June 25, 2007

Via Electronic Mail

OSWER Docket
EPA Docket Center
Mail Code 5305T
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Attention Docket ID No. EPA-HQ-RCRA-2002-0031

RE: Revisions to the Definition of Solid Waste; Supplemental Proposed Rule (72 Fed. Reg. 14,172 (March 26, 2007)

Dear Sir or Madam:

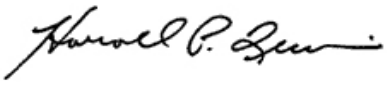
The National Mining Association (NMA) appreciates the opportunity to submit the attached comments on the U.S. Environmental Protection Agency's (EPA) supplemental proposed rule under the Resource Conservation and Recovery Act (RCRA), "Revisions to the Definition of Solid Waste," 72 Fed. Reg. 14,172 (March 26, 2007).

NMA is a national trade association representing the producers of most of America's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and engineering, transportation, financial and other businesses that serve the mining industry. NMA and its member companies have been deeply engaged in the critical question of what constitutes a "solid waste" under RCRA, and more specifically EPA's application of this regulatory definition to the mining and mineral processing industry's secondary materials. NMA has been one of the lead parties in most of the key court cases on the definition of solid waste. NMA's member companies produce and/or use a variety of materials that may be affected by EPA's current proposal. NMA, therefore, has a vital interest in this rulemaking.

The supplemental proposed rule represents EPA's latest attempt in over 20 years to bring its regulations into conformance with the statute and relevant case law. NMA urges EPA to not delay in finalizing this very important rule.

Should there be any question regarding the matters discussed in NMA's comments, please do not hesitate to contact NMA Assistant General Counsel Tawny Bridgeford at (202) 463-2629 or tbridgeford@nma.org.

Sincerely,



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Enclosure

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

72 FED. REG. 14,172 (MARCH 26, 2007)
DOCKET ID NO. EPA-HQ-RCRA-2002-0031

Submitted by:

National Mining Association
Suite 500 East
101 Constitution Avenue, N.W.
Washington, D.C. 20001

June 25, 2007

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I. INTRODUCTION

The National Mining Association (NMA) is a national trade association representing the producers of most of America's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and engineering, transportation, financial and other businesses that serve the mining industry. These comments are submitted in response to the supplemental proposed rule issued by the U.S. Environmental Protection Agency (EPA) under the Resource Conservation and Recovery Act (RCRA), "Revisions to the Definition of Solid Waste," 72 Fed. Reg. 14,172 (March 26, 2007) (2007 Supplemental Proposal).

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) (hereinafter *ABR*) —NMA and its member companies have a keen interest in the definition of solid waste under RCRA. NMA has been an active participant in virtually all of the major EPA rulemakings addressing the definition of solid waste, including most recently EPA's 2003 proposed rule, "Revisions to the Definition of Solid Waste," 68 Fed. Reg. 61,588 (Oct. 28, 2003) (2003 Proposal),[1] as well as the Definition of Solid Waste Roundtable that EPA assembled during the early 1990's to provide input on this issue. NMA 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) (hereinafter *AMC I*), *American Mining Congress v. EPA*, 907 F.2d 1179 (D.C. Cir. 1990) (hereinafter *AMC II*), and *American Petroleum Institute v. EPA*, 906 F.2d 729 (D.C. Cir. 1990) (hereinafter *API I*). NMA's member companies produce and/or use a variety of materials that may be affected by EPA's current proposal. NMA, therefore, has a vital interest in this rulemaking.

For over 20 years, the mining and mineral processing industry has been laboring under a series of regulatory definitions that have been ruled unlawful by the D.C. Circuit. *See e.g.*, 50 Fed. Reg. 614 (Jan. 4, 1985) (the definition of solid waste ruled unlawful in *AMC I*). EPA is long overdue in crafting a regulatory definition of solid waste that is consistent with the jurisdictional limitations established by Congress. Specifically, EPA must limit the regulatory definition 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). NMA strongly urges EPA to not delay in adopting a final definition of solid waste that comports with this jurisdictional limit.

II. SUMMARY OF COMMENTS

EPA's General Approach. NMA supports EPA's decision to move beyond the approach proposed in 2003, which would have excluded from the regulatory definition of solid waste those materials generated and reclaimed "in a continuous process within the generating industry." Under this approach, EPA arbitrarily split beneficiation and processing of minerals into separate industries, thereby resulting in the loss of the proposed exclusion. NMA supports

[1] NMA incorporates by reference its comments submitted on February 25, 2004, in response to EPA's 2003 Proposal.

