandatory for *all* recycling—not simply for the additional exclusions governed by the 2008 rule. *See id.* at 1773 (codified at 40 C.F.R. § 260.43).

16. Together, these changes significantly expanded the scope of EPA's asserted RCRA jurisdiction, and now would cover Freeport's mineral production and operational facilities in several unprecedented ways. First, the term "hazardous secondary materials" covers a range of in-process intermediates and materials that were not considered "discarded" under EPA's or Freeport's previous understanding of that term, and which were not previously subject to RCRA regulation. Second, the four mandatory legitimacy "factors" now apply to *all recycling activities*, including production and operational activities at Freeport facilities to which the pre-2015 legitimacy "factors" were irrelevant. Third, the mandatory legitimacy "factors" narrowly define "legitimate recycling," effectively imposing RCRA regulatory duties and conditions even on Freeport's production and reuse of in-process intermediates and materials that EPA *concedes* are "legitimately recycled" and are not "discarded." Fourth, on its face, the Final Rule appears to deem recycling activities that clearly involve no "discard," including activities previously acknowledged by EPA as "legitimate," to be a "sham."

C. The Final Rule Regulates In-Process Intermediates and Materials at Freeport Facilities That Previously Were Not Considered "Discarded," and Therefore Could Not Be Regulated as Solid or Hazardous Waste

17. The Final Rule appears to regulate many in-process materials that were not previously considered "discarded," and thus fell outside of EPA's RCRA regulatory jurisdiction.

Copper "revert"

18. Smelting copper ore to produce pure copper metal creates "revert"—i.e., partly-refined pieces of metallic copper that are in the process of being further refined. The term "revert" includes large, dense, solid pieces of copper metal generated during the process of cooling molten metal: e.g., cooled metal from the inside of ladles; drips, splashes, and spills from the handling of molten metal; and high-copper-content in-process material skimmed from the surface of copper furnaces. At Freeport's facilities, large copper reverts are temporarily stored on the ground for cooling, and are crushed or re-sized before being fed back into the smelting process. "Revert" is valuable, typically 50-95% pure copper, as compared to the roughly 0.1% copper concentration of naturally-occurring mineral ores.

19. Freeport produces and uses copper "revert" as a valuable intermediate that is deliberately fed back into the copper smelting process. In a 2002 inspection report for the Miami facility, EPA concluded that because reverts "contain copper values several orders of magnitude higher than the ore," they are a crucial "means of recovering copper that would otherwise escape from the smelter processes." *See* EPA Region IX, Warning Letter and Certification of Violation Correction 8 (Apr. 9, 2002) ("Inspection Report").

20. Revert has a commercial market value, and Freeport stores, buys, and sells revert depending on its business needs. *See* Inspection Report 9. Revert also serves an important operational role in the smelting process. The Miami smelter cannot be operated without cooled, partially-processed copper revert to control smelter furnace temperatures—essentially, "ice cubes" to moderate the temperature of baths of molten copper. The need for cooling reflects the fact that the chemical reactions occurring in certain copper production furnaces are exothermic: i.e., they produce heat. *Id*.

21. The 2015 Final Rule, however, appears to deem copper revert "sham recycled." Under the third mandatory legitimacy "factor," any recycling activity is a "sham" unless a secondary material is managed consistent with an "analogous raw material" or, where there is no such analogous raw material, "contained." EPA has not defined "analogous raw material," but under the plain meaning of that phrase, there do not appear to be "analogous raw material[s]" to copper revert, which has a copper concentration orders of magnitude higher than naturally-occurring mineral ores. As a result, to satisfy the third mandatory legitimacy "factor," it appears that revert must be "contained."

22. EPA's definition of "contained" applies to "land-based unit[s]," but does not appear to be compatible with Freeport's production and reuse of large pieces of partly-refined copper revert. The Final Rule states that revert must be

stored in a "unit" that prohibits "leaks or other continuing or intermittent unpermitted releases" (to include "releases through surface transport by precipitation runoff, releases to soil and groundwater, [and] wind-blown dust") and the "unit" must be "designed . . . to prevent releases of hazardous secondary materials." 40 C.F.R. § 260.10.

