

**COMMENTS OF THE NATIONAL MINING ASSOCIATION  
ON THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S  
PROPOSED REVISIONS TO THE DEFINITION OF SOLID WASTE**

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**I. INTRODUCTION**

The National Mining Association (“NMA”) is the industry association representing the producers of most of the nation’s coal, metals, and industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment, and supplies; and the engineering and consulting firms, financial institutions, and other firms serving the coal and hard rock mining industry. These comments are submitted in response to the proposed rule issued by the U.S. Environmental Protection Agency (“EPA” or “the Agency”) under the Resource Conservation and Recovery Act (“RCRA”), entitled “Revisions to the Definition of Solid Waste,” 68 Fed. Reg. 61,558 (October 28, 2003).

As EPA is well aware -- and as the U.S. Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) recognized in the case that was the impetus for the current rulemaking, *Association of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000) (“*ABR*”) -- NMA and its member companies have a keen interest in the definition of solid waste under RCRA. NMA (or its predecessor, the American Mining Congress) has been an active participant in virtually all of the major EPA rulemakings addressing the definition of solid waste, as well as the Definition of Solid Waste Roundtable that was assembled by the Agency during the early 1990’s to provide input on this issue. The Association has also been one of the lead parties in most of the key court cases on the definition of solid waste, including not only *ABR*, but also *American Mining Congress v. EPA*, 824 F.2d 1177 (D.C. Cir. 1987) (“*AMC I*”), *American Mining Congress v. EPA*, 907 F.2d 1179 (D.C. Cir. 1990) (“*AMC II*”), and *American Petroleum Institute v. EPA*, 906 F.2d 729 (D.C. Cir. 1990) (“*API I*”). As discussed throughout these comments, NMA’s member companies produce and/or use a variety of materials that may be affected by EPA’s current proposal. The Association, therefore, clearly has a vital interest in this rulemaking.

We have recently entered the 20th year of laboring under a series of regulatory definitions that have been ruled unlawful by the court. *See, e.g.*, 50 Fed. Reg. 614 (January 4, 1985) (the definition of solid waste ruled unlawful in *AMC I*). Surely now the time has finally arrived for EPA to craft a regulatory definition of solid waste that is consistent with the jurisdictional limitations established by Congress. Specifically, the regulatory definition must be limited to “materials that are ‘discarded’ by virtue of being disposed of, abandoned, or thrown away.” *ABR*, 208 F.3d at 1051, quoting *AMC I*, 824 F.2d at 1190.

**II. SUMMARY OF COMMENTS**

***EPA’s General Approach.*** EPA has once again proposed amendments to the regulatory definition of solid waste that fail to abide by the limitations that have been set

by Congress and affirmed by the courts. Although the Agency's RCRA authority extends only to "discarded" materials, the proposed rule would regulate certain materials that are destined for recycling, just because they are not recycled in a "continuous process in the generating industry." This approach is in direct conflict with clear pronouncements by the courts that materials recycled outside the generating industry are generally not discarded and therefore cannot summarily be classified as solid wastes.

The relevant case law demonstrates that there is a spectrum of recycling, and EPA's authority varies along the spectrum. At one end of the spectrum are in-process materials that are produced and beneficially used within the primary metals and minerals industry. These materials are essential intermediates in the incremental process by which metals and minerals are produced from ores, and their use is an integral part of the overall production process. Thus, the in-process materials are not being discarded and cannot be regulated by EPA. In contrast, materials that are recycled outside the generating industry may in some limited circumstances be regulated as solid wastes, but only if it can be shown that they are being discarded in some meaningful way.

EPA should address both categories of materials as quickly as possible, but may want to consider addressing intra-industry recycling first, because the statute and the case law clearly leave the Agency with no discretion in this area and because in-process materials should not continue to be classified as solid wastes under the regulations while EPA grapples with the potentially more difficult inter-industry issues. The Agency should also address within-company and on-site recycling in much the same way, and at the same time, as intra-industry recycling.

***The Existing Regulations.*** Under the current regulatory definition of solid waste, many secondary materials that are produced and used within the primary metals and minerals industry are already properly excluded from the definition of solid waste. However, this is not true for in-process materials that are deemed to be "spent," unless they meet certain requirements for storage prior to recycling. These storage requirements are unlawful -- and impose substantial economic and operational burdens -- for in-process materials within the primary metals and minerals industry. Moreover, they place a premium on designations (*e.g.*, "spent materials") that have no meaning within the industry. The existing regulations also improperly classify *all* secondary materials as solid wastes when they are stored for more than one year, even though such storage is sometimes an integral part of processing the materials. Thus, it is essential that the current regulations be amended.

***The Proposed Exclusion.*** Even though EPA's proposal is designed to exclude from regulation secondary materials that are reclaimed in a continuous process within the generating industry, the proposal would nevertheless continue to regulate certain in-process materials within the primary metals and minerals industry. As an initial matter, the proposed rule would define the industry in such a way that two integrally related parts (*i.e.*, beneficiation and mineral processing) would be deemed separate industries. In this

way, in-process materials that are necessarily transferred between the two types of operations would not be eligible for the exclusion and would be classified as solid wastes.

The proposed exclusion also would not apply to in-process materials that are “speculatively accumulated” for more than one year, despite the fact that longer storage is sometimes dictated by the operational realities of the primary metals and minerals industry, and therefore is not indicative of discard. Similarly, the proposal would prohibit handling of excluded materials by entities or facilities outside the generating industry (other than transporters), even though such handling is sometimes an operational necessity.

In order to rectify these problems, NMA suggests a few modifications to the proposed exclusion. First, the relevant “industry” must be defined to encompass both beneficiation and mineral processing operations. Second, EPA should specify that materials within this industry are “in process” during the first year after their production; only after the one-year period should such materials start to be subject to a speculative accumulation “clock.” Third, the Agency should either delete the prohibition on out-of-industry handling for the primary metals and minerals industry, or allow out-of-industry establishments and entities to engage in loading, unloading and related activities (*e.g.*, incidental storage).

Finally, EPA must not adopt its proposed Option #2, under which otherwise excluded materials would lose the regulatory exclusion if they are recycled by a facility that also recycles any regulated hazardous wastes from a different industry. This option would unlawfully classify undiscarded materials as wastes based on the way that *other* materials are handled. In addition, it would not serve any environmental purpose. On the contrary, Option #2 would effectively force a major smelter to cease its long-standing practice of recycling “F006” hazardous wastes, thereby undermining the resource conservation and recovery goals of RCRA as well as EPA’s ongoing efforts to encourage environmentally sound recycling of this specific waste.

***Legitimacy Criteria.*** There is no need for EPA to issue a wholesale revision to the criteria used for distinguishing between legitimate and sham recycling. Moreover, it would be inappropriate for the Agency to codify the criteria into the regulations, because the resulting rule would inevitably prove to be rigid and incapable of accounting for the wide range of recycling operations, and would distort the guidance that EPA has painstakingly developed over the years and applied with considerable success.

If, nevertheless, EPA goes forward with issuing regulatory criteria, those criteria should be based on the presumption that recycling is generally legitimate and to be encouraged. The Agency must make clear in the regulatory language (*i.e.*, not solely in preamble language) that the criteria are only factors for consideration, rather than mandatory requirements that must be satisfied for recycling to be deemed legitimate. Similarly, EPA should emphasize that different criteria may be appropriate for different types of recycling.

The one criterion that might be appropriate to consider in all situations is whether the materials being recycled are making a useful contribution to the recycling process (proposed Criterion #2). After all, if a material does not contribute to a process or the products of the process, it is not being recycled in any meaningful way. EPA's view of what constitutes a useful contribution, however, is unduly narrow (especially to the extent that the Agency states that the material must be "efficiently" used in the recycling process and that mismanagement of any recycling residues indicates the materials used in the process are not contributing to the process).

EPA's proposed Criterion #3 (*i.e.*, whether the recycling process yields a valuable product) is of dubious merit because it is subsumed by Criterion #2. If a recycling process does not produce a product with any value (under the third criterion), the secondary material inputs cannot be making a useful contribution (under the second criterion). Criterion #3, therefore, does not provide any help in distinguishing between legitimate and sham recycling. Moreover, as drafted by EPA, this criterion could be interpreted in ways that would discourage legitimate recycling (*e.g.*, by branding as a sham any individual recycling step that does not result in a salable product).

Another criterion proposed by EPA (Criterion #1) is whether the secondary material destined for recycling is being stored as a valuable commodity. NMA believes that this criterion is unlawful, at least as applied to in-process materials within the primary metals and minerals industry, because such materials cannot be deemed discarded based on the fact that they are stored prior to recycling or the manner of storage. Moreover, the particular benchmarks that the Agency has proposed for evaluating storage practices are vague, unrealistic, and environmentally counterproductive. For example, they would require a determination of whether secondary materials are "analogous" to any raw materials, without any clear standard for making such a determination. Where "analogous" raw materials exist, the secondary materials would have to be managed in a "similar" way, regardless of practical differences between the materials and the potential availability of "different" storage methods that might be protective. Where no "analogous" raw materials exist, the secondary materials would have to be stored to "minimize" the potential for releases, which might require "gold-plated" protection against even insignificant releases of non-hazardous constituents using methods that are not deemed necessary for hazardous wastes.

EPA's fourth and final proposed criterion is whether the product of the recycling process contains hazardous constituents that are not found in the corresponding virgin product (or are not found to the same extent), in which case such constituents would be deemed "toxics along for the ride" ("TARs") that are being discarded. NMA, however, objects to the Agency's suggestion that any hazardous constituents that unavoidably make their way into a product as a result of the technical limitations of a recycling process are being "discarded." This is especially true in the context of the primary metals and minerals industry, where products typically come in several grades, all of which are

generally subject to stringent international specifications and/or contract limitations, and where processing inevitably concentrates certain non-target metals and minerals together with the target metal(s) or mineral(s). Moreover, the use of in-process materials is intrinsic to the primary metals and minerals industry, making the type of comparison required under the TAR test (*i.e.*, the comparison between products produced from purely virgin materials and products produced with in-process materials) virtually impossible to make. Accordingly, EPA's criteria are inappropriate for the in-process materials produced and used within the primary metals and minerals industry.

***Implementation and Related Issues.*** EPA's proposed notification requirement for persons generating materials that cease to be regulated due to the new exclusion would unlawfully regulate materials that are not discarded and would not serve any legitimate oversight function (especially given the fact that other excluded materials -- including newly generated materials covered by the proposed exclusion -- will not be subject to notification). Thus, the notification requirement should not be adopted.

EPA should clarify that the new exclusion will narrow the scope of the federal regulations (rather than make them less stringent) and that therefore the Agency cannot enforce any state rules that fail to reflect the exclusion. EPA should also encourage states to adopt the new exclusion, so as to encourage beneficial recycling. In addition, the Agency should highlight the fact that any state rules governing the transport of materials covered by the new federal exclusion will be preempted by virtue of the nation's hazardous materials transportation law.

***Enforcement.*** EPA must abandon its proposal that generators be subject to enforcement whenever recyclers handle their secondary materials in a manner that does not comply with the requirements of the exclusion. By converting actions of the generators that were innocent at the time they were performed into punishable offenses, EPA's enforcement scheme would go against the prospective nature of RCRA. It also would impose liability without regard to fault (and without regard to proximate causation), despite clear evidence that Congress did not intend such a liability regime. The approach proposed by EPA would be fundamentally unfair and therefore would violate constitutional guarantees of due process. The risks faced by generators would discourage beneficial recycling and thereby undermine the goals of RCRA.

### **III. EPA'S GENERAL APPROACH**

#### **A. EPA Cannot Classify Recyclable Secondary Materials As "Discarded" Just Because They Are Not Recycled in a "Continuous Process in the Generating Industry"**

EPA's proposed revisions to the regulatory definition of solid waste are inconsistent with the instructions of the D.C. Circuit in *ABR* to "define 'solid waste' in accordance with this opinion." *See ABR*, 208 F.3d at 1060. The court took EPA to task for "parsing" and "dissecting" the *AMC I* opinion, and for developing a complex

regulatory definition of one of the phrases used in that opinion, *i.e.*, “immediate reuse.” *Id.* at 1052. In the current proposal, the Agency’s “solution” is to parse and dissect a *different* phrase from the *AMC I* opinion, *i.e.*, “continuing process within the generating industry.”

This clearly will not do.

As the D.C. Circuit held in *AMC I*, and underscored in *ABR*, “Congress clearly and unambiguously expressed its intent that ‘solid waste’ (and therefore EPA’s regulatory authority) be limited to materials that are ‘discarded’ by virtue of being disposed of, abandoned, or thrown away.” *See AMC I*, 824 F.2d at 1190; *ABR*, 208 F.3d at 1051. Although the *AMC I* court did state that materials “destined for beneficial reuse or recycling in a continuous process by the generating industry itself” are one specific category of materials that cannot be viewed as discarded, *see AMC I*, 824 F.2d at 1186, there was never any suggestion that these are the only recyclable materials that are excluded from classification as solid wastes. On the contrary, the court made clear that the only touchstone is the one supplied by Congress: only “discarded” materials can be regulated as wastes, and the term “discarded” should be understood “in its ordinary, everyday sense.” *Id.* at 1193.

As the *ABR* court stressed, “secondary materials destined for recycling are obviously not” discarded materials. *ABR*, 208 F.3d at 1051. “To say that when something is saved it is thrown away is an extraordinary distortion of the English language.” *Id.* at 1053. This is true whether the materials are destined for recycling within the generating industry or a different industry. Thus, EPA’s sole focus on “continuous process[ing] by the generating industry” is misplaced.

Any possible questions about whether discard is indicated whenever a material is destined for beneficial reuse or recycling outside the generating industry have surely been put to rest by the recent decision of the D.C. Circuit in *Safe Food and Fertilizer v. EPA*, 350 F.3d 1263 (D.C. Cir. 2003) (“*Safe Food*”). The court in that decision explicitly stated:

We have never said that RCRA compels the conclusion that material destined for recycling in another industry is necessarily “discarded.” Although ordinary language seems inconsistent with treating immediate reuse within an industry’s ongoing industrial process as a “discard,” . . . the converse is not true. . . . [F]irm-to-firm transfers are hardly good indicia of a “discard” as the term is ordinarily understood.

*Safe Food*, 350 F.3d at 1268.<sup>1</sup> In light of this decision, EPA clearly can no longer limit its revision of the regulatory definition of solid waste to materials generated and

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<sup>1</sup> EPA itself made much the same point in its brief in the *Safe Food* case. *See* Brief of Respondent EPA, submitted in *Safe Food v. EPA*, No. 02-1326 (D.C. Cir. filed June 30, 2003) at 38 n.19 (“Inter-industry transfers of commodities occur routinely and Petitioners offer no basis for assuming that such transfers necessarily result in discard”).

reclaimed in a continuous process within the same industry. Instead, the Agency must more broadly ensure that only discarded materials are classified as solid wastes.

