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

REPLY 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)

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GLOSSARY

As used herein,

APA means the Administrative Procedure Act;

API means petitioner American Petroleum Institute;

DOT means United States Department of Transportation;

EPA means respondent United States Environmental Protection Agency;

FAA means Federal Aviation Administration;

FCC means Federal Communications Commission;

FERC means Federal Energy Regulatory Commission;

Gulf means Movant-Intervenor Gulf Chemical and Metallurgical Corporation;

JA means the Joint Appendix; and

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

SUMMARY OF ARGUMENT

I. EPA casts the 2015 rule as a reasonable incremental step, but it was a *stark* change for the primary-metals industry. Historically, that industry's valuable in-process materials, continuously reused within ongoing production processes, have never been understood as "discarded" and always fell outside RCRA's statutory jurisdiction as a matter of plain meaning and *Chevron* step 1. This Court so held. *E.g.*, *Am. Mining Cong. v. EPA*, 824 F.2d 1177, 1181 (D.C. Cir. 1987) ("*American Mining*"). That conclusion applied regardless of the regulatory guidance, exclusions or exemptions that dominate EPA's Brief. But the 2015 rule dramatically expanded EPA's RCRA jurisdiction by making the "legitimacy" factors mandatory for *all* in-process, recycled or reused "hazardous secondary materials"—not just the narrow categories of materials addressed by the 2008 rule's two regulatory exclusions.

EPA cannot justify this violation of RCRA's unambiguous bounds. It argues that the legitimacy factors merely "determin[e] whether . . . materials really are being recycled." EPA.Br. 18. That unsupported assertion defies reality. For industry, the new legitimacy factors have the look, feel, and effect of substantive

regulations.[1] They restrict how industry may handle in-process materials and dictate acceptable chemical composition. EPA's heavy reliance on *Solvay USA Inc. v. EPA*, 608 F. App'x 10 (D.C. Cir. 2015) (per curiam), is misplaced. That unpublished opinion differs fundamentally as to the rulemakings at issue, challenges raised, and materials involved.

In-process materials in the mining and primary metals industry are so obviously not "discarded" that Environmental-Intervenors *do not even suggest* they fall within RCRA's scope. EPA appropriately recognizes that "large revert" is beyond RCRA jurisdiction, but confusingly asserts "fine revert" is not. EPA's first point is correct, because "large revert" is not "discarded." But EPA provides no principled ground to distinguish "fine revert"; none exists. "Fine reverts" encompass the "valuable metal-bearing and mineral-bearing dusts [that] are often released in processing a particular metal" and then reused in continuous industrial processes, which this Court found plainly not "discarded." *American Mining*, 824 F.2d at 1181.

II. The Court should vacate the specific requirements of the Verified Recycler Exclusion that Industry Petitioners challenge. Whether a material has

[1] *Cf. Dole v. Williams Enters., Inc.*, 876 F.2d 186, 188 n.2 (D.C. Cir. 1989) ("WHEREAS it looks like a duck, and WHEREAS it walks like a duck, and WHEREAS it quacks like a duck, WE THEREFORE HOLD that it is a duck.").

been "discarded" cannot plausibly depend upon the granting of a permit or variance or similar "regulatory oversight."

Moreover, the record does not support the wished-for "pattern of discard" that EPA relied upon to support its presumption that materials transferred for recycling are "discarded." EPA's presumption also conflicts with precedent and represents an arbitrary departure from longstanding policy.

III. The Court may review the Response To Comments, because it was issued with, and serves to explain, the 2015 rule. EPA's position that off-specification products that are reprocessed before use are "secondary materials" subject to the legitimacy regulation intrudes into the manufacturing process. That is beyond EPA's RCRA authority, and represents an arbitrary departure from longstanding policy.

IV. Gulf has not established its standing.

ARGUMENT

I. THE NOW-MANDATORY LEGITIMACY FACTORS EXCEED EPA'S RCRA JURISDICTION.

A. The Legitimacy Factors Are Substantive Regulation Masquerading As A Jurisdictional Test.

EPA's mandatory legitimacy factors go beyond defining what is "discarded," and substantively regulate material that is not "discarded" under that term's plain meaning. Industry.Br. 16-34. EPA's response is semantic: asserting

(without substantiation) that the legitimacy factors are only a test to "determine[] whether the secondary materials are being 'recycled,'" not "conditions on secondary materials that are actually being recycled." EPA.Br. 24-25, 28-30, 35.

EPA is wrong for two reasons. *First:* Even non-discarded materials that *satisfy* all the legitimacy factors remain subject to *de facto* regulation under them. EPA has created a parallel regime, in the guise of a jurisdictional determination, that imposes regulatory obligations on unambiguously non-discarded materials. Those obligations have no basis in statutory text, but restrict how material is handled, and cap its chemical composition. *See* Industry.Br. 18-22. Environmental-Intervenors concede this point, praising Factor 3 as "mandat[ing] better management" of materials. Envtl.-Intervenors.Br. 10. *Second:* Any deviation from the legitimacy factors means material is deemed "sham" recycled and "discarded," including in-process materials that cannot be viewed as "discarded" within the ordinary (or any reasonable) meaning of that term. Revert sitting on open ground could be considered discarded for failing to meet the "contained" requirement, despite no portion ever having left the smelting facility. Industry.Br. 26-27.