23. For operational and technical reasons, Freeport currently handles revert on the ground. Among other things, revert is generated at extremely high temperatures, and must cool before it can be manipulated, resized, and re-introduced into the smelting process. Large pieces of revert must be physically crushed or broken apart mechanically, using heavy equipment such as a backhoe. Even assuming "containment" units could be built, these temperatures and handling practices would likely damage them.[2]

24. The Final Rule has thus increased Freeport's overall RCRA regulatory burden and constrained its ability to conduct its production operations. On the one hand, Freeport could remove copper revert from its production processes and instead manage it as "waste," but would thereby lose the valuable copper and other minerals contained therein. On the other hand, Freeport could continue to use revert in the copper smelting process. But to reduce the RCRA enforcement risks

[2] In addition to its enriched copper content, revert contains other minerals and substances derived from naturally-occurring ores that would likely exceed EPA's toxicity and corrosivity characteristics. See 40 C.F.R. §§ 261.22 and 261.24.

raised by the new "contained" factor, Freeport might then attempt to build a costly new containment structure for reverts (the integrity of which might be jeopardized by the high temperatures and heavy equipment routinely used in the production process). In any case, if EPA were to deem intermediate reverts "sham recycled," and therefore "discarded" as "hazardous waste" because they fail to meet the new "contained" factor, continuing to use revert could subject Freeport's copper production process to onerous RCRA "hazardous waste" regulation.

25. Moreover, even if Freeport's revert management practices qualify as "contain[ment]," and even if Freeport's use of reverts satisfies all of the other mandatory legitimacy "factors" and is deemed "legitimate recycling," the Final Rule *still* imposes RCRA regulatory duties and conditions on Freeport's production and reuse of copper revert. Among other things, the Final Rule appears to require Freeport to store revert in a "unit" that meets EPA's specifications, to label the unit or maintain logs, and to ensure that revert does not cause Freeport's products to contain chemical constituents that differ from EPA's chosen "legitimate product or intermediate" or commodity standards. *See* 40 C.F.R. § 260.43(a)(3), (4). Furthermore, the Final Rule imposes an ongoing documentation burden on Freeport to demonstrate how its use of intermediate copper revert meets all four mandatory legitimacy factors, on pain of RCRA enforcement. *See* 80 Fed. Reg. at 1755-56.

Weak sulfuric acid

26. Freeport's Miami copper smelter operates in tandem with an "acid plant." That plant uses sulfur-mineral off-gases from the smelter to produce commercial-grade sulfuric acid (which can be sold as a commodity), as well as a weak sulfuric acid solution. The weak acid solution contains water, sulfuric acid, copper, and other constituents derived from naturally-occurring mineral ores.[3]

27. The weak sulfuric acid solution functions as a highly valuable input for Freeport's production of copper through the "hydrometallurgical" production system at the same site, which requires the use of acid and water. In that system, Freeport uses in-process weak acid to mine copper ore in a large land-based production (i.e., heap leach) facility. The weak acid extracts the copper from its mineral matrix (e.g., copper oxide) into liquid solution, and Freeport then "electroplates" the copper out of solution into solid metal sheets (i.e., copper cathodes). Thus, in addition to the acid and water values, the presence of some copper in the in-process weak acid solution is another significant benefit for this production system, as it is ultimately recovered as solid copper.

28. In 2002, EPA concluded that this production and reuse of in-process "weak acid" did not constitute "disposal." *See* Inspection Report 16-20. Among

[3] The weak acid solution is a beneficially corrosive solution that contains metals that exceed the toxicity characteristic thresholds in 40 C.F.R. § 261.24.

other things, EPA concluded that the in-process "weak acid" substitutes for acid and water that would otherwise have to be purchased; that the weak acid derives "all its acid value and toxic metals from the sulfates and metals originally in the furnace [copper ore] feedstock"; and that the acid is used primarily to leach copper, not to dispose of any toxic metals present in the solution. *Id.* at 18-20.