Similarly, EPA cannot limit its revision of the regulatory definition of solid waste to materials generated and reclaimed in a “continuous” process. Of course, such materials are a particularly clear example of materials that are not wastes and thus beyond the purview of RCRA. However, the Agency’s narrow focus on “continuous” processing is reminiscent of its focus on “immediate” processing in the “Phase IV” land disposal restrictions (“LDR”) rule. In *ABR*, the D.C. Circuit reprimanded EPA for singling out the word “immediate” and making it a guiding principle for the regulatory definition of solid waste. EPA should not repeat the same mistake here. Instead, it should abide by the court’s central holding that materials being saved for recycling are not wastes. *See, e.g., ABR*, 208 F.3d at 1053 (repudiating the idea that “when something is saved it is thrown away,” and noting that the relevant case law contains “[n]othing . . . about saved materials being transformed into discarded materials.”).<sup>2</sup>

#### **B. EPA Should Distinguish Between Secondary Materials Recycled Inside and Outside the Generating Industry**

Although EPA clearly must expand its proposed revisions to the regulatory definition of solid waste beyond materials that are “destined for beneficial reuse or recycling in a continuous process by the generating industry,” NMA believes it is not necessary, and perhaps may not even be appropriate, to address these materials in the same way as other recycled materials (*e.g.*, materials recycled in a different industry than the one in which they were generated).<sup>3</sup>

As the D.C. Circuit noted in *American Petroleum Institute v. EPA*, 216 F.3d 50 (D.C. Cir. 2000) (“*API I*”), there is a wide “spectrum” of recycled materials. At one end of the spectrum are secondary materials “destined for reuse as part of a continuous industrial process,” which “EPA cannot regulate as solid waste” because they are “not abandoned or thrown away.” *See API II*, 216 F.3d at 56 (emphasis added). “At the other

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<sup>2</sup> More detailed discussions of the relevant case law (prior to *Safe Food*) were included in NMA’s briefs in the *ABR* case, as well as in our response to EPA’s request for comments in the March 13, 2002 final rule implementing the vacatur ordered by the *ABR* court. *See, e.g.*, Brief of Petitioners-Intervenors on RCRA Classification Issues, submitted in *ABR v. EPA*, No. 98-1368 and consolidated cases (D.C. Cir. filed March 9, 1999) at 13-21; Reply Brief of Petitioners-Intervenors on RCRA Classification Issues, submitted in *ABR v. EPA*, No. 98-1368 and consolidated cases (D.C. Cir. filed July 9, 1999) at 4-9; Letter from Roderick T. Dwyer, NMA, to Marianne L. Horinko, Assistant Administrator, Office of Solid Waste and Emergency Response, EPA (July 10, 2002), Attachment at 6-9. The Agency’s discussion of the case law in the current proposal suggests that EPA is still misreading the relevant court decisions. However, instead of repeating the entirety of our prior analysis, we refer the Agency to these earlier documents and hereby incorporate them by reference into these comments.

<sup>3</sup> As discussed in Section III.F below, however, NMA believes that two types of materials recycled outside the generating industry (*i.e.*, materials destined for within-company recycling or on-site recycling) should be excluded in much the same manner as materials recycled within the generating industry.

end of the spectrum . . . a material that has been ‘indisputably “discarded”’ can, of course, be subjected to regulation as solid waste.” *Id.* Other materials generally lie “somewhere between the extremes of ongoing production and indisputable discard,” *id.*, and therefore might or might not be regulated as wastes. *See also ABR*, 208 F.3d at 1054 (noting with approval EPA’s prior acknowledgment of a “[jurisdictional] continuum”).

This view was reinforced by the recent decision of the D.C. Circuit in *Safe Food*. The court there stated as follows:

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

*See Safe Food*, 350 F.3d at 1268 (first emphasis added). Thus, EPA is prohibited from regulating materials that are beneficially recycled within the generating industry. However, the Agency may have some discretion in determining whether materials recycled outside the generating industry can be viewed as discarded and therefore regulated as solid wastes.<sup>4</sup> Of course, any discretion must be exercised in a manner that is reasonable and consistent with the statute and the relevant case law. *See, e.g., API II*, 216 F.3d at 57.

In light of these pronouncements by the D.C. Circuit, EPA need not, and perhaps should not, try to establish a “one size fits all” exclusion from the regulatory definition of solid waste. The Agency should issue a simple, straightforward, and unconditional exclusion for materials that are beneficially reused or recycled within the generating industry. In addition, it should identify the limited situations in which materials recycled outside the generating industry can properly be considered discarded, and therefore regulated as solid wastes.

### **C. EPA Cannot Regulate Under RCRA In-Process Materials Within the Primary Metals and Minerals Industry**

Any final rule issued by EPA must recognize and reflect the unique nature of the primary metals and minerals industry. In the preamble to the proposed rule, the Agency persists in characterizing the industry as “generating” various types of “secondary materials” during its handling of ores, and then “reclaiming” the materials for additional metal or mineral values. As discussed below, however, this is a false paradigm.

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<sup>4</sup> The *ABR* court made the same points in a slightly different way, reaffirming “the decision in *AMC I* that ‘discarded’ was not ambiguous” at least with respect to materials generated and recycled within the same industry, but noting that the term “may be ambiguous as applied to [other] situations.” *See ABR*, 208 F.3d at 1056.

The very essence of the primary metals and minerals industry is the extraction of valuable materials from earthen ores. It is a misnomer for EPA to refer to extraction (or any part of that process) as “reclamation,” as if the industry is “obtain[ing materials] from a waste product or by-product” or “restor[ing a product] to use.” *See* Webster’s Ninth New Collegiate Dictionary (1985) at 983 (definitions of “reclaim” and “reclamation”). The purpose of the industry is not to “re-claim” values, but to “claim” them in the first instance. What EPA refers to as reclamation is the central production process in the primary metals and minerals industry.

The fact that some materials inevitably leave or escape from one operation in the process and are reinserted into either the same or a different operation to obtain further metal or mineral values does not mean that those materials have been “generated” as “secondary materials” that now require “reclamation.” Instead, these materials are still very much in the production process.<sup>5</sup> The D.C. Circuit underscored this fact when it described the primary metals and minerals production process in *AMC I*:

Extractive metallurgy proceeds incrementally. Rome was not built in a day, and all metal cannot be extracted in one fell swoop. In consequence, materials are reprocessed in order to remove as much of the pure metal as possible from the natural ore. . . . What is more, valuable metal-bearing and mineral-bearing dusts are often released in processing a particular metal. The mining facility typically recaptures, recycles, and reuses these dusts, frequently in production processes different from the one from which the dusts were originally emitted.

*AMC I*, 824 F.2d at 1181.

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<sup>5</sup> The term “secondary material” is particularly misleading as applied to in-process materials within the primary metals and minerals industry because it may improperly suggest that these materials are not an integral part of the primary metals and minerals production process. As discussed below, however, these materials are typically returned to the primary production process for continued recovery of the same metal or mineral, and the additional values recovered are of vital importance to the overall economics of the primary metals and minerals production process. In other cases, the materials may be used to produce different metals or minerals. However, these other products are important co-products of the primary production process. *See, e.g.*, 50 Fed. Reg. 614, 625 (January 4, 1985) (co-products include “various metals produced in tandem by smelting operations (such as lead recovered from primary copper smelting operations)” and “sulfuric acid from smelters’ metallurgical acid plants”); *id.* (co-products are “materials [that are] produced intentionally, and which in their existing state are ordinarily used as commodities in trade by the general public”). The in-process materials that are used as intermediates to make these co-products cannot in any meaningful way be deemed “secondary.”

Notwithstanding this fact, in certain portions of these comments, we may refer to the materials at issue as secondary materials, because the EPA proposal we are responding to uses that phrase and it would be confusing to use different words to describe the same material. Similarly, we may sometimes refer to the production processes in which the materials are used as “reclamation,” even though that term is also inappropriate, as discussed above.

Although the court here mentioned only metal- and mineral-bearing dusts, a wide variety of other metal- or mineral-rich materials are also released, recaptured, and reused within the production process. Similarly, there are several materials that are released, recaptured and reused within the production process in order to utilize other material values (*e.g.*, acid, cyanide, or water values).<sup>6</sup>

For example, during the primary production of copper, the following materials (in addition to dusts, such as smelter flue dusts) are often removed from a particular operation, and then used in the same or another operation to extract additional copper values (and/or utilize other material values, where sufficient quantities are present):

- Refractory bricks removed from the inner lining of smelting units, which typically have readily visible “veins” of solid copper.
- Off-specification copper anodes, which are extremely high in copper values and, indeed, would ordinarily be the final product of solvent extraction/electrowinning operations, but which fail to meet commercial specifications.
- Acidic solutions from smelter acid plants and other processing operations, which in addition to their acid values may contain substantial copper values, and therefore are ideal for use in copper heap leach production operations or in hydrometallurgical processes.
- Reverts, which are materials that solidify in the transfer ladles used in smelting operations and are intentionally knocked loose, or which are spilled during the transfer of molten metal and are regularly recovered, so that they can be returned to the smelter (after cooling, crushing, and sizing) for continued copper extraction. *See generally ABR*, 208 F.3d at 1054, n.2.

Similarly, during the primary production of precious metals, the following materials (in addition to the dusts referenced above) exit one operation, only to be reinserted into the same or a different operation:

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<sup>6</sup> NMA and its member companies have discussed all of the additional in-process materials that are mentioned below in earlier filings. *See, e.g.*, Brief of Petitioners-Intervenors on RCRA Classification Issues, submitted in *ABR v. EPA*, No. 98-1368 and consolidated cases (D.C. Cir. filed March 9, 1999) at 4-8, and the documents referenced therein; Letter from Roderick T. Dwyer, NMA, to Marianne L. Horinko, Assistant Administrator, Office of Solid Waste and Emergency Response, EPA (July 10, 2002), Attachment at 4-6. For a more complete discussion of these materials, we refer EPA to such documents, which are hereby incorporated by reference into these comments. *See also* note 2 above.

We recognize that some of the materials discussed here may already be excluded from classification as solid wastes under the current regulations. However, as discussed in Section IV below, the existing regulations do not cover all of these materials and are problematic in other ways. In addition, the materials mentioned here illustrate how the use of in-process materials is inherent to the primary metals and minerals industry.

- Slag that is physically attached to the main smelter product (*i.e.*, doré, a mixture of gold and silver), but which is broken off, gathered, and then processed to extract gold values by being ground and leached in a series of steps (including the carbon-in-leach (“CIL”) production circuit where a variety of other gold-bearing materials are processed).
- Wet scrubber residues, which are similar to the dusts mentioned in *AMC I*, but have substantial water content (due to the way they are collected) and therefore are typically processed in the CIL production circuit for recovery of the metal values (as well as for use of the water itself).
- Retort cooling water, which picks up substantial metal values while being used to cool and condense retort gases, and then is transferred to a CIL production circuit both to recover these metal values and to use the water itself in beneficiation operations.
- Non-contact cooling water, which has not picked up metal values but is still a valuable material (especially in the arid west) and therefore can be -- and is -- reused in various places throughout the precious metals production facility.

In each of these cases (and countless others), the materials stay within the “incremental” production process of extractive metallurgy. *See AMC I*, 824 F.2d at 1181. Because these materials remain in-process, they cannot be considered discarded or regulated as wastes.<sup>7</sup> Instead, these materials are beyond EPA’s jurisdiction under RCRA.<sup>8</sup>

**D. EPA Cannot Regulate Recycled Materials That Are *Not* In-Process Unless It Can Show That the Materials Are Properly Deemed Discarded**

We want to stress that we are not claiming that *all* materials processed within the primary metals and minerals industry are in-process materials. For example, when a

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<sup>7</sup> *See, e.g.*, S. Rep. No. 988, 94th Cong., 2d Sess. 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6242 (RCRA “does not establish any federal regulatory authority with respect to decisions in the manufacturing process.”); H.R. Rep. No. 1491, 94th Cong., 2d Sess. 26, *reprinted in* 1976 U.S.C.C.A.N. 6238, 6264 (RCRA is not intended to “interfer[e] with the productive process itself”); *id.* at 36, 1976 U.S.C.C.A.N. at 6274 (RCRA “does not establish any federal regulatory authority with respect to requirements in the manufacturing process”).

<sup>8</sup> For these purposes, in-process materials include any materials that originate within the primary metals and minerals industry and are retained within the industry for productive purposes. Such materials include not only materials processed for recovery of their metal or mineral values, but also materials that are used for acid, water, cyanide, or other values. *Cf.* 40 C.F.R. § 261.4(a)(17) (current conditional exclusion for “[s]pent materials . . . generated within the primary mineral processing industry from which minerals, acids, cyanide, water, or other values are recovered”). In addition, in-process materials include materials that are stored on the land prior to use within the industry.

smelter receives wastewater treatment sludges from the electroplating industry (EPA Hazardous Waste No. F006) for metals recovery, we recognize that such sludges are not in-process materials. Similarly, we are not claiming that all materials originating within the industry are necessarily in-process materials. For example, spent solvents from equipment maintenance operations that are sent to a commercial solvent recycler are not in-process materials.

As noted above, however, just because these materials are not in-process does not mean that they necessarily have been discarded. Instead, these materials are simply at a different location on the spectrum of recycled materials. Unlike in-process materials, these other materials could potentially be deemed discarded, but only if “they can reasonably be considered part of the waste disposal problem.” *See Safe Food*, 350 F.3d at 1268.

**E. EPA May Want to Consider Addressing Intra-Industry Recycling Before Addressing Inter-Industry Recycling**

As discussed above, NMA believes that EPA must develop a broad regulatory exclusion to ensure that undiscarded materials are not classified as solid wastes, regardless of whether they are recycled inside or outside the generating industry. We also believe that EPA has provided the public with adequate notice of and opportunity to comment on the possibility of a broad exclusion, and we therefore urge the Agency to issue such an exclusion without delay.

Nevertheless, we also recognize that materials recycled outside the generating industry may pose different issues -- and more complicated issues -- than materials recycled within the generating industry. As discussed in Section III.B above, there is no ambiguity under RCRA or the case law that EPA is prohibited from regulating materials that are beneficially recycled within the generating industry. *See, e.g., Safe Food*, 350 F.3d at 1268 (“the term ‘discarded’ *cannot* encompass materials that ‘are destined for beneficial reuse or recycling in a continuous process by the generating industry itself.’” (emphasis added)). This is especially true with respect to in-process materials within the primary metals and minerals industry. *See* Section III.C above. Thus, a simple, straightforward, and unconditional exclusion for these materials should be issued forthwith.

In contrast, “materials destined for future recycling by another industry *may* be considered ‘discarded’ . . . if they can reasonably be considered part of the waste disposal problem.” *See Safe Food*, 350 F.3d at 1268 (emphasis in the original). Thus, EPA may need to exercise some discretion in determining when these materials can be classified as solid wastes. Such an effort may require more time than simply codifying the exclusion mandated by the statute and highlighted in the case law for materials that are generated

and recycled within the same industry. Accordingly, the Agency may want to consider taking more time to address inter-industry recycling.<sup>9</sup>

EPA clearly has the authority to address issues in a stepwise fashion.<sup>10</sup> This approach may be appropriate here, given the fact that inter-industry recycling may raise issues that require more time to resolve than intra-industry recycling. EPA should not wait to remedy the rules for materials recycled within the generating industry while it continues to grapple with the rules for materials recycled outside the generating industry.<sup>11</sup> On the other hand, EPA should not use the differences between intra-industry and inter-industry recycling as an excuse to indefinitely postpone the day that the statutory limits on the Agency's authority are fully reflected in the regulations.

**F. EPA Should Exclude Within-Company Recycling and On-Site Recycling in Much the Same Way as Intra-Industry Recycling**

NMA believes that EPA should exclude secondary materials that are produced and recycled within the same company or at the same site in much the same manner as secondary materials that are produced and recycled within the same industry. In particular, the Agency should issue a simple, straightforward, and unconditional exclusion for within-company or on-site recycling. In addition, EPA should consider issuing such an exclusion at the same time as the intra-industry exclusion.

Within-company and on-site recycling are similar to intra-industry recycling inasmuch as they are at the end of the recycling spectrum where EPA cannot regulate. In *ABR*, the D.C. Circuit explicitly stated that materials stored and reused by “the producer”

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<sup>9</sup> As discussed in Section III.F below, however, NMA believes that two types of inter-industry recycling (*i.e.*, within-company recycling and on-site recycling) are similar to intra-industry recycling. Thus, EPA can and should issue an exclusion for these types of inter-industry recycling at the same time that it issues an exclusion for intra-industry recycling.

<sup>10</sup> See, *e.g.*, *Personal Watercraft Industry Association v. Department of Commerce*, 48 F.3d 540, 544-45 (D.C. Cir. 1995) (“An agency does not have to ‘make progress on every front before it can make progress on any front.’ . . . The patient has a headache, a sore throat and a hangnail. [It would not] be arbitrary to treat only the headache and the sore throat in a single session.”); *National Association of Broadcasters v. Federal Communications Commission*, 740 F.2d 1190, 1207 (D.C. Cir. 1984) (“agencies . . . need not deal in one fell swoop with the entire breadth of a [problem]; instead, ‘reform may take place one step at a time, addressing itself to the phase of the problem which seems most acute to the [regulatory] mind.’”).