The only specific authority EPA cites to support its legitimacy factors is *Solvay*. But *Solvay* involved *different legal challenges* to a rule involving the definition of a *different kind* of (i.e., *non*-hazardous) waste. *See* 608 F. App'x at

10. In that rulemaking, EPA explicitly refused to consider the definition of *hazardous* waste. *See* 74 Fed. Reg. 41, 50 (Jan. 2, 2009). EPA told parties interested in the hazardous-waste regime that their comments would not be addressed, and declared the non-hazardous-waste rulemaking would not revisit the definition of hazardous waste in "any way whatsoever." *Id.* EPA cannot now dismiss the distinction between hazardous and non-hazardous waste rules as "irrelevant." EPA.Br. 28.

Additionally, no party in *Solvay* raised the jurisdictional argument presented here—that the legitimacy factors (even if satisfied) constitute substantive regulation that exceed EPA's statutory jurisdiction. There, the relevant challenge to the legitimacy factors was a hard-look-review argument from environmental groups, not a *Chevron* Step 1 challenge questioning EPA's jurisdiction. *See* Opening Br. for Envtl.-Petitioners at 49-51, *Solvay*, 608 F. App'x 10. *Solvay* cannot be read as resolving unraised challenges to the legitimacy factors' jurisdictional status. *See Bismullah v. Gates*, 551 F.3d 1068, 1071 (D.C. Cir. 2009) (issues "which merely lurk in the record" of earlier decisions "are not to be considered as having been so decided" (citation omitted)).

Second, *Solvay* involved discrete categories of materials very different from those subject to the legitimacy factors here. The materials there were either already-"discarded" material being repurposed for fuel, or material being

combusted. 608 F. App'x at 11-12. *Solvay* found RCRA ambiguous as to whether already-"discarded" materials remain so when repurposed, and combusting certain materials amounts to "discard." *See id.* at 12. Here, the legitimacy factors are not limited to such ambiguous circumstances. They apply to *all* "hazardous secondary materials," including in-process materials within continuous, ongoing production processes, which are plainly not "discarded."

Finally, to the extent the unpublished *Solvay* decision conflicts with them, *American Mining* and other prior published decisions control. *See Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011).

B. Factor 3 Impermissibly Regulates Non-Discarded Material.

Factor 3 constitutes *de facto* regulation of how companies handle non-discarded materials during production processes. *See* Industry.Br. 18-19. For instance, where there is no "analogous raw material," Factor 3 requires "contain[ment]" *and* dictates the manner of containment. *Id.* In response, EPA asserts that the factor "does not impose conditions on materials actually destined for recycling." EPA.Br. 29.

But Factor 3 does not simply provide that material "released to the environment" is discarded—as EPA suggests. *Id.* It specifies the *manner* of containment and imposes new labeling and documentation requirements. Industry.Br. 18-19. Tellingly, Environmental-Intervenors do not even *attempt* to

defend the labeling and logging requirements, 40 C.F.R. § 260.10, which have no reasonable connection to whether material is "discarded" (*e.g.*, "abandoned"). *See Ass'n of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1051 (D.C. Cir. 2000).

Many in-process materials, like copper revert, do not need to be handled in "units" meeting particular specifications to prevent release. *See* Industry.Br. 28-29. Similarly, *Battery Recyclers* gave no indication that the mining materials there needed to be "contained" to be non-"discarded." 208 F.3d at 1051. EPA tries to limit *Battery Recyclers* to its facts, but it imposes a "more general[]" jurisdictional limitation that is inconsistent with Factor 3. *See id.* at 1054 ("[S]econdary materials . . . cannot be considered discarded if they are 'reused within an ongoing industrial process.'" (citation omitted)).

Environmental-Intervenors try justifying Factor 3 through examples of materials that are readily seen as "discarded," such as "waste paint" and "electronics reclamation." Envtl.-Intervenors.Br. 10-11. But the examples prove *Industry-Petitioners'* point, because they do not include any in-process materials from the mining or primary metals industries, such as those in *American Mining*.

C. Factor 4 Impermissibly Regulates Non-Discarded Material.

Factor 4 impermissibly prescribes the chemical content of in-process materials, intermediates, and even "products." Industry.Br. 20-25. EPA attempts

to downplay how rigid and burdensome Factor 4 is. EPA.Br. 37-44.[2] But if Factor 4 exceeds EPA's statutory jurisdiction, its rigidity and burdensomeness are irrelevant.

1. *EPA's Attempts To Downplay Factor 4 Are Unavailing.*

EPA makes two main attempts to show that Factor 4 does not improperly force companies to change their management of non-discarded materials. Neither succeeds.

First, EPA repeatedly asserts that the legitimacy factors are "self-implementing." EPA claims industry can select the relevant analogous products or intermediates or commodity standards to assess the legitimacy of recycling. EPA.Br. 37, 39, 44. But EPA does not mean it.[3] The Agency concedes it can "always" "disagree with the generator's selection and bring an enforcement action." *Id.* at 51; *accord* Envtl.-Intervenors.Br. 14-15. Environmental-Intervenors dismiss concerns that in-process materials will be deemed "sham recycled" based on minor chemical differences. Envtl.-Intervenors Br. 14. They

[2] EPA asserts that *amici*'s adulteration argument was forfeited. EPA.Br. 44-46. But commenters preserved it. *See* Soc. of Chem. Mfrs. & Affiliates Comments 15-18 (Oct. 20, 2011), EPA-HQ-RCRA-2010-0742-0266, JA ___.