29. However, the 2015 Final Rule asserts the authority to impose RCRA regulatory duties and conditions on the weak acid solution, and potentially to deem the in-process weak acid as "sham recycled," and therefore "discarded" and subject to RCRA regulation as "hazardous waste." The Final Rule increases Freeport's RCRA regulatory burden in at least three ways.

30. First, even if Freeport's use of the weak acid solution satisfies the four mandatory legitimacy "factors" and is deemed "legitimate recycling," the Final Rule still imposes RCRA regulatory duties and conditions on Freeport's production and reuse of that in-process material. Under the third mandatory factor, secondary materials for which EPA determines there is no "analogous raw material" must be "contained" in units that meet EPA's specifications, documented, and labeled or logged. Under the fourth mandatory factor, weak acid's regulatory status as non-discarded material depends on the solution's chemical composition with respect to individual constituents, which Freeport apparently will be compelled to monitor going forward. Furthermore, the Final

Rule imposes a general and continuous documentation burden on Freeport to demonstrate how its use of weak acid meets all four mandatory legitimacy factors, an obligation that did not exist prior to EPA's promulgation of the Final Rule. *See* 80 Fed. Reg. at 1755-56.

31. Second, the fourth mandatory legitimacy factor appears to give EPA discretion to select sulfuric acid from other sources as the relevant "analogous" product to weak acid, even though Freeport uses in-process weak acid to produce additional solid copper. Under 40 C.F.R. § 260.43(a)(4), any recycling activity is a "sham" unless the "product of the recycling process" (which EPA apparently could designate as weak acid) "does not exhibit a hazardous characteristic . . . that analogous products do not exhibit," and has concentrations of hazardous constituents "comparable to or lower than" in the analogous product or in qualifying "commodity standards." *Id.*[4]

32. Because Freeport's in-process weak sulfuric acid solution derives from raw copper mineral ores, it contains trace constituents (including copper, which itself is later recovered through the heap leach operation) that are not present in sulfuric acid produced from different feedstocks (e.g., raw sulfur). The

[4] Under 40 C.F.R. § 260.43(a)(4)(i)(B), commodity standards can be used as the relevant basis for comparison only if they "include levels that specifically address th[e] [relevant] hazardous constituents." To Freeport's knowledge, there is no such commodity standard for its weak sulfuric acid solution, because Freeport produces that solution for Freeport's own on-site use in hydrometallurgy.

Final Rule does not appear to prevent EPA from selecting such acids (from different feedstocks) as the relevant "analogous product." Because those acids do not contain the same trace constituents as acid from a copper smelter, the Final Rule would appear to require Freeport either to (1) undertake an "assessment" of the weak acid under 40 C.F.R. § 260.42(a)(4)(iii) (which still would provide no guarantees regarding its RCRA regulatory status, as explained below); (2) modify production processes (if technically feasible) to change the chemical composition of the in-process weak acid solution; (3) accept full-blown RCRA regulation, if EPA deemed weak acid the "product of the recycling process" (or disagreed with a possible "assessment"), and Freeport desired to continue to produce and reuse the in-process weak acid in the same manner; or (4) cease reusing the in-process weak acid entirely, and construct a costly new facility to manage it as "hazardous waste" from the outset.[5]

33. Third, even if Freeport were to conduct its own assessment and self-certify that the in-process weak acid "recycling" process is "legitimate" under 40 C.F.R. § 260.43(a)(4)(iii), Freeport would have to expend time and resources to satisfy those new RCRA regulatory obligations that did not exist prior to the Final Rule. Finally, simply by creating uncertainty about the regulatory status of in-

[5] Until such a facility is fully constructed, Freeport would need to identify other facilities to manage the material off-site.

process weak acid, the Final Rule inflicts on Freeport a heightened degree of RCRA enforcement and compliance risk.