<sup>11</sup> A delay is especially inappropriate for in-process materials within the primary metals and minerals industry. As EPA itself noted in the preamble to the proposed rule, the Agency has “already looked closely” at the recycling of materials within the primary metals and minerals industry. See 68 Fed. Reg. at 61,570. The same is true of the courts. See, *e.g.*, *AMCI*, 824 F.2d at 1181; *ABR*, 208 F.3d at 1053-54. EPA has developed a detailed definition of the industry that requires only limited modification for purposes of issuing an exclusion for in-process materials. See Section V.A below. Other conditions are inappropriate or unlawful in this context. See, *e.g.*, Sections V.B. and V.C below. Thus, the Agency may want to consider taking its first step by issuing an exclusion for in-process materials produced and recycled within the primary metals and minerals industry.

are not discarded. *See ABR*, 208 F.3d at 1051 (“Secondary materials destined for recycling are obviously not [discarded]. Rather than throwing these materials away, *the producer* saves them; rather than abandoning them, *the producer* reuses them.” (emphases added)). Similarly, in *Safe Food*, the court indicated that materials retained within a “firm or industry” for recycling should be treated in the same manner. *See Safe Food*, 350 F.3d at 1268 (discussing in one breath “material[s] that [are] transferred to another *firm or industry* for subsequent recycling.” (emphasis added)).

In the preamble to the proposed rule, EPA noted some of the policy reasons why an exclusion for on-site recycling would be warranted. For example:

[M]aterials recycled on-site . . . are unlikely to be discarded because they would be closely managed and monitored by a single entity who is intimately familiar with both the generation and reclamation of the material, no off-site transport of the material (with its attendant risks) would occur, and there would be few questions as to potential liability in the event of mismanagement or mishap.

*See* 68 Fed. Reg. at 61,575. Moreover, an exclusion for on-site recycling would “simplify implementation” and “encourage more legitimate recycling.” *Id.* Almost all of these reasons would also militate in favor of a within-company exclusion. Thus, NMA urges EPA to issue exclusions for on-site and within-company recycling, together with the exclusion for intra-industry recycling.<sup>12</sup>

In crafting the regulatory language for these additional exclusions, EPA should keep a couple of points in mind. First, the Agency should ensure that the on-site exclusion covers not only materials generated and recycled “on-site” as defined in 40 C.F.R. § 260.10, but also materials generated and recycled on contiguous properties (*e.g.*, properties that qualify as part of the same “facility” under 40 C.F.R. § 260.10, or properties that are linked so that even transfers of hazardous wastes would not require a manifest under 40 C.F.R. § 262.20(f)). The rationale for an on-site exclusion would clearly extend to these other situations. Indeed, for this reason, the exclusion might better be termed an “intra-facility” exclusion.

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<sup>12</sup> The within-company and on-site recycling exclusions are especially important if, despite the arguments set forth in Section V.A below, EPA persists in splitting the primary metals and minerals industry in half (*i.e.*, into a mineral processing “industry” and one or more beneficiation “industries”). Many integrated facilities and companies are engaged in extraction, beneficiation, *and* mineral processing. It is essential that EPA not interfere with recycling that occurs within intertwined primary production operations of this type.

Moreover, even if EPA defines the primary metals and minerals industry properly to include extraction, beneficiation, and processing, the within-industry and on-site exclusions would still be important. A few companies and/or facilities engage in further “downstream” operations (*e.g.*, metal alloying or forming). Secondary materials from these other operations that are retained by the generating company or facility for use in “upstream” operations are not being discarded and therefore must not be classified as solid wastes.

Second, EPA should ensure that the “within-company” exclusion covers materials that are generated and recycled within the same corporate family, rather than just the same individual company. Firms may be organized and structured in different ways for a variety of economic reasons. *Cf. Safe Food*, 350 F.3d at 1268 (“firms have ample reasons to avoid complete vertical integration”) (citing Ronald Coase, “The Nature of the Firm,” 4 *Economica* 386 (1937)). It should not matter whether a material generated by one company in a corporate family is recycled by the same specific company, a parent company, a subsidiary, or another affiliate (*e.g.*, a company directly or indirectly under the same control as the generating company, or a related joint venture). In all of these cases, the rationale for a “within-company” exclusion would continue to apply. Thus, the exclusion might better be referred to as an “intra-enterprise” exclusion.

#### **IV. THE EXISTING REGULATIONS**

Under the existing RCRA regulations, many in-process materials within the primary metals and minerals industry are already not classified as solid wastes. *See, e.g.*, 40 C.F.R. § 261.2(c)(3) (characteristic sludges and by-products destined for reclamation are not solid wastes); § 261.2(e) (secondary materials used or reused without prior reclamation are not solid wastes); § 261.4(a)(17) (spent materials from mineral processing are not solid wastes when reclaimed, as long as certain conditions are satisfied). As discussed below, however, the regulations continue to classify some in-process materials as wastes. Moreover, the rules place a cloud over the regulatory status of other materials. These deficiencies must be addressed and remedied in the current rulemaking.

##### **A. The Current Regulations Unlawfully Classify Certain In-Process Spent Materials As Solid Wastes**

Spent materials from mineral processing operations are currently classified as wastes when destined for reclamation within the primary metals and minerals industry, unless they meet certain requirements (*e.g.*, storage in tanks, containers, buildings, or approved pads). *See* 40 C.F.R. § 261.4(a)(17). These in-process materials are therefore being regulated as wastes based on their manner of storage. As discussed in Section III above, however, this type of regulatory scheme is prohibited under RCRA and the relevant case law. *See, e.g., Safe Food*, 350 F.3d at 1268 (“the term ‘discarded’ cannot encompass materials that are destined for beneficial reuse or recycling in a continuous process by the generating industry itself.”). Accordingly, the regulatory definition of solid waste must be amended.

The current requirements for spent materials are of particular concern because they are unnecessarily burdensome and may not be practical for certain materials that EPA claims are spent materials. For example, the Agency generally takes the position that refractory bricks from smelting (a processing operation) are spent materials and thus must be stored in one of the prescribed types of units before being recycled within the

industry.<sup>13</sup> However, the volume of bricks is typically so great that such storage would pose substantial financial and/or operational burdens. Thus, the bricks would generally be classified by EPA as solid wastes, notwithstanding the fact that they are in-process materials that will be recycled within the primary metals and minerals industry.<sup>14</sup> To rectify this problem and conform the regulations to the statute and the relevant case law, EPA must eliminate the storage requirements for in-process spent materials.<sup>15</sup>

### **B. The Current Regulations Unlawfully Classify In-Process Materials As Wastes Whenever They Are Stored Longer Than One Year**

Secondary materials from the primary metals and minerals industry are currently classified as solid wastes if they are “speculatively accumulated” for more than one year. *See, e.g.*, 40 C.F.R. §§ 261.2(c)(4), 261.4(a)(17)(ii). In *ABR*, however, the D.C. Circuit explicitly stated that “temporary storage can be a necessary phase of reclaiming mineral processing secondary material.” *See* 208 F.3d at 1054, n.2. As discussed in Section V.B.1 below, this “necessary phase” of the production process must in many instances continue for longer than one year. Thus, the existing regulations classify some in-process materials as wastes. This result is in direct conflict with the holding of the D.C. Circuit in *ABR*. *See id.* at 1053 (“To say that when something is saved it is thrown away is an extraordinary distortion of the English language.”). EPA must rectify this situation in the final rule.<sup>16</sup>

### **C. The Current Regulations Create Uncertainty and Confusion By Drawing Meaningless Distinctions Among In-Process Materials Within the Primary Metals and Minerals Industry**

Under the existing regulations, materials produced and recycled within the primary metals and minerals industry are viewed differently, depending upon whether they are classified as sludges, by-products, spent materials, commercial products, or scrap

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<sup>13</sup> *See, e.g.*, EPA, “Identification and Description of Mineral Processing Sectors and Waste Streams” (Final Technical Background Document, April 1998) at 258 (at primary copper facilities, “[used] converter bricks . . . clearly are spent materials”).

<sup>14</sup> The same issue may apply to other spent materials that are recycled within the industry, including certain acidic solutions that EPA may claim are spent materials.

<sup>15</sup> EPA’s proposed rule would alleviate the problem to a large extent for spent materials from mineral processing that are recycled to the same or another mineral processing operation. However, it would retain the storage requirements for spent materials that are recycled to a beneficiation operation. Thus, the proposal would continue to unlawfully regulate certain in-process spent materials (*e.g.*, furnace bricks, which are generally subjected to milling -- a beneficiation operation -- as the first step in recovering the entrained metals). *See* Section V.A below.

<sup>16</sup> EPA’s proposed rule would retain the speculative accumulation restrictions by incorporating them into the definition of a “continuous process.” As discussed in Section V.B.1 below, however, NMA proposes an alternative approach for determining when a secondary material from the primary metals and minerals industry has been stored so long that it has crossed the line of discard.

metal. None of these categories, however, has any meaning within the industry. As noted in Section III.C above, the materials at issue are in-process materials (or intermediates), rather than secondary materials. Thus, it makes no sense to try figuring out which *types* of secondary materials they are.

The only relevant consideration within the industry is whether a particular material has significant amounts of recoverable metals and/or other useful material values. Because EPA's categories do not in any way affect the way that the industry views or handles the materials, such categories cannot be the determining factor in deciding whether a material is discarded. It is simply arbitrary to say that a material within the primary metals and minerals industry is a waste if it is labeled as "spent material," but not if it is labeled a "by-product" or "sludge."

The current regulatory scheme is especially problematic given the difficulty in trying to apply EPA's categories to materials produced by the primary metals and minerals industry. Consider, for example, used refractory brick. As noted above, EPA has indicated that this material qualifies as a "spent material," which is defined as "any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing." *See* 40 C.F.R. § 261.1(c)(1). However, used refractory brick is not "contaminated" and is removed from service for other reasons (*e.g.*, wearing or cracking). Moreover, it is often still capable of continuing to serve its original purpose. Refractory brick might instead be viewed as a by-product. *See* 40 C.F.R. § 261.1(c)(3) (defining a "by-product" as "a material that is not one of the primary products of a production process and is not solely or separately produced by the production process").<sup>17</sup> On the other hand, because used bricks generally have visible veins of solid metal, they might be viewed as scrap metal. *See* 40 C.F.R. § 261.1(c)(6) (defining "scrap metal" to include "bits and pieces" of metal).

Rather than trying to figure out which of EPA's categories of materials comes closest to being relevant to each type of in-process material produced by the primary metals and minerals industry, the Agency should simply acknowledge that when the materials are beneficially used within the industry, they are not being discarded and cannot be regulated as wastes.

## V. THE PROPOSED EXCLUSION

As discussed in Section III.A above, EPA cannot limit the current rulemaking to materials that are reclaimed in a "continuous process within the generating industry." The Agency might be able to treat such materials differently than other recycled materials. *See* Section III.B above. However, the specifics of the Agency's proposal are seriously flawed.

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<sup>17</sup> For example, the Nevada Division of Environmental Protection has taken the position that used bricks from rebuilding of autoclaves and roasting units are properly considered by-products, rather than spent materials.

In particular, EPA has defined the “generating industry” in a way that would effectively prohibit secondary materials from moving between two integrally related parts of the process for producing metals and minerals from ores (*i.e.*, beneficiation and processing). In addition, the Agency has placed restrictions on “continuous processes” that do not reflect the realities of the primary metals and minerals industry. Moreover, EPA’s “Option #2” would unreasonably and unlawfully classify secondary materials as “discarded” based on the way that *other* materials are being handled. Each of these issues is discussed separately below.

#### **A. Definition of the “Generating Industry”**

EPA has proposed to define the “primary mineral processing industry” by reference to prior rulemakings addressing the scope of the so-called “Bevill Amendment.” The Agency notes that, under the proposal, “‘beneficiation’ is not included within the ‘mineral processing industry.’” *See* 68 Fed. Reg. at 61,579. Instead, EPA proposes to identify four separate “industries” engaged in beneficiation, corresponding to the following North American Industry Classification System (“NAICS”) Codes: 2121 (coal mining), 2122 (metal ore mining), 2123 (nonmetallic mineral mining and quarrying), and 2131 (support activities for mining). Because these “industries” are separate from the “primary mineral processing industry” and from each other, materials transferred between the beneficiation “industries” and the “primary mineral processing industry” for recycling would not be eligible for exclusion from the definition of solid waste.

NMA strongly objects to this proposed division of the primary metals and minerals industry. Both beneficiation and mineral processing are integral parts of the overall process by which metals and minerals are produced from ores and other materials extracted from the ground. Congress recognized this fact when it enacted the Bevill Amendment, addressing solid wastes from “the extraction, beneficiation, and processing of ores and minerals.” *See* 42 U.S.C. § 6921(b)(3)(A)(ii). It would therefore be arbitrary for EPA to brand secondary materials that pass from one type of operation to the other as discarded materials (*e.g.*, by designating beneficiation and processing as separate industries for purposes of this rulemaking).

In fact, materials are routinely transferred between beneficiation and processing operations, in order to optimize recovery of the “target” metals and minerals in the most appropriate and cost-effective way. As EPA itself has acknowledged, “[m]ost beneficiation processes [are] immediately upstream from [an] initial processing operation in a production sequence.” *See* 54 Fed. Reg. 36,592, 36,619 (September 1, 1989). Thus, materials are necessarily transferred from beneficiation processes to mineral processing operations. Indeed, beneficiation operations have no other purpose but to produce materials that are suitable for use in subsequent mineral processing operations, where the final products of the “production sequence” (*e.g.*, commercial metals or minerals) are generally produced. For example, there is no use for the concentrate produced by beneficiation of copper ore other than for production of copper metal and other metal and mineral products. Accordingly, there is no basis for claiming that materials generated

within the beneficiation “industry” are being discarded whenever they are transferred for use in the mineral processing “industry.”

Moreover, secondary materials are frequently returned from mineral processing operations to beneficiation operations, in order to continue recovering metal or mineral values. EPA, in fact, addressed these practices in detail in its Phase IV LDR rulemaking. The Agency there stated as follows:

Both the gold and copper sectors . . . routinely reintroduce mineral-bearing streams from their processing activities into their beneficiation plants to further recover metal values. . . . [T]he mineral processing secondary materials are being used as feedstock precisely because those materials share attributes found in raw materials (*i.e.*, recoverable amounts of metals). . . . [S]ince the mineral processing secondary materials are from the same industry sector and are being reclaimed *within the same industry*, they can be viewed as secondary materials which are not wastes.

*See* 63 Fed. Reg. 28,556, 28,594 (May 26, 1998) (emphasis added). Based on this analysis, EPA issued a conditional exclusion for secondary materials “generated within the primary mineral processing industry from which minerals . . . or other values are recovered . . . by beneficiation.” *See* 40 C.F.R. § 261.4(a)(17).<sup>18</sup>

There are countless examples of secondary materials from mineral processing operations being recycled in beneficiation operations. For example, furnace brick from smelting (a processing operation) is often subjected to milling (a beneficiation operation) as the first step in recovering entrained metals. *See* note 15 above and accompanying text. Similarly, furnace slag from smelting (processing) is often subjected to grinding and flotation (beneficiation) for recovery of copper or other metals. In addition, acid plant sludges from smelting operations (processing) are often subjected to leaching (beneficiation) for recovery of soluble metals.<sup>19</sup>

In these ways, beneficiation and mineral processing operations are closely intertwined and are part of an integrated process for producing commercial metal and mineral products.<sup>20</sup> Materials that are transferred from one type of operation to the other

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<sup>18</sup> Although this exclusion (which, in the wake of *ABR*, is now limited to spent materials) would be retained under EPA’s proposal, it would not “fix” the problem of the Agency’s cramped definition of the generating industry, because it imposes stringent storage requirements -- which cannot always be met -- on spent materials that are sent from mineral processing operations to beneficiation operations. *See generally* Section IV.A above.

<sup>19</sup> We recognize that some of these materials may be excluded from regulation under the existing regulations. *See, e.g.*, 40 C.F.R. § 261.2(c)(3). However, as discussed in Section IV above, the existing regulations do not cover all of these materials and are problematic in other ways. In addition, the materials mentioned here illustrate the interconnected nature of beneficiation and processing operations.