[3] EPA says no testing is required for generators to compare the chemical composition of the product of their recycling with that of a relevant analogous product. 40 C.F.R. § 260.43(a)(4)(i)(A)-(B); EPA.Br. 38. But even if generators know the composition of *their products*, they cannot know the composition of *competitors'* products without testing them.

cite preamble language (but not the actual rule) to claim that only "high" or "significantly elevated" levels matter. *Id.* EPA offers no such assurances, limiting allowable deviation to a "small acceptable range," EPA.Br. 38—whatever that may mean. Besides EPA's second-guessing, generators face enforcement by state regulators and private plaintiffs. *See* 42 U.S.C. § 6972. The rule exceeds RCRA's scope by inviting enforcement against non-"discarded" in-process materials.

Second, EPA erroneously asserts that Factor 4 is flexible. For instance, EPA suggests that other parts of Factor 4 avoid the need to analyze hazardous constituent levels. EPA.Br. 39. But those options apply *only* "[w]here there is no analogous product." 40 C.F.R. § 260.43(a)(4)(ii). And EPA gives *itself* discretion to second-guess generators' determinations of whether products are "analogous."

Similarly, EPA trumpets § 260.43(a)(4)(iii)'s "alternative option" as a safety valve. EPA.Br. 41-44. But requiring generators to prove that "toxics in the product," "bioavailability" and "levels of hazardous constituents" do not pose environmental or health risks constitutes *de facto* regulation of non-discarded materials. Industry.Br. 24-25. EPA does not deny that. Instead, EPA cites *Safe Food & Fertilizer v. EPA*, 350 F.3d 1263, 1269 (D.C. Cir. 2003), for the proposition that health and environmental risks "can be" relevant to discard. EPA.Br. 42. But EPA does not suggest such risks are always or even often relevant, so the rule impermissibly sweeps in "at least some" non-discarded

material. *Battery Recyclers*, 208 F.3d at 1056. *Safe Food* relied on health and environmental risks in deciding whether EPA lawfully excluded recycled fertilizers despite chemical differences with virgin materials. *See* 350 F.3d at 1269. But by its terms, Factor 4's "alternative option" does not involve a comparative chemical assessment. *Cf.* Envtl.-Intervenors.Br. 15-16 (assuming otherwise). It asks in absolute terms whether recycled materials "contain levels of hazardous constituents that pose a significant human health or environmental risk." 40 C.F.R. § 260.43(a)(4)(iii).

EPA's assertion that Factor 4's "alternative option" is not "illusory" (EPA.Br. 44), depends on the same flawed "self-implementing" theory. EPA protests that regulated entities can obtain "a non-waste determination" under 40 C.F.R. § 260.34(c). EPA.Br. 44. But that merely emphasizes EPA's intrusion into ongoing production processes. And it retains the underlying defect; such determinations "will [again] be based on whether the hazardous secondary material is legitimately recycled as specified in § 260.43." 80 Fed. Reg. 1694, 1734 (Jan. 13, 2015).

2. *Safe Food Does Not Apply.*

EPA and Environmental-Intervenors erroneously analogize Factor 4 to the "identity" principle from *Safe Food*. EPA.Br. 34-35; Envtl.-Intervenors.Br. 15. *Safe Food* upheld a rule dealing with EPA's authority over material that EPA had

previously "classified" as "solid waste" (and thus was "discarded") absent a specific exemption. *See* 350 F.3d at 1265. Here, EPA regulates vast ranges of in-process hazardous secondary materials that are part of continuous production processes and never "discarded." While *Safe Food* may have found it reasonable to conclude that materials are not discarded if they are "indistinguishable" from virgin materials, the converse is not necessarily true. *Cf.* Envtl.-Intervenors.Br. 15 (arguing that recycled materials *are* discarded unless indistinguishable from virgin materials).

3. *EPA And Environmental-Intervenors' Examples Are Irrelevant.*

Contrary to EPA's suggestion (EPA.Br. 35), applying Factor 4 to all secondary materials is not necessary to prevent companies from, *e.g.*, disposing of lead-contaminated foundry sand by selling it as play sand. That example involves repurposing sand after it was no longer useable at a metal foundry. It does not involve in-process materials and intermediates used (and retained) in a continuous industrial process. Therefore, it does not support applying Factor 4 universally, including to in-process materials in the mining and primary metals industries. *See American Mining*, 824 F.2d at 1181.

Furthermore, the source cited in EPA's Brief shows Factor 4 is unnecessary to prevent such concerns. The example shows no "gap" in then-existing regulations, because the sand already qualified as "hazardous waste" under RCRA

in 2002—which is why EPA could address it through a RCRA § 7003 order. *See* Damage Cases from Recycling of Hazardous Secondary Materials, app. 1 at 1-128 (EPA-HQ-RCRA-2010-0742-0370) ("Damage Study"), JA ___. Also, the sand in question was sold only because the company was *mistaken* about whether lead levels were acceptable, not because of inadequate regulations. *Id*. Factor 4 would not eliminate such mistakes.

The other examples Environmental-Intervenors (but not EPA) cite to justify Factor 4 involve materials that readily qualify as "discarded," or whose status is at best ambiguous. *See* Envtl.-Intervenors.Br. 13-14. For instance, the Marine Shale Processors example involved "hundreds of different hazardous wastes" being burned in an incinerator. *Id.* at 13 (citing Damage Study, app. 1 at 1-298). Similarly, a "secondary smelter" processing scrap material is very different than a primary metal smelter incrementally purifying natural ores and in-process intermediates into high-purity end products. *Id.* (citing Damage Study app. 1 at 1-114). Old Bridge Chemicals (*id.* at 13-14) stored materials for six years without re-use. Damage Study app. 1 at 1-339. Also, Environmental-Intervenors repeatedly suggest that materials can be deemed "discarded" if they "cause . . . harm." Envtl.-Intervenors.Br. 12. That is the wrong question; RCRA limits EPA to regulating materials that have been "discarded," not any substances that might be "harmful."