EPA's recognition that this approach to same industry recycling failed to "accurately delineate EPA's RCRA jurisdiction." 72 Fed. Reg. at 14,185.

While EPA properly decides to "restructure its approach" and "examine the principles behind the court's holdings on the definition of solid waste," *id.* at 14,175, the agency has once again failed to adopt the regulatory approach to the definition of solid waste mandated by Congress and affirmed by the D.C. Circuit. More specifically, EPA's regulatory authority is "limited to materials that are 'discarded' by virtue of being disposed of, abandoned, or thrown away." *ABR*, 208 F.3d at 1051. Until the moment of discard, EPA does not have jurisdiction over the secondary material. Despite EPA's "reexamination" of the case law, EPA's 2007 Supplemental Proposal fails to focus on the threshold question of *when* a material is discarded. Instead, EPA proposes "generator control" and "transfer-based" exclusions that contain conditions with respect to *who* is reclaiming the secondary material, *where* it is being reclaimed, and *how* it is being reclaimed. EPA must recognize that until a secondary material is discarded, EPA has no RCRA jurisdiction over such material.

Additionally, EPA's 2007 Supplemental Proposal raises substantial concerns regarding whether one of EPA's goals is to exert RCRA hazardous waste jurisdiction over land-based mining and mineral processing industry production operations, to the extent that they use secondary materials, *e.g.* secondary acid streams, in production. As EPA is well aware, the mining industry utilizes land-based production units as critical elements of their production processes. Specifically, the copper and gold sectors use heap and dump leaching technology as integral parts of their production operations. When the mining and mineral processing industry uses secondary acid streams, or other secondary materials, in land-based production units, they are not discarded. NMA is concerned, however, over the intended application of the proposed "generator control" and "transfer-based" exclusions, in particular the provisions on "land-based units," to the mining and mineral processing industry's land-based production units, as well as the use of secondary materials in the production process to recover target metals and minerals from natural ores. In the past, EPA has properly disavowed authority over regulating mining and mineral processing industry land-based production units. *See* 63 Fed. Reg. at 28,578, 28,580, & 28,582. EPA must again recognize this limitation on its authority and explicitly state in the final rule that EPA has no jurisdiction over mining and mineral processing industry land-based production units.

EPA's Proposed Exclusions.

Condition on Land-Based Storage: EPA's proposed "generator control" and "transfer-based" exclusions are unlawful in that they each include a condition relating to land-based storage of secondary material. This condition requires secondary material "managed in a land-based unit . . . . to be contained." 72 Fed. Reg. at 14,216 (proposed 40 C.F.R. § 261.4(a)(23)), 72 Fed. Reg. at 14,217 (proposed 40 C.F.R. § 261.4(2)(24)). EPA's assertion of RCRA authority over the storage of mineral processing materials prior to reclamation is blatantly illegal under principles of *res judicata*. The D.C. Circuit, in both *AMC I* and *ABR*, explicitly addressed this issue and rejected EPA's prior attempts to exert jurisdiction over stored in-process materials in the mining and mineral processing industry that had not been discarded. *ABR*, 203 F.3d at 1053;

AMC I, 824 F.2d at 1192-93. Accordingly, EPA must strike its "storage" conditions from the proposed "generator control" and "transfer-based" exclusions.

If EPA adopts a "contained" condition in the final rule, NMA urges EPA to include explicit preamble language that facilities that comply with existing state regulatory programs that control or address releases are proof that secondary materials are adequately "contained" for purposes of the "generator control" and "transfer-based" exclusions. NMA also urges EPA to clarify that a "significant" release does not mean that a secondary material is not "contained," and that the "contained" determination should in every instance include a consideration of all of the factors involved (*i.e.*, local geological and meteorological conditions and specific measures employed).

Expansion of the "Generator Control" Exclusion: EPA should clarify and expand the "generator control" exclusion to ensure that both owners and operators of the land can take advantage of the exclusion. EPA should also expand the exclusion to include facilities that may be under separate ownership, but are located at the same site. Additionally, the "generator control" exclusion should apply where the secondary material is recycled by a parent, subsidiary, or affiliate of the generating company. The generator, or the eligible entity it sends the secondary material to, should be allowed to acknowledge responsibility for the safe management of the secondary material.

"Reasonable Efforts" and Financial Assurance Conditions: In regards to the "transfer-based" exclusion, NMA opposes requiring generators to meet the proposed "reasonable efforts" and financial assurance conditions, since EPA lacks the authority to subject facilities to requirements or conditions when using secondary materials in production operations in which these materials are never discarded. If EPA finalizes the "reasonable efforts" condition, EPA should adopt an objective standard that provides an adequate "safe harbor" for generators.