<sup>20</sup> Indeed, the two types of operations are frequently located together at a single integrated facility. EPA’s proposal would regulate secondary materials transferred from mineral processing operations to on-

for further recovery of metal or mineral values are clearly not discarded. Thus, EPA cannot classify such materials as solid wastes by erecting an artificial wall between the two types of operations.

Elsewhere in the proposal, EPA has recognized the inappropriateness of dividing another extractive industry -- the petroleum industry -- into different “industries” according to the specific operations involved. In particular, the Agency has proposed to define the “petroleum refining industry” to include all of the operations *in addition to refining* that are necessary for production of the ultimate (petroleum) products (*e.g.*, exploration, production, and bulk storage). The primary metals and minerals industry is similar to the petroleum industry inasmuch as both industries entail the extraction of materials from the ground, followed by a series of extraction and/or purification steps that are necessary to produce useful products for the general public. Accordingly, EPA should define the primary metals and minerals industry broadly (as it has proposed to do for the petroleum industry) so that it includes the extraction, beneficiation, and processing of ores and minerals.<sup>21</sup>

## **B. Definition of “Continuous Process”**

Under EPA’s proposal, materials would be deemed generated and reclaimed in a “continuous” process if they are not speculatively accumulated and are not handled by any entity or facility outside the generating industry (other than a transporter). NMA has concerns about both of these requirements, as discussed below.

### **1. Prohibition on Speculative Accumulation**

NMA recognizes that at some point in time, if a material being stored for use is not actually used, it may cross the line of discard and become abandoned or disposed of. We also understand that EPA has long used the definition of speculative accumulation in 40 C.F.R. § 261.1(c)(8) to identify the relevant point in time, and this definition has worked well for a wide variety of industries. However, given the operational realities of the primary metals and minerals industry, EPA’s current speculative accumulation rules are too restrictive.

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site beneficiation operations, despite the clear statement of the *ABR* court that materials saved and reused by a facility are not discarded. *See* 208 F.3d at 1051 (“Secondary materials destined for recycling are obviously not [discarded]. Rather than throwing these materials away, *the producer* saves them; rather than abandoning them, *the producer* reuses them” (emphasis added)); Section III.F above.

<sup>21</sup> NMA notes that this objective can only be achieved by using a narrative definition of the primary metals and minerals industry, rather than the NAICS code approach proposed by EPA for most other industries. Even if the Agency were to adopt the least stringent NAICS code approach and base the exclusion on single-digit codes, beneficiation operations (in single-digit NAICS code 2) would be split from mineral processing operations (in single-digit NAICS code 3). We agree with EPA’s statement in the preamble that it is appropriate to use a narrative definition for the primary metals and minerals industry -- regardless of the approach it may use for other industries -- given the fact that the Agency (and the courts, for that matter) have already looked closely at the recycling of materials within this industry.

In *ABR*, the D.C. Circuit pointed out that “temporary storage can be a necessary phase of reclaiming mineral processing secondary material.” *See ABR*, 208 F.3d at 1054, n.2. In many instances, this “necessary phase” of the production process must continue longer than the one-year timeframe allowed under the present definition of speculative accumulation.

Furnace bricks, for example, are high in metal values and contain readily visible “veins” of solid copper. Because of their high value, the bricks are invariably reintroduced into the metals production process as a feedstock. However, for the following reasons, they may not be used within one year:

- The bricks are removed from high temperature units (*e.g.*, smelters) in very large quantities that cannot practically be utilized all at once. For example, a typical unit may generate tens of tons of brick during routine maintenance which occurs every few months; hundreds of tons of brick during scheduled re-bricking which occurs every year or so; and even larger quantities during eventual closure.
- The bricks must be subjected to multiple processing steps before they are fully returned to use. For example, the bricks are generally sorted by hand (a slow and laborious process, given the quantities involved) to remove large pieces of metal, and then screened to remove additional metal pieces. Although these metal pieces are extremely valuable and are used beneficially, they could interfere with or damage the equipment that is subsequently used to recover additional metal values. The later steps may include crushing, grinding, and floating. They result in a concentrate that is processed in a smelter for production of the final metal product. The multiplicity of steps prolongs the necessary period for storage, especially because some of the steps require personnel, equipment, or reagents that are not always readily available.
- The brick materials must be metered carefully back into the production process. For example, the large pieces of metal that are obtained by the initial hand sorting operation can be added directly into a converter furnace, but will reduce the temperature within the unit. Indeed, this “cold dope” serves a valuable role in controlling furnace heat (as well as in providing metal values). However, the materials must be used in a measured way. Similarly, the concentrate produced by grinding and floating the brick must be added slowly into a smelting furnace because this concentrate has less sulfur (which acts as a fuel in the unit) than some of the other materials processed in the furnace.
- Economic considerations sometimes favor increased use of other materials in the production process, thereby necessitating longer storage of brick than would otherwise be the case. For example, market conditions may temporarily reduce the price of commercial copper concentrates. In such

an event, a smelter might reasonably delay the use of bricks in its process so as to take advantage of the reduced price.

Because the refractory bricks contain so much metal, this is not a situation where the generators are merely speculating that the materials “may” be used. *Cf. ABR*, 208 F.3d at 1055 (indicating that a material may be deemed discarded if the generator merely claims that it “*may* at some time in the future be reclaimed” (emphasis added)). On the contrary, there is no doubt that the bricks will be used as feedstocks in the production process. For this reason, the bricks are clearly in-process materials and should not be subject to the standard speculative accumulation rules that apply to secondary materials. The bricks cannot be classified as discarded materials (*i.e.*, wastes), even though they are being stored for more than one year.

The furnace brick example is only one of many in the primary metals and minerals industry where EPA’s current speculative accumulation rules are inappropriate. Certain other materials are like the furnace bricks, inasmuch as they are periodically collected in large volumes from production units and then used as feedstock in smaller increments over a long period of time (thereby requiring extended storage). Copper smelters, for example, sometimes accumulate reverts due to operational or economic factors, even though the materials will be used to recover their substantial copper values. In the case of other materials, extended storage is required for the opposite reason, *i.e.*, the materials are produced in small quantities but must be accumulated over a long time to have enough for use in a large batch production operation. Finally, extended storage may also sometimes be required in other situations (*e.g.*, when a production unit is undergoing prolonged maintenance, a substantial renovation, or upgrade).

Clearly, some changes to EPA’s current speculative accumulation rules are necessary in the context of the primary metals and minerals industry. NMA suggests that the Agency adopt the alternative approach developed by the Arizona Department of Environmental Quality to reflect the unique nature of the primary metals and minerals industry. Under this approach, secondary materials from mineral processing operations are deemed to be “in process” for one year after being produced. If the materials have not been reused or recycled within that time frame, they then become subject to the standard speculation accumulation provisions. Specifically, after the one-year in-process period, the speculative accumulation “clock” is started, and if 75% of the materials present are not reused or recycled by the end of the following calendar year they are then generally classified as solid wastes.

This approach would recognize that in-process materials are not being accumulated “speculatively” for possible recycling at a later date, but instead are being held temporarily as part of a primary metals and minerals production process. *See ABR*, 208 F.3d at 1054, n.2 (“temporary storage can be a necessary phase of reclaiming mineral processing secondary material”). In order to clarify that in-process materials are not being speculatively accumulated, EPA should add language reflecting the Arizona approach to the definition of speculative accumulation in 40 C.F.R. § 261.1(c)(8).

Incorporating such language directly into that definition will ensure that the clarification applies for all purposes under the RCRA regulations.<sup>22</sup>

EPA should not, however, incorporate a separate speculative accumulation provision into the new regulatory exclusion (as EPA has proposed to be codified at Section 261.2(g)(3)(ii)). Such a provision would be unnecessary and confusing, especially because any secondary materials that are being speculatively accumulated -- except commercial chemical products -- are *already* classified as solid wastes under 40 C.F.R. § 261.2(c)(4).<sup>23</sup>

## 2. Prohibition on Out-of-Industry Handling

Under EPA's proposal, the second requirement for a secondary material to be deemed generated and reclaimed in a "continuous process" would be that the material must not be handled by any entity or facility outside the generating industry (other than a transporter). According to the Agency, the purpose of this requirement is to ensure that excluded secondary materials are not shipped to a broker, which would indicate a "significant discontinuity" in use of the material.

As an initial matter, given the typically large volumes of secondary materials generated within the primary metals and minerals industry, it is rare that brokers or other middlemen physically handle such materials. Nevertheless, we are concerned that EPA's proposal could have an adverse effect on certain practices within the industry.

Consider, for example, a smelting operation that generates a secondary material and ships it to another smelting operation (*e.g.*, for recovery of a different metal). Even under EPA's narrow definition of the mineral processing industry, this transfer would be deemed intra-industry. However, the generating smelter may be located at a facility with establishments and/or affiliated companies in other industries (*e.g.*, beneficiation operations, which would be in a different industry under the Agency's proposal). For operational reasons, the generating smelter might need to rely on one of these other

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<sup>22</sup> The existing definition already identifies other situations where materials are not subject to the "speculative accumulation" label. Indeed, the definition suggests that materials held as part of a production process should not be deemed to be accumulated speculatively. *See* 40 C.F.R. § 261.1(c)(8) ("Materials accumulating in units that would be exempt from regulation under § 261.4(c) are not to be included in making [speculative accumulation] calculation[s]"); § 261.4(c) ("A hazardous waste which is generated in a product or raw material storage tank . . . or in a manufacturing process unit . . . is not subject to regulation.").

<sup>23</sup> It is worth noting that under the existing regulations, even secondary materials that *are* subject to being "speculatively accumulated" may be stored for much longer than one year without being classified as solid wastes, pursuant to the variance provision at 40 C.F.R. § 260.31(a). As noted above, however, in-process materials are not being speculatively accumulated. Of course, under the Arizona approach, if the materials are stored longer than the one-year in-process period, they will then become subject to the speculative accumulation "clock," and if that clock subsequently expires, further storage may be allowed under a § 260.31(a) variance.

establishments or companies for loading the secondary material onto transport units (or for related operations). Under EPA's proposal, however, this practice might mean loss of the exclusion and classification of the material as a solid waste.<sup>24</sup>

NMA does not believe that such a result is intended by EPA. The Agency has proposed allowing secondary materials to be handled by "transporters" outside the generating industry, apparently in recognition of the fact that such handling does not demonstrate a "discontinuity" in use or any other form of discard. For the same reason, establishments and entities outside the generating industry should be allowed to engage in loading, unloading, and related activities (*e.g.*, incidental storage).

To a large extent, this problem might be addressed by properly defining the primary metals and minerals industry, as discussed in Section V.A above. However, the potential for problems would likely remain. NMA believes that the best solution would be to delete the prohibition on out-of-industry handling (at least for the primary metals and minerals industry). However, if the Agency retains the prohibition, we believe EPA should expand the allowance for out-of-industry transporters to include out-of-industry loading, unloading, and related operations. In addition, EPA should allow out-of-industry handling by establishments located at the same facility as the generating or recycling establishment, as well as by entities that are corporate affiliates of the generator or recycler. *Cf.* Section III.F above (requesting exclusions for materials that are generated and recycled within the same corporate family or at the same site).

**C. Option #2: Denying the Exclusion to Materials that Would Otherwise Qualify, if Recycled at a Facility that Also Handles Hazardous Wastes from Another Industry**

Under EPA's Option #2, "hazardous secondary materials that are generated and reclaimed in a continuous process within the same industry would not be eligible for . . . exclusion if the reclamation takes place at a facility that also recycles regulated hazardous wastes generated in a different industry." As discussed below, this option is unlawful, illogical, and environmentally counterproductive. Therefore, it should be rejected.

**1. Option #2 Is Inconsistent With the Statutory Definition of Solid Waste**

Under RCRA and the *AMC I* line of cases, a material can be classified as a solid waste only if *that material* has been "'discarded' by virtue of being disposed of, abandoned, or thrown away." There is no basis for saying that an undiscarded material is a solid waste based on the way that *other* materials are being managed. Yet, that is

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<sup>24</sup> Similarly, under EPA's proposal, if a secondary material is shipped from one facility to another within the Metal Ore Mining "industry" (NAICS Code 2122), but is handled in between by an establishment or entity in the Support Activities for Mining "industry" (NAICS Code 2131), the material might lose its exclusion from the definition of solid waste. Of course, this material would presumably be excluded from the definition of hazardous waste under the Bevill Amendment. However, this example illustrates once again the potential problems with EPA's proposed prohibition on out-of-industry handling.

exactly what Option #2 would do. Therefore, this option is contrary to law and cannot be adopted.

## **2. EPA's Justifications for Option #2 Are Without Merit**

EPA's policy arguments for Option #2 lack foundation. According to the Agency, this option would provide "greater certainty to the regulated community," especially generators seeking to determine the status of the secondary materials that they send offsite for recycling. In fact, however, Option #2 would dramatically increase uncertainty.

Consider, for example, a generator that sends a secondary material to a reclamation facility, knowing that the receiving facility is in the same industry (even under EPA's narrow definition of the industry). Under Option #1, the generator could be relatively certain that the secondary material would not be a waste (subject to the other conditions that would apply under both of EPA's options). Under Option #2, however, if the receiving facility happened also to recycle a small amount of hazardous wastes from a different industry, the within-industry material would be "transformed" into a waste. This change could -- and, indeed, likely would -- happen without the generator's knowledge, especially because the hazardous wastes would be coming from a different industry, might be stored separately, and could even be recycled in a completely different operation at the receiving facility. Moreover, under EPA's proposed enforcement approach (*see* Section VIII below), the change would apply back to the point where the secondary material was originally generated, thereby exposing the generator to a potential enforcement action. It is difficult to see how any of this would further the interests of certainty, as claimed by EPA.

EPA also asserts that Option #2 would "address potential concerns regarding the mixing of excluded secondary materials with regulated hazardous wastes." The Agency is vague about what the concerns might be, other than to say that such mixing might make it "more difficult for overseeing agencies to [monitor] compliance with the terms of the exclusion." NMA notes, however, that the "regulated hazardous wastes" would, by definition, be subject to regulation, potentially including stringent requirements for any storage that occurs and the prohibition against impermissible dilution under the LDR program. Thus, it seems unlikely that facilities would go out of their way to mix hazardous wastes with other materials, except as required for purposes of their operations.

Moreover, EPA would apparently allow the excluded secondary materials to be mixed with a host of other materials, including virgin materials (*e.g.*, virgin raw materials or reagents needed for the recycling process), non-hazardous wastes, and "hazardous materials that are excluded from regulation under other provisions" (*e.g.*, characteristic by-products or sludges destined for reclamation). Indeed, under the Agency's first proposed legitimacy criterion (*see* Section VI.B.1 below), generators would be encouraged to store secondary materials in the same unit as analogous virgin raw materials. Given the fact that EPA allows or even encourages these types of mixing, it

makes no sense for the Agency to complain that mixing of excluded secondary materials with regulated hazardous wastes would undermine regulatory oversight of the handling of excluded materials.

### 3. Option #2 Would Be Environmentally Counterproductive

Perhaps most importantly, Option #2 would discourage environmentally beneficial recycling operations. EPA itself seems to recognize this fact, when it states that “Option #1 . . . would likely encourage more beneficial recycling.” The problem is perhaps best illustrated by reference to the Phelps Dodge Miami smelter.

That facility produces copper by smelting beneficiated copper ores, together with a variety of in-process materials (*e.g.*, dusts, reverts, and bricks). For almost 20 years, the facility has supplemented its feedstock with a small, but economically important, amount of wastewater treatment sludges from the electroplating industry (EPA Hazardous Waste No. F006). These sludges are received at the facility as hazardous wastes (*e.g.*, accompanied by a hazardous waste manifest). However, the facility does not require a hazardous waste permit because the sludges are inserted into the process without prior storage, and because the smelting process itself qualifies as an exempt smelting, melting, or refining furnace.