D. EPA Properly Recognizes That Freeport's In-Process Materials Are Beyond Its RCRA Jurisdiction, Yet Cannot Conceal the Rule's Overreach To Non-"Discarded" Materials.

1. *This Court Should Consider The Rule's Effect On Particular Materials.*

Contrary to EPA's suggestion, there are good reasons to consider how the 2015 rule affects particular materials. First, this Court has often used specific examples to illustrate EPA's overreach when analyzing challenges to past rules defining "solid waste." *E.g.*, *Battery Recyclers*, 208 F.3d at 1054 & n.2 (giving "example from the rulemaking record in th[at] case" to illustrate why rule "contradicts" *American Mining*); *see also Am. Mining Cong. v. EPA*, 907 F.2d 1179, 1183, 1185 (D.C. Cir. 1990). *Battery Recyclers* vacated EPA's rule because it "s[ought] to regulate" "at least some" material that "is not abandoned or thrown away." 208 F.3d at 1056.

Second, EPA glosses over RCRA's judicial review provision, which provides that agency actions that "could have been" challenged in a petition for review "shall not be subject to judicial review in civil or criminal proceedings for enforcement." 42 U.S.C. § 6976(a). EPA's failure to commit here to withholding untimeliness objections to future challenges is a strong "reason to adjudicate specific materials." EPA.Br. 31.

Finally, EPA's current assurances do not preclude future enforcement. EPA relies heavily on language in the preamble (not published in the Code of Federal

Regulations) indicating that EPA is not revisiting prior legitimacy determinations. EPA.Br. 32. Elsewhere, EPA has been quick to assert that preamble language is not binding. *See Florida Power & Light Co. v. EPA*, 145 F.3d 1414, 1418 (D.C. Cir. 1998). EPA evidently has abandoned any such argument here—though it never expressly states the preamble is binding. Carefully-worded assurances that "EPA is not revisiting prior legitimacy determinations," EPA.Br. 32, overlook RCRA enforcement by states and private plaintiffs. Indeed, the rule warns that prior non-waste determinations "remain[] in effect, *unless the authorized state decides to revisit the[m]*." 80 Fed. Reg. at 1735 (emphasis added). Also, EPA could later decide the preamble is not binding because it is "no[t] so precise as . . . to have legal force." *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1223 (D.C. Cir. 1996).[4] Moreover, EPA's statements preserving prior legitimacy determinations are not relevant to the many thousands of hazardous secondary materials recycled daily that have never been subjected to a specific EPA or state legitimacy review.

2. *Asserting Jurisdiction Over "Fine Revert" Reveals The Extent Of EPA's Overreach.*

EPA recognizes that "the legitimacy test does not apply" to large reverts, which cannot plausibly be deemed "discarded." EPA.Br. 32. Confusingly, EPA

[4] The preamble should bind EPA—especially if this Court were to rely on it to decide that EPA stayed within its jurisdiction.

asserts the legitimacy test *does* apply to fine reverts, without explaining *why* or grounding that determination in the meaning of "discard." *Id.* at 32 n.6. Like "large reverts," "fine reverts" are not discarded in the ordinary sense of that term. EPA briefly suggests two possible distinctions—particle size and copper concentration. *Id.* But neither characteristic is relevant to whether fine revert is "discarded" (*e.g.*, abandoned).

To begin with, "fine revert" encompasses the "valuable metal-bearing and mineral-bearing dusts [that] are often released in processing a particular metal" held to be non-"discarded" in *American Mining*, 824 F.2d at 1181. Freeport undisputedly "recaptures, recycles, and reuses" such revert during incremental production processes. *Id.* "Large" and "fine" revert both contain broad ranges of copper materials recycled incrementally and continuously to generate high-purity end-product. *American Mining* recognized that extractive metallurgy requires such recycling, and that in-process materials are plainly not "discarded." The copper concentration in both "large" and "fine" revert far exceeds natural ores' low concentrations. *See* 2002 Inspection Report at 8, JA ___. "[F]ine revert" includes copper "sands" and "sweepings," which are recycled into the smelting process, not "discarded." *Id.* So both forms of revert are beyond RCRA jurisdiction, making it crucial to grant Industry-Petitioners' first request for relief as a straightforward application of *American Mining* and related cases. *See* Industry.Br. 65 ¶ 1.

3. *EPA's Other Arguments Fail.*

EPA downplays Factor 3's "containment" obligation, saying "some" runoff is allowed from a unit managing revert. EPA.Br. 33. Evidently, EPA believes that if a unit's releases exceed the "some" threshold, then *all* the material remaining in the unit is "discarded"—not simply the small percentage actually being released. EPA lacks authority to deem all in-process revert "discarded" just because "some" small amount might inadvertently be released. *See Battery Recyclers*, 208 F.3d at 1056.

EPA says the rule imposes no "continuous documentation" requirement. EPA.Br. 34. But the preamble explains that prudent generators must maintain documentation or risk RCRA liability for not keeping contemporaneous records. *See* 80 Fed. Reg. at 1755-56 (noting that, in enforcement actions, defendants "would have the burden to provide documentation showing" compliance with the factors).

4. *EPA Unlawfully Regulates Non-Discarded Weak Acid.*

The mandatory legitimacy factors also unlawfully regulate Freeport's weak acid stream. Industry.Br. 29-34. Nearly all of EPA's responses simply restate its general arguments about Factors 3 and 4. EPA.Br. 49-50. They fail for reasons previously given.