34. If the production and reuse of in-process weak acid is deemed "sham recycling," Freeport could not continue to use the in-process solution in its current fashion without making substantial modifications to the operation of the copper smelter, acid plant, and other production facilities, to comply with RCRA's management and permitting requirements. Conversely, if Freeport were to cease using the in-process weak acid solution for hydrometallurgy, it would incur significant costs by being forced to manage the in-process weak acid solution as a "hazardous waste," and to purchase replacement materials (e.g., water and sulfuric acid). Designing and constructing a facility to manage the weak acid solution at Miami would cost tens of millions of dollars and take more than two years, with ongoing costs once operational of several million per year. In the interim, Freeport would need to identify facilities to manage the weak acid off-site, which would be highly costly (if adequate off-site capacity even exists).

D. The Final Rule Has Harmed Freeport

35. As described above, the Final Rule harms Freeport in several ways.

36. First, the Final Rule imposes a new RCRA requirement that Freeport satisfy four mandatory legitimacy "factors" for all recycling activity at all of its facilities. Prior to 2015, Freeport was not required to satisfy any mandatory

legitimacy "factors" when producing and reusing these in-process materials, or to satisfy other RCRA regulatory conditions or duties, because the in-process materials are not "discarded," and therefore were considered outside of EPA's RCRA regulatory jurisdiction.

37. Second, the Final Rule effectively imposes RCRA regulatory duties and conditions even on in-process materials that EPA would agree are legitimately recycled and thus not "discarded." As noted above, these duties and conditions include an ongoing documentation burden, requiring Freeport to demonstrate how its use of in-process materials meets all four mandatory legitimacy factors. The Final Rule also requires that in-process materials for which there is no "analogous raw material" be "contained." The Rule appears to impose *de facto* caps on the chemical composition of in-process materials—caps that EPA can adjust through its unilateral selection of a particular "analogous product." Thus, even if every in-process material at every Freeport facility were to satisfy all the mandatory legitimacy factors, the Final Rule constrains Freeport's ability to produce and reuse those in-process materials in a manner most advantageous to its business operations.

38. Third, the Final Rule appears to deem certain in-process materials at Freeport's sites to be "sham recycled" and therefore "discarded." Continuing to use in-process materials previously viewed as outside RCRA jurisdiction, but now

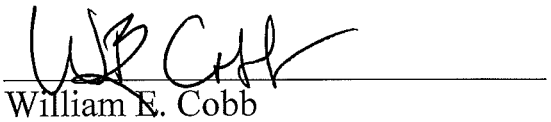
deemed to be "discarded" and a "hazardous waste," would require extensive changes to certain Freeport production operations, at significant cost. Discontinuing the current beneficial production and reuse of these in-process materials would also impose significant costs, on the order of millions of dollars of lost valuable mineral content, and new management and disposal costs.

39. Fourth, the Final Rule creates uncertainty about the regulatory status of in-process materials that have long been viewed as falling outside RCRA jurisdiction, under both the plain meaning of the RCRA statute and EPA's prior regulations and regulatory determinations. Freeport facilities, such as its copper smelter, have relied upon the plain meaning of "discard" since RCRA's enactment. By upsetting the plain meaning of "discard" and longstanding, well-settled regulatory determinations (under which Freeport's in-process materials were understood to fall outside RCRA jurisdiction), the Final Rule increases Freeport's RCRA enforcement and compliance risks. Freeport is incurring new costs in ongoing efforts to mitigate these risks.

* * *

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 9, 2015.



William E. Cobb

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 25(c), I hereby certify that I have this 9th day of December 2015, served a copy of the foregoing Addenda on all counsel of record electronically through the Court's CM/ECF system or by U.S. mail, postage prepaid.

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