Unfortunately, under EPA’s Option #2, the facility would be forced to cease recycling F006. Option #2 would not directly affect the status of the F006 (which would remain a hazardous waste).<sup>25</sup> However, it would prevent in-process materials from being eligible for the new exclusion from the definition of solid waste (because those materials are currently being processed in a unit that recycles hazardous wastes). In the absence of the exclusion, EPA would likely view at least some of the in-process materials as solid and hazardous wastes, thereby triggering RCRA storage requirements for such materials (including the 90-day accumulation rules and/or permitting, if the storage continues for more than 90 days or cannot be conducted in tanks, containers, or specially designed containment buildings). In order to avoid the excessive burdens that these requirements would impose on its long-standing production practices, the facility would have no choice but to stop accepting the F006 for recycling.<sup>26</sup>

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<sup>25</sup> As indicated in Section III.D above, even though the F006 is not an in-process material, NMA believes that it should be excluded from the regulatory definition of solid waste on the ground that it is not discarded. For purposes of the present discussion, however, we are assuming that EPA will be proceeding initially with a narrow intra-industry exclusion. If the Agency instead proceeds with a broader inter-industry exclusion, Option #2 might be moot.

<sup>26</sup> The problem can be seen most clearly in the case of spent materials from the smelter that are stored in accordance with the requirements of 40 C.F.R. § 261.4(a)(17) before being recycled back to the smelter. Currently, such materials would be excluded from the definition of solid waste. Under EPA’s proposal, however, these materials would no longer be excluded, as long as the smelter continues to accept F006 hazardous wastes. Given the uncertainties in applying the Agency’s definition of spent materials in the context of the primary metals and minerals industry (as discussed in Section IV.C above), the smelter

This result would be environmentally counterproductive and would directly conflict with EPA's ongoing efforts to encourage F006 recycling.<sup>27</sup> In addition, because of the importance of F006 recycling to the economics of the Miami smelter, Option #2 would unnecessarily weaken the financial status of the facility. EPA has claimed that the purpose of the current rulemaking is to reduce regulatory obstacles to recycling. Because Option #2 would actually create new obstacles, it is not deregulatory and must not be adopted.

## VI. LEGITIMACY CRITERIA

### A. General Concerns with EPA's Proposed Criteria

#### 1. EPA Need Not, and Should Not, Revisit the Existing Criteria

In the preamble to the proposed rule, EPA admits that its efforts to codify criteria for legitimate recycling have not been mandated by Congress or the courts. However, the Agency asserts that the current rulemaking is "a good opportunity to establish RCRA's recycling legitimacy criteria in regulations, and at the same time to make clarifying revisions to them." NMA respectfully disagrees.

As an initial matter, NMA does not believe that there is any compelling need to address the criteria for distinguishing between legitimate and sham recycling. We are not aware of any situations in which the existing guidance has proven to be inadequate.

Although EPA alludes to some "stakeholders" who have expressed a desire for more clarity or predictability, determinations of legitimacy are inherently complicated and require consideration of numerous factors on a case-specific basis. *See, e.g., API II*, 216 F.3d at 57 ("Legal abandonment of property is premised on determining the intent to abandon, which requires an inquiry into facts and circumstances."). This is especially true given what EPA properly describes as "the exceptional diversity and variability of potentially recyclable materials." It is futile to try to develop a few generic criteria to provide perfect clarity and predictability in all situations. Indeed, any such attempt is

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would have to be concerned that many of its in-process materials might lose their exclusion in this way. So as not to jeopardize the status of such in-process materials, the smelter will have to cease recycling F006.

<sup>27</sup> *See, e.g.*, 68 Fed. Reg. 72,555, 72,559 (December 22, 2003) (EPA's Statement of Priorities as of Fall 2003) ("One of the largest hazardous waste streams amenable to recycling is the wastewater treatment sludges from electroplating operations (waste code F006). EPA is considering changes to the existing RCRA regulations to encourage safe recycling and waste management practices of wastewater treatment sludges from electroplating operations."); *id.* at 72,568-69 (projecting a proposal in August 2004). *See also* 65 Fed. Reg. 12,378 (March 8, 2000) (reducing regulatory requirements for generators of F006 who send the wastes for recycling); 67 Fed. Reg. 52,617 (August 13, 2002) (granting a variance from the definition of solid waste for concentrate material that is produced by one reclaimer of F006); 68 Fed. Reg. 18,042 (April 14, 2003) (proposing an exclusion from the definition of solid waste for F006 generated by one company and used as an ingredient in the production of cement); 69 Fed. Reg. 7888 (February 20, 2004) (proposing to exclude the F006 generated by one company from the definition of hazardous waste).

likely to be counterproductive, leading to over-simplifications that brand legitimate recycling processes as illegitimate and thereby cause valuable resources to be wasted.

To the extent that any deficiencies in the existing criteria might be identified, EPA can and should address them using more targeted approaches. As noted in the preamble, “the Agency has [previously] examined in depth a number of waste-specific and industry-specific recycling practices, and has promulgated regulations that address the legitimacy of these practices in much more specific terms.” This approach is more likely to avoid the pitfalls of an overly simplified generic rulemaking that fails to reflect the full spectrum of recycling operations. *See* Section III.B above.

Finally, NMA is concerned that EPA’s proposal on legitimacy criteria is a distraction from the more important task of responding to the court decision in *ABR*. Addressing peripheral issues is likely to lead to substantial confusion and further delay an already overdue response to the case that is the impetus for the current rulemaking. It is especially surprising that EPA would take on this extra work at a time when some argue that the Agency’s financial resources are being severely strained.

## **2. Any Revisions to the Existing Criteria Should Remain as Guidance**

EPA states that “[t]he proposed legitimacy criteria, if finalized, would continue to be used in the same way as the current guidance has been used.” If this is true, there would be no need to codify the criteria in the regulations. Indeed, codification would be inappropriate. Moreover, NMA believes there are several other reasons why the criteria should not be incorporated into the regulations, but instead should be kept as guidance.

First, guidance provides greater flexibility for the case-by-case evaluation and weighing of multiple factors, which EPA acknowledges is necessary for a determination of legitimacy. Where, as here, a “bright-line” test cannot be established, a rigid rule is inappropriate and likely to be unworkable.

Second, guidance offers an opportunity to provide explanations, examples, and narrative discussions, which are especially important in this area. The proposal, in fact, highlights the necessity of such guidance, inasmuch as it requires over six pages of preambular language to provide a basic explanation of the four “simple” criteria to be included in the regulations. Obviously, it would be impossible to include all of this guidance (much less EPA’s other guidance on the distinction between sham and legitimate recycling) in the regulations. However, by selecting some guidance and incorporating it into regulatory criteria, EPA’s proposal would inevitably be perceived to be giving this portion of the guidance greater legal significance. Indeed, some might assume that any other guidance from the Agency should be discounted or ignored. To avoid such distortions, EPA should keep all of its guidance on equal footing by abandoning the current effort to codify limited portions of the guidance.

Finally, any regulatory language seeking to distinguish between sham recycling and legitimate recycling will be a powerful signal that all recycling will be viewed with suspicion, and in this way will discourage companies from engaging in recycling. As discussed below, this effect will be particularly noticeable if EPA crafts the language in the regulations as “legitimacy criteria” that the regulated community must “demonstrate” they comply with. However, even if the language is crafted as sham recycling factors for consideration by regulatory agencies, the mere presence of such factors in the regulations is likely to significantly discourage legitimate recycling.

### **3. Any New Criteria Should Not Presume that Recycling Is Illegitimate**

NMA is concerned that EPA’s proposal reflects a new and disturbing presumption that recycling is generally not legitimate. Whereas the existing criteria focus on identifying instances of sham recycling, the proposed criteria are designed to identify instances where recycling is legitimate. The not-so-subtle implication is that recycling is presumed to be illegitimate, unless one can overcome that presumption by demonstrating the contrary. Indeed, the proposed rule states that “persons claiming to be excluded” from regulation due to recycling “must be able to demonstrate that the recycling is legitimate.” The fact that this language would be incorporated into the regulations reinforces the conclusion that generators and other handlers of recyclable secondary materials would face a new and substantial hurdle.

EPA’s proposed “presumption of illegitimacy” is not supported by the facts. The vast majority of recycling operations are carried out for legitimate -- indeed, laudable -- purposes. The Agency’s proposal is especially inappropriate in the context of the primary metals and minerals industry, where the “recycling” activities are in fact an inherent part of the production process. *See* Section III.C above. By viewing all recycling activities as suspect, the proposed rule would create new obstacles to the beneficial reuse of materials and thereby undermine the resource conservation and recovery goals of RCRA.

### **4. The Criteria Should Be Factors for Consideration, Rather than Mandatory Requirements**

In the preamble to the proposal, EPA states that application of the legitimacy criteria “will require some subjective evaluation and balancing.” This means that a particular recycling practice will not have to satisfy all of the listed criteria to be deemed legitimate. Instead, if a recycling operation is “weak” on one criterion, it may still be considered legitimate based on other criteria.

NMA strongly endorses this approach, which is consistent with EPA’s long-standing guidance and practice. As noted above, a determination of legitimacy can be based on a wide range of factors. No single factor is necessary in all cases, and thus EPA cannot mandate conformance with all four of the proposed criteria. Likewise, there is no simple formula for weighing the criteria to determine when recycling is legitimate.

Although EPA appears to support these basic understandings, it has included in the preamble several statements that may encourage implementing agencies to view the criteria as a four-point test, rather than four factors for consideration. For example, EPA asserts (without any clear basis) that “most, if not all, legitimate recycling processes will conform to each of the four criteria.” The Agency also seems to dismiss as a remote possibility the idea that “there *may be* situations when a recycling activity that does not conform to one or more criteria could be considered legitimate.”

NMA is concerned that these statements may lead to improper application of EPA’s legitimacy criteria. In order to clarify the dynamic nature of the four factors, we urge EPA to stress in any final regulatory language that might be adopted that the factors are not mandatory. Indeed, we believe that the very term “criteria” may suggest that the four items are standards that must be achieved. *See, e.g., Webster’s Ninth New Collegiate Dictionary* (1985) at 307 (indicating that a criterion is synonymous with a standard). We therefore ask that the items be renamed “factors” so as to highlight that they are only considerations to help guide determinations of legitimacy.

## **5. Different Criteria May Be Appropriate for Different Types of Recycling**

As discussed in Section III.B above, there is a broad spectrum of recycling activities, and EPA’s authority to regulate recyclable materials may vary along the spectrum. For example, “EPA cannot regulate as solid waste secondary materials ‘destined for reuse as part of a continuous industrial process.’” *See API II*, 216 F.3d at 56. However, the Agency may have some degree of discretion in determining whether “materials destined for future recycling by another industry” are solid wastes. *See Safe Food*, 350 F.3d at 1268.

Consistent with this spectrum of recycling, EPA may be able to apply different criteria for evaluating different recycling scenarios. In all cases, it may be appropriate to consider whether the materials being recycled are making a useful contribution to the recycling process, because in the absence of any contribution there is no real recycling. *See* Section VI.B.2 below. On the other hand, the other criteria proposed by EPA may be appropriate only in certain cases and not in others.

The in-process materials that are produced and used within the primary metals and minerals industry are at one end of the spectrum of recycling: the end where EPA “cannot regulate” under RCRA. *See API II*, 216 F.3d at 56; Section III.C above. Thus, the Agency cannot require more than that the in-process materials make a useful contribution to the production process. *See Safe Food*, 350 F.3d at 1268 (“We have held that the term ‘discarded’ cannot encompass materials that ‘are destined for beneficial reuse or recycling in a continuous process by the generating industry itself.’”) (citing *AMC I* and *ABR*). Moreover, as discussed in Section VI.B below, the other legitimacy criteria proposed by EPA are inappropriate for in-process materials within the primary metals and minerals industry.

For materials at other points along the recycling spectrum (*e.g.*, materials recycled outside the generating industry), some of EPA's other criteria may be more appropriate. Although we have concerns with these criteria as a general matter, *see* Section VI.B below, we also recognize that the Agency may have more discretion -- albeit not unlimited discretion -- with respect to these other materials. *See Safe Food*, 350 F.3d at 1268 ("materials destined for future recycling by another industry *may* be considered 'discarded' . . . if they can reasonably be considered part of the waste disposal problem."); *see also* Section III.D above.

The fact that different criteria may be appropriate for different recycling scenarios is yet another reason why the criteria should not be "carved in stone" as regulations. If EPA, nevertheless, goes forward with codification of the criteria, it must explicitly provide in the rule that the criteria (other than, perhaps, the "useful contribution" criterion) do not apply to in-process materials within the primary metals and minerals industry and may not apply in other contexts.

## **B. Concerns with the Specific Criteria Proposed by EPA**

### **1. Criterion #1: Whether the Secondary Materials Are Managed As Valuable Commodities**

EPA's first criterion is whether the secondary material destined for recycling is being managed as a valuable commodity. In particular, "[w]here there is an analogous raw material, the secondary material should be managed in a manner consistent with the management of the raw material." Alternatively, "[w]here there is no analogous raw material, the secondary material should be managed to minimize the potential for releases into the environment." NMA objects to this criterion for several reasons, as discussed below.

#### **a. Secondary Materials Cannot Be Deemed Discarded Based on the Way They Are Stored**

NMA believes that this criterion is inconsistent with the decision of the D.C. Circuit in *ABR*, at least in the case of in-process materials within the primary metals and minerals industry. The court in *ABR* rejected the notion that the "dividing line between 'waste' and nonwaste is the manner of storage" of secondary materials prior to recycling. *See ABR*, 208 F.3d at 1051. EPA's proposal, however, would attempt to redraw the same line for determining discard. Once again, the Agency would look to the way that materials are stored prior to recycling in order to decide whether the materials are being legitimately recycled or instead discarded.<sup>28</sup>

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<sup>28</sup> In the preamble to the proposed rule, EPA asserts that the *AMC I* court stated that "metal-bearing secondary materials stored in open piles which leached into the environment while stored for reuse in metals recovery can be considered to be solid wastes." *See* 68 Fed. Reg. at 61,563, citing *AMC I*, 824 F.2d at 1187 (n.14) and 1191 (n.20). However, the Agency is completely distorting the language of the court. The D.C. Circuit did, in fact, discuss an incident that had been mentioned by EPA in which "toxic metals

As the *ABR* court recognized, the fact that a material is stored prior to recycling, and the manner of such storage, simply have no bearing on whether the material has been discarded. *See, e.g., ABR*, 208 F.3d at 1053 (“material stored for recycling is plainly not [discarded]”). In the proposal, EPA acknowledges that raw materials are frequently stored on the land (especially in mineral processing operations) and states that such storage may result in “releases to the environment that constitute discard.” However, the Agency does not claim -- and cannot claim -- that such releases cause the entire mass of raw material to be a waste. Similarly, if a secondary material is stored, prior to recycling, on the land or in some other manner that results in releases, EPA cannot claim that the entire mass of secondary material has been discarded.<sup>29</sup>

Of course, releases that occur from storage units handling secondary materials destined for recycling (or, for that matter, storage units handling raw materials or products) may be of environmental concern. However, the hazardous waste regulations are not the proper tool for limiting the potential for such releases or responding to any releases that may occur. Instead, releases from non-waste units can be -- and generally

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leached from waste piles into an adjacent creek.” *AMC I*, 824 F.2d at 1191, n.20. However, there was no indication that the materials were being “stored for reuse in metals recovery,” as alleged by EPA. Indeed, the court explicitly rejected the notion that that this incident “involved commercial, in-process reuse or recycling activities.” *Id.* at 1191. According to the court, the incident provided a “clear example[ ] of waste disposal.” *Id.* (emphasis in the original). It is difficult to understand how EPA could claim that the D.C. Circuit viewed this incident as involving recycling, when the court actually said precisely the opposite.

<sup>29</sup> This conclusion is consistent with the recent decision of the D.C. Circuit in *Safe Food*. Although the court there stated that several factors might be used to “distinguish[ ] products from wastes” and mentioned that “management practices” might be one such factor, *Safe Food*, 350 F.3d at 1269, it was clearly not passing judgment on the appropriateness of this potential factor. *Id.* (“We need not consider whether a material could be classified as a non-discard exclusively on the basis of the market participation theory [*i.e.*, whether market participants handle the material as a valuable product]. . . . The question . . . is whether the identity principle [*i.e.*, a different factor] is a reasonable tool for distinguishing products from wastes.”).