II. THE COURT SHOULD VACATE THOSE "VERIFIED RECYCLER" REQUIREMENTS THAT LACK RECORD SUPPORT AND DO NOT DEFINE "DISCARD."

A. The "Exclusion" Is A Renewed Assertion Of Authority.

Environmental Intervenors (Br. at 18-20) and EPA (80 Fed. Reg. 1707/3) imply that because EPA previously labeled certain materials "hazardous wastes," there is now a higher bar for those materials' exclusion from RCRA. But the original purpose of the rulemakings ultimately leading to the Verified Recycler Exclusion was to *re-examine the underlying premise* that certain materials that are reclaimed are "discarded." 72 Fed. Reg. 14,172, 14,175-78 (Mar. 26, 2007). That materials like recycled refinery catalysts were once considered hazardous wastes neither prevents EPA from reconsidering the "discard" question,[5] nor grants EPA license to reach conclusions on a less-than-adequate record, nor allows EPA to impose conditions unrelated to defining "discard."

[5] EPA claims API's challenge to EPA's assertion of authority over reclaimed catalysts is time-barred. EPA.Br. 1, 71. This ignores EPA's reconsideration of the catalysts' "discard" status in the 2008 and 2015 rulemakings. *See API v. EPA*, 683 F.3d 382, 385 (D.C. Cir. 2012) ("[2007] proposed rule would have excluded spent refinery catalysts from the definition of solid waste"); 76 Fed. Reg. 44,094, 44,141/3 (July 22, 2011) (soliciting comment on the catalysts' exclusion). API challenged the 2008 rule in No. 09-1038, and now challenges EPA's revised assertion of authority in the 2015 rule. The catalysts' "discard" status was not litigated in *API v. EPA*, 216 F.3d 50 (D.C. Cir. 2000), and even had it been, EPA was free to reconsider.

B. A Presumption That Transfer Equals "Discard" Underlies EPA's Assertion Of Authority.

Environmental Intervenors deny EPA relied upon a presumption that transfer equals "discard." Envtl.-Intervenors.Br. 18. But EPA acknowledges the undeniable: "[T]he 2015 Rule . . . presumed that secondary materials that are transferred to a third-party for off-site recycling are discarded and therefore wastes." EPA.Br. 8. *See id.* at 19-20 ("It is reasonable for EPA to adopt a presumption that transferring secondary materials to a third-party for recycling is discard."); 80 Fed. Reg. 1707/1 (stating the presumption under the heading "*EPA's Rationale for Requiring Conditions for Transfers of Hazardous Secondary Materials Sent for Reclamation*").

EPA says Industry Petitioners are inconsistent in challenging the presumption when the same presumption purportedly underlay the Transfer-Based Exclusion (which, excepting its treatment of refinery catalysts, Industry Petitioners seek to preserve). EPA.Br. 56. But there is no inconsistency. While Industry Petitioners might have challenged any number of conditions of either exclusion, they have chosen only to challenge those conditions which are both plainly beyond the pale and unduly burdensome.[6]

[6] EPA objects that Industry Petitioners challenge the 2015 rule's variance requirement, which EPA says is equivalent to the 2008 rule's audit requirement. *Id.* at 69. But there is a huge practical difference between an open-ended pre-approval process and a self-implementing audit.

C. *Post Hoc* Rationalization Cannot Resuscitate The Record.

EPA relied upon the Problems Study and the Market Study to support its presumption that transfer equals "discard." *See* 80 Fed. Reg. 1707. If that presumption is invalid, so are the challenged requirements of the Verified Recycler Exclusion. Those requirements do not define the absence of "discard," but depend on the presumption that transferred materials are *already* "discarded."

Industry Petitioners showed in their Brief (at 39-44) that EPA never placed the damage cases in the Problems Study into context. The 250 cases represent only about two percent of the number of facilities now involved in recycling, and, because the cases occurred over a period of at least 25 years, likely represent an even lower percentage of all recycling operations. API Comments 11-12, JA ___.

On Brief (at 62), EPA says "there is no 'acceptable' rate of environmental damage from discarded hazardous secondary materials." That is *post hoc* rationalization, for EPA never provided this response in the record. It is absurd, anyway. It means if there were only *one* damage case out of 10,254 recycling facilities, EPA still would conclude there is a "pattern of discard" requiring a presumption that transfer equals "discard."

Gulf claims EPA found the 2015 rule's conditions necessary for catalysts. Envtl.-Intervenors.Br. 33. But the *only* condition EPA discussed respecting the catalysts was the "contained" definition's provision that all units "address[ ] any potential risks of fires or explosions." 80 Fed. Reg. 1738, 1771.

EPA now says the Problems Study's real value is it "supports a presumption that a transfer is more likely to result in discard than is recycling that occurs within the generator's control." EPA.Br. 61. But EPA cannot know whether even this much is so, because the Problems Study itself says "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." Problems Study 8, JA ___.

Yet even *if* third-party recycling has a higher percentage of damage incidents than on-site recycling, that does not mean third-party recycling *generally* involves "discard." Just because A is larger than B does not mean either one is particularly large. Only if *among third-party recyclers* there were a high percentage of damage cases might EPA's conclusion make any sense. Two percent or less does not seem a very high percentage, and EPA has not even addressed the question.

Environmental Intervenors say Industry Petitioners' complaint merely reflects "disagreement over the agency's methodology." Envtl.-Intervenors.Br. 6. But that is not so. Industry Petitioners show that the information EPA relied upon does not support EPA's conclusions, and that EPA failed to respond to relevant comments. In fact, although EPA did not respond to comments, EPA evidently *agreed* that commenters had a valid point. Industry.Br. 42-43.

Moreover, EPA likely would not have taken the same action, absent reliance upon the Problems Study. EPA hypothesized that third-party recyclers lack

incentives to manage materials carefully, but relied upon the study to prove that such recyclers generally *are* careless *in practice*. But the study does not provide such proof. Because it is not clear EPA would have taken the same action absent reliance upon the study, the Court may not uphold EPA's action. *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319, 330 (D.C. Cir. 2006).

The Market Study merely explains EPA's theories about third-party recyclers' "incentives." It is not really even a "study" (although EPA so characterizes it), but an essay in economic theory with references to wished-for empirical evidence. EPA's Brief (at 64) implies the study contains empirical evidence on the five materials "analyzed," but the study lacks *any* empirical evidence. EPA points to none. So the Market Study also cannot confirm the elusive "pattern of discard" to which EPA continues to refer. *Id.*

D. The "Discard" Presumption Conflicts With Precedent.

Even if the record were not so poor, EPA's presumption could not be upheld, because it conflicts with the *Safe Food* holding. EPA's attempt to demote that holding to *dicta* is misguided. EPA characterizes the Court's statement that "firm-to-firm transfers are hardly good indicia of a 'discard' as the term is ordinarily understood" as "one potential reason" why materials sent for recycling to third parties are not necessarily "discarded." EPA.Br. 60. But the Court's statement about firm-to-firm transfers was the *only* reason it gave for that

conclusion. Because that reason was integral to the Court's rejection of one of the plaintiff's theories and to the decision to deny relief, that reason was a holding. *See* Industry.Br. 38.

EPA cites *Safe Food*'s having largely upheld the exclusion at issue there. EPA.Br. 60. But *Safe Food* did not involve an industry claim that the exclusion exceeded EPA's authority. Nor did the Court endorse any presumption of "discard."

While *Safe Food* is precedent, *Solvay* is not. EPA *agrees* that *Solvay* "has no precedential value," EPA.Br. 27, but asserts this is because "the reasonableness of the presumption regarding transfers [was] so clear as to break no new ground," *id.* at 57.

But were it binding precedent, *Solvay would* have broken new ground. This Court had never reviewed any such presumption before. *Safe Food* held that transfer is not a good indicator of "discard." And even if *Safe Food*'s holding were merely *dicta,* it would still defeat any claim that the reasonableness of presuming "discard" is "clear."

Responding to Industry Petitioners' demonstration that *Solvay* departed from *American Mining, et al.*, EPA just says "the Court certainly gave no indication it was doing that." EPA.Br. 28. But Industry Petitioners showed exactly how *Solvay*

conflicts with earlier cases concerning EPA's burden of establishing "discard" when asserting jurisdiction, Industry.Br. 49-50, and EPA has no response to that.

The most important distinction between *Solvay* and the present case identified in Industry Petitioners' Brief (at 49) is that *Solvay* did not confront the grossly deficient record at issue here. Here, EPA never said its presumption that transfer equals "discard" is self-evident. Instead, EPA relied upon "studies," which, as demonstrated above, failed to support EPA's presumption.

E. EPA Departed Arbitrarily From Its Historical Position That Transfer Is Generally Unimportant.

EPA says its presumption is not inconsistent with its historical position, citing two exclusions limited to on-site recycling. EPA.Br. 66. But the point is that until now, EPA *generally* has not viewed transfer as relevant to the "discard" inquiry. Industry.Br. 46.

Both in the record and on brief, therefore, EPA does not recognize its policy shift. While an agency may not have to show the reasons for its new policy are better than the reasons for its old policy, *FCC v. Fox Television Studios, Inc.*, 556 U.S. 502, 515 (2009), the agency must at least show it is consciously changing its policy, *id.*

F. The Challenged Requirements Do Not Define "Discard" Or Its Absence.

As shown in Industry Petitioners' Brief (at 51-55), the variance and emergency preparedness/response requirements do not define "discard" or its absence. Instead, they operate to regulate non-discarded materials to *prevent* "discard." This is beyond EPA's authority.

EPA seems to concede materials must be "discarded" before they can be regulated: "The central organizing idea in defining solid waste is whether or not a material *has been* discarded." EPA.Br. 2 (emphasis added). Yet EPA admits that the variance requirement with its "regulatory oversight" allows regulators "to ensure that transferred materials *will not be* discarded." EPA.Br. 67-68 (emphasis added). This admission is consistent with all of EPA's references in the record to *preventing* "discard." *See* Industry.Br. 55.

Yet elsewhere, EPA says it is not regulating based on the potential for future "discard," but "to ensure that hazardous secondary materials are not discarded in the first place." EPA.Br. 70. There is no difference. However one puts it, EPA is regulating to *prevent* "discard."

Because anything – even products – can *become* "discarded," to accept EPA's regulating materials to *prevent* "discard" would be to remove any limit upon EPA's jurisdiction. That would be inconsistent with the statute and the law of the Circuit.

G. The Court Should Vacate Only Those Provisions It Finds Invalid.

Although Industry Petitioners could have challenged other conditions of the exclusion, as relevant here they seek reversal only of (1) the RCRA permit or variance requirement, and (2) the emergency preparedness/response requirements. Industry.Br. 51-54, 58, 66. Environmental Intervenors claim those provisions are not severable, so the Court must vacate the entire exclusion. Envtl.-Intervenors.Br. 27-30.