Moreover, to the extent the court addressed management practices, it was focused on management of the ultimate product of the recycling process, rather than management of the secondary materials used as ingredients in the process. According to the court, “[i]f [a] combination [of factors] is enough to establish that the recycled [products] are not ‘discarded’ . . . it follows that feedstocks used to manufacture them are also not ‘discarded’ -- and therefore not waste -- since the feedstocks are ingredients in a non-discarded final product.” *Id.* Thus, if the handling of the recycled products (in conjunction with other factors) leads to the conclusion that such products are not discarded, neither the products nor the secondary materials used in their production can be classified as wastes. The secondary materials are not subject to an independent evaluation based on their manner of storage or other factors.

It is also worth noting that the *Safe Food* court was considering only the narrow situation of zinc micronutrient fertilizers produced by recycling secondary materials from a different industry. The factors that might be relevant in determining whether these fertilizers (and their secondary material precursors) are discarded are not necessarily relevant in determining whether other materials are discarded. This is especially true in the case of in-process secondary materials within the primary metals and minerals industry, which the courts have explicitly ruled do not constitute solid wastes. *See* Section III.C above.

are -- addressed through other federal environmental regulatory programs, including the Clean Air Act, the Clean Water Act, and various reporting and remediation authorities. State regulatory programs add another level of safeguards.<sup>30</sup> Moreover, companies generally have strong economic incentives to handle recyclable secondary materials (like raw materials and products) in a protective manner, in order to preserve the value of the materials and to minimize potential environmental liabilities.<sup>31</sup>

**b. EPA's Guidelines for Storage of Materials That Are Analogous to Raw Materials Are Vague and Ignore Practical Realities**

Even if it were somehow permissible to consider storage practices when deciding whether a secondary material is discarded, the particular benchmarks set forth in the proposal would not be appropriate. Under the first measure, "the Agency would expect the secondary materials . . . to be managed in the same or similar units" as any "analogous" raw material. For these purposes, materials would be deemed analogous if they have "similar" physical and chemical properties or composition. However, this standard is so vague that facilities would be left guessing whether their secondary materials are "similar" enough to their virgin raw materials to be deemed "analogous." In addition, even if the materials were completely indistinguishable, the facilities would have no way of knowing whether the units in which the materials are stored are sufficiently "similar."

Moreover, EPA is ignoring the possibility that there may be valid reasons for handling "analogous" materials in dissimilar units. Segregation of the materials may be necessary for economic accounting purposes, for logistical reasons (*e.g.*, if the materials come from different locations or are transported by different means), or due to production needs (*e.g.*, if the materials, despite being considered "analogous," have enough differences to require careful blending into the production process). If the materials are segregated, the storage units may be designed differently for many reasons, including

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<sup>30</sup> For example, the Arizona Aquifer Protection Program generally requires facilities where materials are stored on the land to have a permit that protects against violations of aquifer water quality standards and requires use of the best available demonstrated control technology to reduce any discharges. *See, e.g.*, Ariz. Rev. Stat. §§ 49-241, *et seq.*; Ariz. Admin. Code R18-9-101, *et seq.* Similarly, the Arizona air regulations limit fugitive dust emissions from piles of both wastes and in-process materials. *See* Ariz. Admin. Code R18-2-601, *et seq.* Other states have similar requirements. *See, e.g.*, Utah Admin. Code R307-205-3 (fugitive dust control requirements for material storage and handling operations); R307-309-4 (additional fugitive dust controls for operations in counties that have not attained particulate matter standards); R317-6-6 (groundwater protection rules); R317-8-3.9 (stormwater rules).

<sup>31</sup> In the extremely unlikely case that a recyclable secondary material is stored in a manner that results in wholesale loss of the material, EPA might be able to establish that the material is not actually being "saved" for recycling. However, the Agency cannot say that a material is being discarded based on the fact that environmentally significant releases may occur while the material is being stored for recycling. Otherwise, the statutory provisions limiting EPA's authority to regulation of *waste* storage units would be meaningless.

differences in the volume of the materials, the locations of the sources of the materials, the time that the units were constructed, and the physical properties or chemical composition of the materials (assuming such differences are not enough to prevent the materials from being considered “analogous”). According to EPA, however, any differences between the storage units might cause the entire recycling operation to be deemed a sham. Apparently, this might be true even if the storage units for the secondary materials “minimize” the potential for releases (*i.e.*, meet the standard for secondary materials that do not have analogous raw materials, as discussed below).<sup>32</sup>

**c. EPA’s Guidelines for Storage of Materials That Are Not Analogous to Any Raw Materials Are Vague, Unduly Restrictive, and Counterproductive**

The second yardstick under Criterion #1 specifies that secondary materials without any analogous raw materials should be “managed to minimize the potential for releases into the environment.” This minimization standard, however, is extremely vague and could be interpreted in ways that would classify virtually all recycling processes as sham operations.

The D.C. Circuit long ago stated that “[t]o ‘minimize’ something is, to quote the Oxford English Dictionary, to ‘reduce [it] to the smallest possible amount, extent, or degree.’” *See Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 361 (D.C. Cir. 1989), *cert. denied* 498 U.S. 849 (1990). Thus, the “minimization” standard could potentially be interpreted to require use of a containment system that meets or even exceeds the standards for hazardous waste storage units (even though such a requirement would obviously be unlawful and unduly burdensome). Some federal or state regulatory authorities might also take the position that any releases that occur demonstrate that the “potential for releases” was not minimized. Moreover, EPA’s proposed standard could

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<sup>32</sup> For example, in the primary production of precious metals, certain “secondary” materials (*e.g.*, slag, baghouse dust, used anodes, and spent crucibles) arguably are not being stored in a “similar” manner as “analogous” raw materials. In particular, the secondary materials are stored in containers within buildings, due to the fact that they are solid and relatively small in volume. However, the “primary” production streams being processed in the same stages of the operation (*e.g.*, leaching or refining) are typically contained in tanks and pipes, because they are in the form of a slurry or liquid and are extremely large in volume. The primary and secondary streams might be viewed as analogous, inasmuch as they are processed in much the same way. However, the tanks and containers might not be deemed “similar.” In such an event, EPA’s first proposed criterion would not be satisfied, even though the secondary materials are obviously being handled in a protective manner and are not wastes. Indeed, even the existing regulations acknowledge that spent materials from mineral processing operations are not wastes if stored in containers prior to recycling. *See* 40 C.F.R. § 261.4(a)(17)(iii).

Furthermore, the “secondary” materials discussed above are processed like ore, inasmuch as they are crushed and ground to a powder-like consistency, slurried, and then sent to a leaching circuit. EPA might therefore conclude that the secondary materials are “analogous” to ore and must be stored in a “similar” manner. This might require the secondary materials to be stored outside on the ground, rather than indoors in containers, as is currently the case. Clearly, such a result would make no sense.

be read to apply to *insignificant* releases, as well as releases of constituents that are *not hazardous*.

Although it is our understanding that EPA does not intend the minimization standard to be interpreted in these ways, the proposed regulatory language could leave the door open for such interpretations. As a result, the regulated community might have to assume that the standard would be interpreted as stringently as possible, or face the risk of enforcement. In this way, EPA's proposal would have a chilling effect on recycling.

**2. Criterion #2: Whether the Secondary Materials Make a Useful Contribution**

**a. NMA Agrees That a Material Must Be Useful to Be Legitimately Recycled**

NMA believes that EPA's second proposed criterion (*i.e.*, whether the secondary material provides a useful contribution to the recycling process or a product of the process) is the only criterion that may be appropriate, because it relates directly to the issue of legitimacy. If a material does not contribute in any way to a production or recycling process or a product of the process, it clearly is not being recycled in any meaningful way. *See API II*, 216 F.3d at 57 ("it would be hard to explain why, other than to discard, [a company] would engage in a costly treatment activity with no economic benefits").

NMA is also generally supportive of much of the clarifying discussion in the preamble about the second criterion (except as discussed in Sections VI.B.2.b and VI.B.2.c below). As noted above, however, we are concerned about separating the discussion (in the preamble or guidance) from the criterion (in the regulations). Therefore, we urge EPA not to incorporate this criterion (or any of the others) into the regulations.<sup>33</sup>

**b. EPA Is Wrong to Suggest That a Material Must Be "Efficiently" Used to Be Legitimately Recycled**

NMA is concerned about some of the discussion in the preamble about what constitutes a "useful contribution," especially the suggestion that a material may not be making a useful contribution if the recycling process is not "efficient[t]" in recovering or

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<sup>33</sup> If EPA, nevertheless, goes forward with codifying this criterion, NMA urges EPA to reiterate certain key points made in the preamble to the Phase IV LDR rule about the role that economics plays in a determination of legitimacy. In particular, "recycling need not be profitable to be legitimate." *See* 63 Fed. Reg. at 28,587. There are "cases where recycling [is] economical only relative to disposal, and yet, the company [is] legitimately reusing the recycled materials." *Id.* Similarly, EPA should stress some of the points made in the preamble to the current proposal, such as the fact that "in many legitimate recycling transactions the generator pays the recycler to accept the material to be recycled." *See* 68 Fed. Reg. at 61,584.

regenerating a component of the material. *See* 68 Fed. Reg. at 61,584. As an initial matter, as EPA itself admits, a secondary material can make a useful contribution to a recycling process even if *none* of its components are recovered or regenerated (*e.g.*, if the material serves as a catalyst or carrier). Thus, it makes little sense to require “efficiency” in the recovery or regeneration of components.

Moreover, even when the contribution that a material makes is as a source of particular components, the efficiency of recovery should be irrelevant. A recycling process may be inefficient for a variety of technical or economic reasons. Just because a process is inefficient does not mean that it is illegitimate.

For example, EPA states that “if the objective of a recycling process were recovery of copper from a secondary material, but only a small fraction of the copper in the material is actually recovered, sham recycling could be indicated.” However, there are many other reasons why the process might be “inefficient” in this sense of the term.<sup>34</sup> The copper might be present in a variety of chemical or physical forms, only some of which are readily recovered. Alternatively, the secondary material might be recycled in a unit that is optimized for processing ores (because of their much greater volume) and therefore is unable to achieve as high a recovery rate from the (smaller volume) secondary materials. Similarly, current recycling technologies may be able to recover small percentages of copper at low cost, but may be unable to recover higher percentages at any cost or at a reasonable cost. In each situation, the recycling process might be inefficient, but would not be a sham.<sup>35</sup> This is especially true because the copper-containing secondary materials (like many secondary materials from mineral processing) may be large in volume and therefore even a “small fraction of the copper” may be of significant value. Moreover, as a general matter, substantial costs have already been incurred to produce the secondary material, and therefore it makes economic sense to obtain even a small additional return on this investment by returning the material to the production process (assuming, as is typically the case, that the incremental costs are comparatively small).

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<sup>34</sup> NMA objects to EPA’s narrow view of efficiency as applied to the primary metals and mineral industry. We believe that a process should be deemed efficient if it produces economically significant amounts of the target metal(s) or mineral(s) and is justified on an economic basis. We also reiterate the points made in Section III.C above that in-process materials within the primary metals and minerals industry are not “secondary materials” and are not being “reclaimed,” but instead are being processed as an integral part of primary production operations.

<sup>35</sup> Flotation of furnace brick, for example, is not as efficient as flotation of ore, because flotation is designed to recover copper sulfide materials, and a portion of the copper in the brick is metallic copper or copper oxide. Nevertheless, flotation may be the best option for recovering the copper in the brick, because other methods (*e.g.*, leaching) require costly crushing of the brick to a much smaller particle size and have even lower overall efficiencies of recovery (*e.g.*, because they are not as effective in recovering the copper sulfides). The flotation process for brick is more than worth the effort in terms of the copper value that is recovered. Thus, it cannot be viewed as a sham operation.

This conclusion is reinforced by the decision of the D.C. Circuit in *API II*. The court in that case explicitly rejected EPA's claim that oil-bearing wastewaters reclaimed in primary treatment operations were being discarded, in light of the small amount of oil that is recovered:

EPA points out that primary treatment only recovers a small amount of oil relative to the entire output of a typical refining facility. However, the oil is still valuable and usable, so that reason alone cannot show discard. The rock of a diamond mine may only contain a tiny portion of precious carbon, but that is enough to keep miners busy.

*Id.* at 57. Miners also can “keep busy” with small amounts of other minerals and metals. *See, e.g., AMC I*, 824 F.2d at 1181 (“In the mining industry, primary metals production involves the extraction of fractions of a percent of a metal from a complex mineralogical matrix (*i.e.*, the natural material in which the minerals are embedded).”).

**c. Mismanagement of Residues from Recycling a Material Does Not Mean that the Material Served No Purpose in the Recycling Process**

In the preamble to the proposed rule, EPA claims that “[a] pattern of mismanagement of the residues by the recycling facility may . . . be an indication of sham recycling.” *See* 68 Fed. Reg. at 61,584. The residues that the Agency is apparently referring to are the residues (*i.e.*, outputs other than products) that result from the recycling process.<sup>36</sup> However, the handling of such residues has no bearing on the issue of whether the *inputs* to the recycling process are being legitimately recycled or instead discarded.

Of course, if the residues are mismanaged, any amount that is released into the environment might potentially be viewed as wastes. Similarly, if the residues from a recycling process are otherwise discarded (*e.g.*, in a landfill), they might be regulated as solid wastes. However, the same could be said about residues from production processes that do not use secondary materials.

EPA could not argue that the generation of wastes or the mismanagement of residues undermine the “legitimacy” of a production process that uses only virgin material inputs. Likewise, the generation of wastes or the mismanagement of residues cannot convert what would otherwise be legitimate recycling into an illegitimate form of sham recycling. The residues in these situations might properly be subject to regulation,

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<sup>36</sup> If, instead, EPA means that mishandling of the *inputs* to a recycling process indicates sham recycling, the Agency is simply repeating its proposed Criterion #1. In such an event, we refer EPA to our comments in Section VI.B.1 above as to why this criterion is inappropriate.

but the status of the recycling process itself -- and the inputs to the process -- would not be affected.<sup>37</sup>

**3. Criterion #3: Whether the Product from the Recycling Process Is Valuable**

EPA's third proposed criterion (*i.e.*, whether the recycling process yields a valuable product) is of dubious merit because it is redundant, potentially misleading, and could be unduly restrictive.

**a. Criterion #3 Is Subsumed By Criterion #2**

In light of the second criterion (*i.e.*, whether the secondary material provides a useful contribution), the third criterion is unnecessary. If a recycling process does not ultimately produce a product with any value (in "violation" of Criterion #3), the secondary material inputs to the process cannot be contributing any value (as required by Criterion #2). The third criterion, therefore, does not provide any help in distinguishing between legitimate and sham recycling.

**b. The Proposed Text of Criterion #3 Is Seriously Flawed**

The third criterion, however, could cause confusion amongst regulators and the regulated community. As currently drafted, the criterion would focus on whether "[t]he recycling process yields a valuable product or intermediate." In the preamble, EPA clarifies that this criterion could be satisfied, even if "a particular step in a recycling process does not yield a separate salable or ready-to-use product," as long as such a product is eventually produced. The regulatory language, however, might be read by some (contrary to the preamble language) as suggesting that a processing step would not meet the criterion unless that step, by itself, yields a salable product.

The third criterion is also flawed because it seems to require that the product of the recycling process must either be (1) sold to a third party or (2) used by the generator or recycler. In the preamble, EPA correctly notes that a product may be "valuable" even if it is "sold at a loss." It is also possible that a product could be valuable when it is not "sold" at all, but rather sent to a third party as part of some other economic arrangement. However, once again the intent of the preamble is not carried through to the proposed regulatory language, since neither one of these situations is clearly addressed in the proposed rule.

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<sup>37</sup> EPA may have meant to say that the mishandling of the *products* of a recycling process indicates sham recycling. However, even virgin products can be mishandled, and they are obviously not obtained from a sham recycling operation. Moreover, if EPA believes that mishandling of a recycling product suggests that the product is not valuable, the Agency is simply restating its proposed Criterion #3. In such an event, we refer EPA to our comments in Section VI.B.3 below as to why this criterion should be rejected.

Finally, the proposed language would allow the products to be used by the generator (or the recycler), instead of sold to a third party. However, the term “generator” is defined as “any person, by site” whose act or process produces a material. *See* 40 C.F.R. § 260.10. Thus, the criterion could potentially be read as requiring use by the generator at the site of generation. Such a limitation would clearly be inappropriate; a product would be valuable even if it is used by the generator at a different site.<sup>38</sup> Accordingly, this criterion is problematic and should be deleted (or, at a minimum, corrected to reflect the preamble discussion and the additional points addressed above).

#### **4. Criterion #4: Whether the Product Contains “Toxics Along for the Ride”**

EPA’s fourth and final criterion concerns “whether hazardous constituents are ‘discarded’ by being incorporated into a product made from hazardous secondary materials.” In particular, a recycling process would not be deemed legitimate under this criterion if the product from the process (1) contains “significant amounts” of hazardous constituents that are not present in analogous products, (2) contains “significantly elevated levels” of hazardous constituents that are found in analogous products, or (3) exhibits a hazardous characteristic that analogous products do not exhibit. As discussed below, NMA believes this “toxics along for the ride” (“TAR”) criterion is flawed for several reasons.

##### **a. TARs In a Product Are Not an Indicator of Sham Recycling**

As an initial matter, NMA does not believe that this criterion has any bearing on whether a recycling process is legitimate, especially in the primary metals and minerals industry. In its discussion of the second criterion, EPA correctly notes that “[n]ot every component of a secondary material would necessarily have to contribute to the product or process” as long as some component of that material does. For example, the Agency states that “a legitimate recycling operation involving recovery of precious metals might not recover all of the components of a hazardous secondary material, but would recover precious metals with sufficient value to justify the recycling.” Under the fourth criterion, however, if a small amount of hazardous components in the secondary material made their way into the precious metal product (*e.g.*, due to technical limitations in the recycling process), the entire process would be deemed a sham. This clearly would make no sense.

A similar issue could arise in the case of base metals. Consider, for example, a smelting facility that produces copper to meet international specifications for high-grade material, including a selenium limit of 1.0 ppm. The facility might theoretically be able

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<sup>38</sup> Similarly, a product would be valuable if it is used by a related corporate entity (*e.g.*, a parent company, subsidiary, or affiliate of the generator). *Cf.* Section III.F above. However, because related entities are generally viewed as different “persons,” *see* 40 C.F.R. § 260.10 (definition of “person”), they would not be deemed the “generator” and, under EPA’s proposed Criterion #3, might not be able to use the secondary material (unless the material is “sold” to the related corporate entity).

to produce a product containing 0.1 ppm selenium without using any secondary materials. However, it might also be able to use a copper-rich secondary material and remain below the 1.0 ppm limit, perhaps producing high-grade copper with 0.9 ppm selenium. The 9-fold increase in selenium content might be deemed a “significant” elevation in concentration, thereby causing the process to be deemed a sham under Criterion #4. Nonetheless, the facility would be recovering valuable copper from the secondary material and producing a product that meets high-grade specifications. Thus, there can be no doubt that the process is legitimate.

Indeed, even if the copper-rich secondary material caused the quality of the product to be reduced (*e.g.*, to a mid-grade copper with 5.0 ppm selenium), the recycling process might very well still be legitimate. The smelter might be able to produce more copper at lower cost using the secondary material, and the savings might more than offset the lower price of the product. However, under Criterion #4, the now 50-fold increase in selenium concentrations might be viewed as “significant,” and thus the process might be viewed as a sham method of discarding the selenium.<sup>39</sup>

NMA notes that virgin raw materials (*i.e.*, ores) often come in several different grades, with different types and amounts of metallic impurities, including some that might be viewed by EPA as hazardous constituents. If a producer starts to use a lower grade ore than has previously been used, more of these hazardous constituents might end up in the (virgin) product. However, EPA could not claim that the raw material is being disposed of, under the theory that the product contains “toxics along for the ride.”<sup>40</sup> Similarly, the Agency should not be able to argue that a recycled secondary material is being discarded, just because some of its hazardous constituents end up in the finished product of the recycling process.<sup>41</sup>

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<sup>39</sup> As discussed in Section VI.B.4.c below, it is extremely unlikely that the use of secondary materials could ever have such substantial effects on the final metal products, particularly given the small volume of the secondary materials compared to the primary materials (*e.g.*, ores). Moreover, it is questionable whether a test could be devised to measure any possible effects, because all of the products are produced from a combination of primary and in-process materials. Nevertheless, we include these hypothetical examples to illustrate that TARs are not a valid indicator of sham recycling. Even if the secondary materials somehow had a *substantial* effect on hazardous constituents in the products, the recycling process could still be legitimate.

<sup>40</sup> EPA itself has admitted as much in its brief in the *Safe Food* case. See Brief of Respondent EPA, submitted in *Safe Food v. EPA*, No. 02-1326 (D.C. Cir. filed June 30, 2003) at 41 n.21 (“inputs to almost any manufacturing process contain a mixture of contributing and non-contributing materials, and some of the non-contributing materials may be toxic . . . . That does not, however, compel the conclusion that the inputs and resulting products are all ‘solid wastes.’”).

<sup>41</sup> Of course, EPA may state that the increases in hazardous constituent concentrations in the examples above would not necessarily be “significant.” The producers of the products, however, would have no way of knowing what a federal or state regulator might deem significant (or how they themselves might carry the burden that would be imposed under the proposed rule to “demonstrate” that the hazardous constituents are not significant). In the face of such uncertainty, many producers would simply choose not

**b. TARs In a Product Are Not Being Discarded**

Fundamentally, NMA objects to EPA's suggestion that any "significant" amounts of hazardous constituents that unavoidably make their way into a product as a result of the technical limitations of a recycling process are being "discarded." Because these constituents are incorporated into useful products, they are not being "disposed of, abandoned, or thrown away." Moreover, the only option under EPA's proposal (to avoid engaging in "illegitimate" recycling) would apparently be to landfill the secondary materials. Of course, this landfilling would truly qualify as discard for the typically small quantities of hazardous constituents that otherwise would be "toxics along for the ride" if the secondary materials were instead recycled. Perhaps more importantly, landfilling of the secondary materials would result in discard of the typically larger quantities of useful components. It is difficult to imagine how such results would benefit the environment.

NMA recognizes that the D.C. Circuit in *Safe Food* suggested that a comparison of the hazardous constituent concentrations in virgin and recycled zinc micronutrient fertilizers could be used (together with other factors) to help determine whether such recycled fertilizers are discarded materials (*i.e.*, wastes). *See Safe Food*, 350 F.3d at 1269. However, the court was considering only the narrow situation of zinc micronutrient fertilizers produced by recycling secondary materials from a different industry. There is no reason to believe that the court would find "toxics along for the ride" to be relevant in other situations (*e.g.*, when a product is not used as a zinc fertilizer or is not produced by recycling secondary materials from outside the industry). On the contrary, as discussed above, such constituents (and the products that contain them) are simply not being discarded.<sup>42</sup>

**c. EPA's Proposed TAR Test Cannot Be Applied to In-Process Materials Within the Primary Metals and Minerals Industry**

EPA's proposed "toxics along for the ride" test is particularly inappropriate for in-process materials within the primary metals and minerals industry. As an initial matter, it is unclear how the test could be applied within the industry, because there are no products made without the use of in-process materials. The recycling of in-process materials is intrinsic to primary metals and minerals production, as the industry seeks to maximize the recovery of the target metal(s) and mineral(s) present in the virgin ore. *See* Section III.C

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to use secondary materials as ingredients in their production processes. In this way, beneficial recycling would be discouraged and the goals of RCRA would be frustrated.

<sup>42</sup> Moreover, even in the narrow situation addressed in *Safe Food*, all the court did was uphold EPA's conclusion that where the virgin and recycled products are substantially identical, the recycled products are not wastes. *See Safe Food*, 350 F.3 at 1269 ("Nobody questions that virgin fertilizers . . . are products rather than wastes. Once one accepts that premise, it seems eminently reasonable to treat materials that are indistinguishable in the relevant respects as products as well."). The court did not endorse the *converse* proposition that where differences do exist, the recycled products can be classified as wastes.

above. Therefore, unless the industry completely reconfigures its operations, it would be impossible to make the comparison required under the test, *i.e.*, the comparison between the “toxics” in products made solely from virgin feedstocks and the “toxics” in products made from both virgin and in-process materials.

In order to obtain a product from purely virgin materials, it would be necessary to re-route all in-process materials away from the production process into either storage or another process. In both cases, substantial changes to capital equipment might be necessary or new equipment might be required. Moreover, because the in-process materials often serve multiple functions in a process (*e.g.*, as sources of metal, acid, water, cyanide, flux, or other values), they would likely need to be replaced with one or more virgin reagents (as well as additional ore). It would probably not be sufficient to make these changes temporarily; the composition of ores is so variable that it would likely be necessary to make the TAR comparison on an on-going basis. Accordingly, mineral processing facilities might effectively be required to establish completely separate production lines for virgin and in-process materials. Clearly, this would not be practical or desirable.

Moreover, even if it were somehow possible to make the required comparison, any increased levels of metallic impurities in a product that might result from use of in-process materials would not be an indicator of sham recycling. As the D.C. Circuit noted in *AMC I*, primary metals production proceeds by the step-wise concentration of the minute metal values found in natural ores. *See, e.g., AMC I*, 824 F.2d at 1181. As the concentrations of the “target” metal(s) increase, so do the concentrations of other metals (especially those with similar physical or chemical properties as the target metal(s)). The result is that in-process materials almost invariably have higher concentrations of both target metals and non-target metals than the original ores. When these materials are reinserted into the production process, the product could conceivably have higher concentrations of non-target metals than would otherwise be the case. However, this result would hardly be an indicator of sham recycling.

Furthermore, the higher levels should not be of concern for several reasons. For example, the in-process materials are generally much smaller in volume than the virgin ore, and thus should have only a small effect (if any) on the non-target metal concentrations in the final products. Indeed, the potential effects of the secondary materials should be negligible compared to the effects of the natural variations in the ore. In addition, the products are subject to stringent international specifications and/or contract requirements, which limit the amount of non-target metals that can be present in the products.<sup>43</sup> Finally, the only non-target metals in the in-process materials (and therefore in the final products) are indigenous to the ores.

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<sup>43</sup> When the limits are set by contract, the customers generally can either reject the products or charge the producer with severe monetary penalties. Thus, it would be irrational and counterproductive for a producer to engage in practices that would increase the levels of impurities in the products beyond contract specifications.

**d. Product Safety and Quality Issues Can And Should Be Addressed in Other Ways**

To the extent that EPA's real concern is with the safety or quality of the products produced with recycled materials (as is evidenced by the Agency's statement that recycled plastics used in children's toys might be subject to a more stringent "significance" test than recycled plastics used in industrial applications), such concerns simply have no place in a RCRA rulemaking, given that the statute is limited to solid wastes. These concerns could potentially be addressed under other statutes (*e.g.*, the Consumer Product Safety Act; the Food, Drug, and Cosmetic Act; or the Toxic Substances Control Act). However, as a general matter, producers will not use secondary materials in their processes if such materials will adversely affect the quality or safety of the products (*e.g.*, result in a product that can no longer be sold or that might create new liabilities).

**e. Evaluating Products Based on Hazardous Waste Characteristics Is Inappropriate**

Finally, NMA objects to the use of the hazardous waste characteristics to evaluate products under proposed Criterion #4. As a legal matter, the characteristics apply only to solid wastes, and therefore cannot properly be used in the context of products. Moreover, the characteristic tests were developed to identify wastes that are hazardous under specific waste mismanagement scenarios (*e.g.*, co-disposal with municipal solid wastes in a landfill). Those waste mismanagement scenarios would not ordinarily be relevant for products, whether produced from virgin or recycled materials. Thus, there would be no reason to believe that products "failing" a characteristic test would necessarily pose a significant hazard. In addition, if a recycled product were to exhibit a characteristic that is not exhibited by an analogous virgin product, sham recycling would not necessarily be indicated.

**VII. IMPLEMENTATION AND RELATED ISSUES**

**A. Notification and Recordkeeping**

EPA is proposing to require one-time notifications to be submitted by generators of materials that cease to be regulated as hazardous wastes as a result of the new exclusion. NMA objects to this requirement on several grounds.

First, EPA is mistaken when it states that its "right" to require such notification is "inherent in [the Agency's] authority to regulate discarded material." The materials covered by the proposed exclusion are undiscarded materials. EPA's authority to regulate discarded materials does not include the authority to impose RCRA regulatory requirements on these (or any other) undiscarded materials.

Second, EPA's claim that notification is needed for purposes of oversight seems to be without merit. The Agency explicitly states that notification would not be required

for materials that were previously excluded from regulation under other provisions (or that continue to be excluded from regulation under other provisions). However, if notification is not necessary for previously excluded materials, there seems to be no reason to require notification for newly excluded materials. Moreover, even though EPA does not explicitly address this issue, newly generated materials covered by the proposed exclusion will presumably not be subject to the notification requirement because:

- (1) They will not be “previously regulated” materials;
- (2) They will likely not be evaluated under the hazardous wastes characteristics (which apply only to solid wastes); and
- (3) Future generators will have no obvious way to determine whether their materials would have been classified as solid wastes under regulations that have long since been deleted or superceded.

It is unclear why EPA considers notification to be necessary for materials that are newly excluded from regulation under the proposal, when newly generated materials will apparently not be subject to any notification requirements.

Third, generators should not be burdened with having to determine whether their undiscarded secondary materials were previously classified as solid wastes under rules that were overbroad, much less be subjected to additional rules based on the fact that they were unlucky enough to have been adversely affected by the unlawful regulations. This would truly be adding insult to injury.<sup>44</sup>

Finally, EPA has dramatically underestimated the amount of time and effort that would be required for facilities to determine whether they are subject to the notification requirement and, if so, to prepare and file a proper notice. This is especially true because many facilities recycle a large number of materials. The burdens obviously will be increased even further if the Agency adopts one or more of the additional options set forth in the proposal (*e.g.*, requirements for update notices, periodic reports, or detailed recycling records).

## **B. State Authorization**

In the preamble, EPA asserts that the proposed rule would make the federal regulations “less stringent” than the current federal regulations, and therefore would not have to be adopted by the states. NMA disagrees with EPA’s characterization of the rule as “less stringent.”

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<sup>44</sup> Then again, because the undiscarded materials covered by the new regulatory exclusion were never properly classified as solid wastes in the first instance, arguably none of these materials will be subject to EPA’s proposed notification requirement. Specifically, because of the overriding statutory limitations on EPA’s authority, the materials may never have been “previously . . . subject to regulation as hazardous wastes.”

We believe the proposed rule, for the most part, is best characterized as a clarification of the existing law. The current regulations are necessarily limited by the statute under which they were issued. Thus, the undiscarded materials covered by the proposed regulatory exclusion are already excluded from regulation by virtue of the statute. The proposed rule would codify the exclusion that the statute already provides.

Moreover, to the extent that the proposed rule might be viewed as reducing the range of materials classified as solid wastes, it would be making the federal regulations “narrower in scope,” rather than “less stringent.” This distinction is important because any state rules that continue to track the current federal regulations would become “broader in scope” than the federal regulations. It is well established that such “broader in scope” state regulations are unenforceable by EPA.<sup>45</sup>

EPA should explicitly state in the final rule that it cannot and will not continue to enforce state rules that are not amended to reflect the narrowing of the federal regulatory definition of solid waste. Moreover, it should strongly urge all states to adopt these aspects of the final rule. As the Agency has noted, the rule promises to substantially further the goals of resource conservation and recovery. However, given the fact that most states are authorized to implement substantial portions of their hazardous waste programs in lieu of the corresponding portions of the federal RCRA program, these goals will be frustrated in the absence of state participation.