Environmental Intervenors are wrong. The Court should avoid exceeding its Administrative Procedure Act authority. *Catholic Soc. Serv. v. Shalala*, 12 F.3d 1123, 1127-28 (D.C. Cir. 1994). The APA empowers courts to set aside "agency action." 5 U.S.C. § 706(2)(C). "Agency action" means "the whole *or a part* of an agency rule." 5 U.S.C. § 551(13) (emphasis added). Thus,

> [C]ourts may "set aside" only the part of a rule found to be invalid—for that is the only "agency action" that exceeds statutory authority. It would, therefore, exceed the statutory scope of review for a court to set aside an entire rule where only a part is invalid, and where the remaining portion may sensibly be given independent life.

Catholic Soc. Serv., 12 F.3d at 1128.

Here, the exclusion can sensibly live, independent of the challenged requirements. As Environmental Intervenors state (Br. 29), vacatur of those requirements would "effectively recreate the 2008 Transfer-Based Exclusion."

Whatever its own flaws, that exclusion (or its equivalent) can operate "sensibly" without the permit/variance and emergency preparedness/response requirements.

This Court sometimes has found that invalid parts of a rule are not severable if there is "substantial doubt" the agency would have promulgated the rule without them. *E.g.*, *Davis Cty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997). No such doubt exists here.

In 2008, EPA effectively *did* promulgate the rule without the invalid parts, by promulgating the Transfer-Based Exclusion. In 2015, EPA adopted the new variance requirement and emergency preparedness/response requirements – not because of any admitted substantive problem with the Transfer-Based Exclusion – but to provide greater "oversight and public participation." 80 Fed. Reg. 1708. Surely, had EPA recognized that these new requirements carried it beyond its authority, it would not have added them, but simply left the Transfer-Based Exclusion in place.

Moreover, vacating the entire exclusion would create an additional complication. Vacatur would—contrary to Environmental Intervenors' claim—automatically result in a return to the *status quo ante*, *i.e.*, the Transfer-Based Exclusion. With rare exceptions, this Court has held that vacatur restores the prior rule. *See Air Transp. Ass'n of Canada v. FAA*, 254 F.3d 271, 277 (D.C. Cir. 2001), *modified on reh'g*, 276 F.3d 599 (D.C. Cir. 2001).

Complete restoration of the 2008 Transfer-Based Exclusion would resuscitate the problem that refinery catalysts were ineligible – a problem the 2015 rule mooted. The Court should avoid that complication by following the precedent discussed above and only vacate the challenged portions of the rule. Were the Court to depart from precedent and vacate the entire exclusion, the Court should either rule upon API's challenges to the 2008 rule (which have been briefed, and never withdrawn), or allow renewed briefing of those challenges.[7]

As a further alternative to the preferred, precedent-based approach of vacating only the challenged provisions, the Court could first vacate the language of the 2008 exclusion that rendered the catalysts ineligible,[8] under the doctrine that orders not reviewed because of mootness should be vacated to prevent them from causing any legal consequences. *Am. Family Life Assurance Co. v. FCC*, 129 F.3d 625, 631 (D.C. Cir. 1997). The Court may vacate that portion of the 2008 rule the challenge to which is mooted, while leaving the rest undisturbed. *Associated Gas*

[7] Those challenges include: (1) EPA arbitrarily treated catalysts differently than similar materials; (2) it was arbitrary and *ultra vires* (a) to consider recycled catalysts "discarded" and (b) to consider catalysts meeting the Transfer-Based Exclusion "discarded;" and (3) EPA acted without notice and comment. API Br. in No. 09-1038 at 24-46 [Doc. #1319593]. Because the 2015 rule superseded the 2008 rule, it would have been pointless to repeat these arguments respecting the 2008 rule in the current briefing.

[8] The disqualifying language was in 40 C.F.R. §§ 261.2(a)(2)(ii) ("it does not meet the listing description for K171 or K172 in § 261.32"); 261.4(a)(23)(iv) (same); and 261.4(a)(24)(iii) (same) (2014).

Distribs. v. FERC, 899 F.2d 1250, 1264 (D.C. Cir. 1990). Then, the Court could vacate the Verified Recycler Exclusion in its entirety, thereby restoring the Transfer-Based Exclusion (minus the language rendering catalysts ineligible).

But the far more straightforward approach would be to vacate only those portions of the Verified Recycler Exclusion the Court finds invalid. That approach best comports with the APA scope of review and is justified on the facts of this case.

III. THE COURT SHOULD VACATE EPA'S ASSERTION OF AUTHORITY OVER OFF-SPECIFICATION PRODUCTS REPROCESSED BEFORE USE.

A. The Court Has Jurisdiction To Review EPA's Record Statements.

Industry Petitioners challenge EPA's interpretation in the Response To Comments accompanying the 2015 rule that "hazardous secondary material" includes commercial products that "are off-specification or otherwise unable to be sold as a product." Industry.Br. 63. Consistent with EPA's position in the proposal, *see id.* at 58-59 (quoting 76 Fed. Reg. 44139 (July 22, 2011)), this implied off-specification products that are reprocessed or "reclaimed" before being used in their normal manner are "hazardous secondary materials," and that their reprocessing is subject to the legitimacy regulation (40 C.F.R. § 260.43).

EPA's Brief confirms its position:

> Commercial chemical products, including off-specification products, are not solid wastes when recycled (40 C.F.R. § 261.2(c)(3) and Table

> 1), although, *as with all hazardous secondary material recycling, that recycling must meet the legitimacy test.*

EPA.Br. 74 (emphasis added).

EPA argues that because a Response To Comments is not a regulation, the Court lacks jurisdiction, relying upon *Molycorp v. EPA*, 197 F.3d 543 (D.C. Cir. 1999). EPA.Br. 72. But this case is nothing like *Molycorp*, where the challenged document was not issued in support of a rulemaking.

Rather, this case is like *United States Air Tour Ass'n v. FAA*, 298 F.3d 997, 1013 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 977 (2003), where the challenged document was part of the rulemaking record, issued with the rule, and relied upon in the Federal Register notice. *See* 80 Fed. Reg. 1720, 1738. The Court found jurisdiction:

> Just as we may examine other record material that provides the underpinnings for the [rule], so also may we review analytic documents issued by the agency that elaborate upon the rule's rationale and assess its impact.

Air Tour Ass'n, 298 F.3d at 1013.

Here, the rule's impact cannot be understood without the Response To Comments. The definition of "hazardous secondary material" in 40 C.F.R. § 260.10 does not refer to off-specification commercial products,[9] and, as

[9] The definition of "secondary material" in 40 C.F.R. § 241.2 is inapplicable to the hazardous waste regulations at issue here. *See* 40 C.F.R. § 241.2 (providing definition of "secondary material" is for "purposes of this subpart").

explained in Industry Petitioners' Brief (at 59-62), EPA's long-held interpretation was that off-specification products are not "secondary materials" when used in their normal manner – *even if they must be reclaimed before such use*. The Response To Comments is therefore integral to EPA's assertion of authority over off-specification products that are reprocessed before use, and is reviewable just as is the rule's text. *Air Tour Ass'n*, 298 F.3d at 1013.

EPA also asserts a lack of ripeness, claiming there is no "concrete controversy." EPA.Br. 72. But as discussed above, EPA's Brief confirms EPA's assertion of authority over off-specification products that are reprocessed before use. Industry Petitioners contest that assertion.

B. EPA's Demand That Manufacturers Prove Their Products Are Products Is Indefensible On The Record And *Ultra Vires*.

It is self-evident that manufacturing sometimes yields products that fail to meet specifications. Where it is necessary to reprocess such products, EPA's rule effectively requires manufacturers to prove that their final products are products. EPA says such reprocessing must meet the legitimacy regulation. EPA.Br. 74.

EPA claims its position is not new. *Id.* at 73-74. But Industry Petitioners provided evidence that EPA's long-held position was that off-specification commercial products are not "secondary materials" – as long as they are used in their normal manner, and *even if they must first be reclaimed*. Industry.Br. 59-62. EPA does not refute that evidence.

Nor does EPA point to any evidence of its own. The section 260.10 definition of "hazardous secondary material" (applicable here) does not mention off-specification products, and the definition of "secondary material" in 40 C.F.R. § 241.2 is inapplicable. *See supra* note 9; *cf.* EPA.Br. 73 (quoting 40 C.F.R. § 241.2).

EPA's position (in the record and on brief) represents a failure to recognize EPA's major change in interpretation. That renders EPA's assertion of authority arbitrary and capricious. Even if an agency need not show the reasons for its new policy are better than the reasons for its old policy, *Fox Television Studios*, 556 U.S. at 515, it must at least demonstrate that it is consciously changing its policy, *id.*

Moreover, EPA adopted its position without responding to relevant comments. EPA says the comments Industry Petitioners rely upon merely said a product is only a "secondary material" when used differently from its normal manner, which EPA does not dispute. EPA.Br. 74 n.8. But the comment was not so limited.

The comment was *prompted* by EPA's proposal to apply the legitimacy factors to "[c]ommercial chemical products being reclaimed." API Comments 42, JA ___. The comment said "[a] commercial chemical product merely being reclaimed is not a secondary material, and the legitimacy criteria would not come

into play." *Id.* at 44, JA ___. EPA's failure to respond cogently to this comment is an independent basis to vacate EPA's action.

In any event, EPA lacks authority to require manufacturers to prove that their products are products, even where they must be reprocessed before use. Such products cannot plausibly be viewed as "discarded."

IV. GULF LACKS STANDING.

Although, as a RCRA permitee, Stephan Decl. ¶ 5 [Doc. #1320515], Gulf has a competitive interest in the requirement that catalyst reclaimers have RCRA permits (or equivalent), Gulf does not rely upon that interest. Instead, Gulf claims a consumer interest, asserting injury "if the existing regulatory safeguards for storage, transportation and handling of reclaimed spent catalysts were weakened or eliminated." Gulf.Br. 16 [Doc. #1320515].

But Gulf never specifies the safeguards it needs, nor how any harm in their absence would be traceable to the catalysts' deregulation. Thus, the Court must speculate about any injury and why Gulf could not protect itself through self-regulation or contract. *See Am. Chem. Council v. DOT*, 468 F.3d 810 (D.C. Cir. 2006).

Handling of the catalysts at refineries would not affect Gulf, and Gulf has offered no pertinent evidence. If Gulf needs regulation to operate its own facility safely, any harm is traceable to Gulf itself.

That leaves transportation. Even in the absence of *any* RCRA regulation, DOT standards would apply were any shipment of catalysts to have the properties about which Gulf professes concern, *i.e.*, "pyrophoric or self-heating properties" (Gulf.Br. 13). *See* 49 C.F.R. §§ 173.1(b), 173.2, 173.124(b).

It was Gulf's burden to explain why these requirements do not protect it. Because Gulf has not identified a concrete injury traceable to vacatur of EPA's actions, Gulf lacks standing.

CONCLUSION

The Court should grant the relief requested in Industry Petitioners' Brief.

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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 6,991 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: May 19, 2016 */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 19th day of May 2016, served a copy of the foregoing *Reply Brief of Industry Petitioners*, including the Addendum 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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