### **C. Transportation**

In the preamble to the proposed rule, EPA claims that even if certain materials are excluded from the definition of solid waste as a result of the current rulemaking, shipments of such materials will remain subject to full hazardous waste regulation as long as they are being handled within states that have not yet adopted the federal rules. In particular, if a shipment is from, through, or to a state that classifies the materials as hazardous wastes, transport within that state must be performed by a hazardous waste transporter and must be accompanied by a hazardous waste manifest.

NMA, however, believes that EPA is overlooking the fact that federal rules for transportation of hazardous materials -- including hazardous wastes -- generally preempt state rules that are more stringent or broader in scope. As EPA has previously noted:

[P]reemption authorities are quite foreign to RCRA [but] are introduced into the transporter arena by the statutory directive in RCRA to maintain

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<sup>45</sup> See, e.g., 40 C.F.R. § 271.1(i)(2) (“Where an approved State program has a greater scope of coverage than required by Federal law, the additional coverage is not part of the Federally approved program [and therefore cannot be enforced by EPA]”); *In the Matter of: Hardin County, OH*, RCRA (3008) Appeal No. 93-1 (EPA Environmental Appeals Board), Final Decision and Order (April 12, 1994) (in the wake of the 1991 vacatur of the federal mixture and derived-from rules, corresponding state rules became “broader in scope” than the federal rules and therefore were unenforceable by EPA).

consistency with the DOT [U.S. Department of Transportation] framework [for transportation of hazardous materials].

Letter from Michael Shapiro, Director, Office of Solid Waste, EPA, to Richard J. Barlow, Northeast Waste Management Officials Association (“NEWMOA”) (June 11, 1996).<sup>46</sup>

To the extent that certain materials are excluded from the federal definition of solid waste, any state rules requiring such materials to be shipped as hazardous wastes would be preempted. Consider, for example, just one requirement: the requirement that hazardous wastes be transported with a manifest. Under EPA’s proposed rule, materials covered by the new regulatory exclusion would not have to be shipped with a manifest for purposes of federal law. The federal hazardous materials transportation law explicitly provides that state shipping paper requirements -- including manifest requirements -- are preempted if they are not “substantively the same” as the corresponding federal requirements. *See* 49 U.S.C. § 5125(b)(1)(C). Thus, any state manifest requirements for the newly excluded materials would clearly be preempted.<sup>47</sup> Significantly, the preemption would apply not only to interstate shipments, but to intrastate shipments as well.<sup>48</sup> Moreover, other state requirements for transport of excluded materials would also be preempted.<sup>49</sup>

NMA recognizes that EPA may be inclined to defer on the issue of preemption to the department that is responsible for implementing the federal hazardous materials transportation law (*i.e.*, DOT). EPA’s statements in the preamble on interstate transport, however, have sufficiently clouded the issue that it is now essential that the Agency set the record straight (in consultation with DOT, if necessary). EPA, in fact, has been

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<sup>46</sup> *See also N.Y. Dep’t of Env’tl. Conservation v. DOT*, 37 F.Supp.2d (N.D.N.Y. 1999) (“despite the RCRA’s recognition that states are permitted to establish requirements which are ‘more stringent’ than EPA regulations, . . . when dealing with transporters of hazardous waste, this general state empowerment must be read in conjunction with the statutory mandate that EPA regulations be consistent with the HMTA [Hazardous Materials Transportation Act].”).

<sup>47</sup> *Cf., e.g.*, 60 Fed. Reg. 62,527, 62,537-38 (December 6, 1995) (New York regulations requiring additional manifest information are preempted, because there are no corresponding federal requirements).

<sup>48</sup> *See* 62 Fed. Reg. 1208 (January 8, 1997) (expanding the scope of the hazardous materials regulations to cover intrastate shipments, consistent with a 1990 amendment to federal hazardous materials transportation law codified at 49 U.S.C. § 5103(b)(1)).

<sup>49</sup> *See, e.g.*, 49 U.S.C. § 5125 (statutory preemption provisions); 49 C.F.R. Part 107, Subpart C (regulatory preemption provisions); *Colorado Public Utilities Commission v. Harmon*, 951 F.2d 1571 (10th Cir. 1991) (Colorado permit requirements for hazardous material transporters are preempted because they are an obstacle to the congressional goal of promoting safety through uniform standards). Of course, state rules related to handling of excluded materials at stationary facilities will generally not be preempted, because they do not involve transportation. However, some storage and related activities may be viewed as an integral part of transportation. *See* 68 Fed. Reg. 61,907 (October 30, 2003).

willing to do so in the past.<sup>50</sup> The Agency should likewise do so in the current case, because preemption will significantly advance the goal of facilitating nationwide recycling operations.

## VIII. ENFORCEMENT

In the preamble to the proposed rule, EPA states that if a generator managing a secondary material as a non-waste under the new exclusion sends the material to a reclaimer who does not comply with all of the requirements of the exclusion, the material will lose the exclusion “from the point when the material was first generated.” As a result, the generator (and the transporter) could be targeted for enforcement, even if he or she had no knowledge of or control over the actions of “the [person] who actually cause[d] the loss of the exclusion,” and even if he or she took reasonable steps (or went further and took extraordinary steps) to ensure against loss of the exclusion.<sup>51</sup>

As discussed below, NMA believes that this enforcement approach simply cannot stand. By converting actions that were innocent at the time they were performed into punishable offenses, EPA’s enforcement scheme would go against the prospective nature of RCRA and the admonition of the D.C. Circuit not to regulate materials that “have not yet become part of the waste disposal problem.” *See, AMC I*, 824 F.2d at 1186. It also would impose liability without regard to fault, despite clear evidence that Congress did not intend such a liability regime. The approach proposed by EPA would be fundamentally unfair and represent a serious violation of due process. The resulting risks that generators would face would discourage legitimate recycling and thereby undermine the goals of RCRA.

### A. EPA’s After-the-Fact Imposition of Liability Would Be Contrary to the Prospective Nature of RCRA

Under EPA’s proposed enforcement scheme, if the reclaimer of a secondary material fails to comply with one or more requirements of the new exclusion, the Agency could reach back in time and penalize the original generator of the material. Indeed, EPA might attempt to retroactively impose liability on generators who shipped materials to a reclaimer *before* the exclusion became effective, at least if the actions (of the reclaimer)

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<sup>50</sup> *See, e.g.*, 49 Fed. Reg. 10,490, 10,495 (March 20, 1984) (“States through which hazardous waste shipments pass are not allowed to place additional information requirements on the transporter as a condition of transportation.”).

<sup>51</sup> Indeed, EPA goes even further and claims that “[i]n an enforcement action, a respondent who claims that a particular hazardous secondary material is excluded . . . would have the burden of proof, *including the burden of persuasion*, to demonstrate that the material has been managed in a manner that maintains the exclusion from the point it was generated.” *See* 68 Fed. Reg. at 61,581 (emphasis added). The Agency’s statement, however, turns the legal system on its head. Respondents in enforcement actions cannot be “presumed guilty until proven otherwise.” EPA clearly has the burden of persuasion in any enforcement case. In addition, the Agency has the initial burden of proof (*e.g.*, to make out a *prima facie* case that a violation occurred).

causing loss of the exclusion were to occur after the effective date. These results, however, would be in direct conflict with the prospective nature of RCRA.

As a general matter, retrospective regulatory measures are “decidedly” disfavored absent clear legislative approval. *Ralis v. RFE/RL, Inc.*, 770 F.2d 1121, 1126-28 (D.C. Cir. 1985). In the case of RCRA, there has been no such legislative approval of retroactivity. On the contrary, RCRA clearly establishes a prospective regulatory regime.<sup>52</sup>

The D.C. Circuit, in fact, has made clear that the definition of solid waste is forward-looking. According to the court, material that is “‘destined’ -- denoting the future” -- for beneficial reuse or recycling is not “discarded” and therefore cannot be regulated as a solid waste. *See ABR*, 208 F.3d at 1053. For a material to be discarded, there must be an “intent to abandon.”<sup>53</sup>

Moreover, “under RCRA, material must be thrown away or abandoned *before* EPA may consider it to be ‘waste.’” *See ABR*, 208 F.3d at 1053 (emphasis added). The Agency cannot regulate materials that “have *not yet* become part of the waste disposal problem.” *Id.* at 1053 (quoting *AMC I*, 824 F.2d at 1186) (emphasis added). EPA’s proposed enforcement scheme would effectively rewrite the statute by imposing penalties for the handling of materials that were, at the time, not discarded but rather intended for recycling. This would be contrary to the plain language of RCRA and the rulings of the D.C. Circuit, and therefore must be rejected.

## **B. EPA’s Imposition of Liability Without Regard to Fault Would Be an Unauthorized Establishment of Strict Liability**

EPA’s proposed enforcement approach would establish a “strict liability” scheme under which a generator who does everything right could nevertheless be penalized due to the subsequent actions of others that the generator has no knowledge of or control over.<sup>54</sup> Although such liability has been imposed by Congress under certain *remedial*

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<sup>52</sup> *See, e.g., United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1377 (8th Cir. 1989) (citing H.R. Rep. No. 1016, Part I, 96th Cong., 2d Sess. 17, *reprinted in* U.S.C.C.A.N. 6119, 6120); *United States v. Bliss*, 667 F. Supp. 1298, 1313 (E.D. Mo. 1987) (citing H.R. Rep. No. 1491, 94th Cong., 2d Sess. 1, *reprinted in* 1976 U.S.C.C.A.N. 6238-39); 45 Fed. Reg. 33,154, 33,170 (May 19, 1980) (“RCRA is written in the present tense and its regulatory scheme is prospective.”).

<sup>53</sup> *See API II*, 216 F.3d at 57 (“Legal abandonment of property is premised on determining the intent to abandon”); *see also* Webster’s 3rd New International Dictionary (Unabridged) 614-15 (1981) (“destine” means “to designate, assign, or dedicate in advance: intend”; “to direct, devise, or set aside for a specific purpose or end”).

<sup>54</sup> Indeed, EPA’s proposal would go beyond traditional notions of strict liability, because it would hold a generator responsible for “violations” created by the actions of a recycler that are not proximately caused by the generator. *See, e.g., Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S.Ct. 2407, 2419-20 (1995) (O’Connor, J., concurring) (“[P]rinciples of proximate cause routinely apply in the . . . strict liability context[. . .]. . . . Strict liability means liability without regard to fault; it does not normally mean liability for every consequence, however remote, of one’s conduct.”). Strict liability

programs (e.g., CERCLA and the “imminent and substantial endangerment” provision of RCRA § 7003(a)), it has never been authorized under the hazardous waste *regulatory* program of RCRA Subtitle C. EPA also cannot, on its own, decide to impose strict liability. See, e.g., *Fort Worth and Denver Ry. Co. v. Lewis*, 693 F.2d 432, 435 and n.8 (5th Cir. 1982) (refusing to interpret a statute so as to allow an agency to select strict liability above other standards of liability, because doing so would raise constitutional questions of overbroad delegation).

It is instructive to note that under CERCLA -- which, as noted above, generally does impose strict liability -- Congress has explicitly carved out an exception for generators and other persons who arrange for the recycling of scrap metal, batteries, and other items. In particular, the Superfund Recycling Equity Act of 1999 (“SREA”) exempts generators from liability if they exercise “reasonable care” to ensure that the receiving facility is in compliance with the substantive provisions of applicable environmental laws and regulations. See CERCLA §§ 127(c)(5), (d)(1), (e)(1). The SREA also specifies that the exception does not apply if the arranger lacks “an objectively reasonable basis” to believe that the material will be recycled or fails to exercise “reasonable care” with respect to the management and handling of the material. See CERCLA § 127(f).

Congress enacted these provisions so that generators of recyclable materials would no longer face the specter of being held “responsible for the actions of those who purchase their goods.” See 145 Cong. Rec. S13086 (October 25, 1999) (statement of Sen. Lott); see also *id.* at S10391, S10431 (August 5, 1999). Congress recognized that such liability would discourage generators from sending their recyclable materials to recyclers and therefore was inconsistent with the goal of “maintain[ing] a successful recycling effort nationwide.” *Id.* at S13086.

For the same reasons, it is important that generators of recyclable materials not be subjected to a standard of strict liability under RCRA. Congress has gone out of its way to ensure that these generators are not subject to strict liability under a statute that otherwise imposes such liability (i.e., CERCLA). Thus, EPA cannot turn around and impose strict liability on the same generators under a statutory program that otherwise does not operate by strict liability (i.e., RCRA Subtitle C). Such action would clearly be inconsistent with Congressional intent and would be beyond EPA’s authority, as noted above.

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statutes generally should not be interpreted so as to eliminate the proximate causation requirement. *Id.* at 2420 (“I would not lightly assume that Congress, in enacting a strict liability statute that is silent on the causation question, has dispensed with this well-entrenched principle.”). It is even more inappropriate to ignore causation where, as here, the statutory scheme is not based on strict liability.

### **C. Penalizing Generators Based on the Actions of Recyclers Is Fundamentally Unfair and a Denial of Due Process**

As noted above, EPA's proposed enforcement scheme would allow generators of recyclable materials to be subjected to penalties based on the actions of others, even when the generators neither know of nor control those other parties' actions. Such penalties would be fundamentally unfair and therefore would violate the due process guarantees of the U.S. Constitution.

As the Supreme Court has noted, "In our jurisprudence guilt is personal." *See Scales v. United States*, 367 U.S. 203, 224 (1961). "Implicit within the concept of due process is that liability may be imposed on an individual only as a result of that person's own acts or omissions." *See Tyson v. New York City Housing Authority*, 369 F. Supp. 513, 519 (S.D.N.Y. 1974).

EPA may argue that it would, in fact, be penalizing the generator for his or her own acts, namely the acts of handling the recyclable materials, in reliance on the exclusion, as non-discarded materials (*i.e.*, non-wastes). At the time of such actions, however, the generator might have every reason to believe that the materials are being properly handled. Indeed, the generator may have exercised reasonable care, or even greater care, to ensure that the receiving facility will recycle the material in conformance with the exclusion. Nevertheless, under EPA's regardless-of-fault, after-the-fact enforcement scheme, the generator could be penalized anyway, if the recycler ultimately fails to satisfy the requirements of the exclusion. This approach would destroy any meaningful relationship between the liability and the actions of the generator.

It is manifestly unfair to impose punishment on an individual for actions that he or she has no power to avoid.<sup>55</sup> Thus, the proposal's enforcement scheme simply cannot be sustained.

### **D. EPA's Proposed Enforcement Scheme Would Discourage Recycling**

EPA's heavy-handed enforcement scheme would discourage generators from sending their materials for recycling. Indeed, as noted above, Congress recognized a similar danger under CERCLA and reacted by amending that statute's liability scheme for generators of recyclable materials. If the Agency now implements the same discredited liability scheme under RCRA, it will be undermining the resource conservation and recovery goals of the statute.

In the preamble to the proposed rule, EPA tries to reassure generators that "[e]nforcing agencies will use their discretion to select the [enforcement] option that is appropriate to a specific case and its factual circumstances." The Agency notes that

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<sup>55</sup> *See, e.g., Spence v. Gormley*, 439 N.E. 2d 741, 748 (Mass. 1982) ("punitive action must be based on personal responsibility") (citing *Plyler v. Doe.*, 457 U.S. 202, 219-22 (1982)); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 174-5 (1972)).

“[s]ome of these options include sending a notice of violation, ordering that the situation be remedied, or assessing fines or other penalties as appropriate.”

These preamble statements, however, will not provide any comfort to generators of secondary materials that must be sent off-site for recycling. The generators will have no way of knowing how the enforcing agencies will exercise their discretion until well after the generators transfer their materials off-site. Moreover, none of the enforcement options mentioned by EPA are likely to be deemed acceptable risks by generators who are concerned about the Agency’s regardless-of-fault, after-the-fact enforcement scheme.

If EPA believes that it would not be appropriate to initiate an enforcement action against a generator who acts in reasonable reliance on the new exclusion, it should say so explicitly in the final rule. This approach would help to reduce impediments to recycling. In addition, it would be more consistent with the structure of RCRA, the requirements of due process, and the decision of the D.C. Circuit in *ABR*.