Notification Requirement: NMA also opposes the notification requirements EPA proposes for both the "generator control" and "transfer-based" exclusions as an unlawful assertion of jurisdiction over non-discarded materials. If EPA moves forward with finalizing any notification requirement, NMA strongly urges the agency to limit the requirement to the "one-time" notification proposed.

Speculative Accumulation: NMA also opposes the speculative accumulation restrictions incorporated in the proposed exclusions as they result in the unlawful classification of in-process materials as wastes whenever they are stored longer than one year. Moreover, in the context of the primary metals and minerals industry, there are instances where the one-year timeframe imposed under the current definition of speculative accumulation is not appropriate. In these instances, longer storage is dictated by the operational realities of the primary metals and minerals industry that are not indicative of discard. NMA urges EPA to specify that materials within this industry are "in process" during the first year after their production; only after the one-year period should materials start to be subject to a speculative accumulation "clock."

Exports: EPA should expand the proposed "generator control" exclusion to permit export of secondary materials. EPA, however, should eliminate the export notification and other

requirements from the final rule. The proposed notice and consent procedures are inconsistent with and unnecessary given EPA's existing export procedures. As proposed, the notice and consent procedures will serve as a barrier to recycling of secondary materials in other countries and discourage overall recycling of secondary materials.

Retention of Existing Exclusions to the Regulatory Definition of Solid Waste. NMA supports the retention of existing exclusions to the regulatory definition of solid waste. Additionally, EPA must clarify in the final rule that existing EPA and authorized state regulatory determinations regarding the RCRA status of mineral processing materials will remain valid. Furthermore, NMA urges EPA to explicitly state in the final rule that prior determinations and variances regarding the recycling of F006 are not impacted by the proposed exclusions.

Legitimacy Criteria. NMA opposes codifying the legitimacy criteria in the final rule. Such criteria should be maintained as guidance. By making certain criteria mandatory, the agency strips the subjectivity and flexibility out of the legitimacy determination. A determination of legitimacy can be based on a wide range of factors, and there is no simple formula for weighing the criteria to determine when recycling is legitimate.

If EPA decides not to maintain the criteria as guidance, NMA urges EPA to finalize the "2 plus 2" approach to codifying the legitimacy criteria. This approach is the preferred alternative to the four mandatory criteria proposed in 2003 because it makes mandatory the only two criteria (*i.e.,* whether the secondary materials make a useful contribution to the recycling process and whether the recycling process produces a valuable product) that NMA believes directly relate to the issue of legitimacy. In regards to the second mandatory criterion proposed (*i.e.*, that the recycling process "must produce a valuable product or intermediate"), NMA urges EPA to clarify that a product can be valuable even when it is sold at a loss, as well as when the product is sent to a third party under some other economic arrangement.

NMA, however, urges EPA to not apply the "2 plus 2" approach to recycling operations or secondary materials not otherwise addressed by the 2007 Supplemental Proposal. Furthermore, NMA should make clear in the final rule that all prior legitimacy determinations are grandfathered and remain valid. All prior determinations that a mining and mineral processing recycling activity is legitimate should remain in place.

EPA's first proposed factor to be considered in the legitimacy determination (*i.e.*, management as a valuable commodity) should be eliminated. NMA believes that this legitimacy factor is inconsistent with RCRA and the decision of the D.C. Circuit in *ABR*, and should not be included as a legitimacy factor. How secondary materials are stored is irrelevant to determining whether they are being legitimately recycled. Furthermore, the proposed benchmarks for evaluating storage practices are vague and ignore practical realities. For example, EPA would require a determination of whether the secondary materials are "analogous" to any raw materials, without any clear standard for making such determination. Moreover, EPA ignores the possibility that valid reasons may exist for handling "analogous" materials differently. Under EPA's proposed rule, secondary materials without any analogous raw materials should be "contained." If EPA were to adopt this factor in the final rule, NMA urges the agency to interpret it consistently with the "contained" requirements for land-based units proposed for the

"generator control" and "transfer-based" exclusions. EPA should also recognize that existing state regulatory programs to control or address releases are proof that secondary materials are adequately contained for purposes of the legitimacy determination.

EPA's second proposed factor to be considered in the legitimacy determination (*i.e.*, the "toxics along for the ride" (TARs) factor) should also eliminated. This factor focuses on 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 the constituents would be deemed TARs that are being discarded. NMA does not believe that the TARs factor has any bearing on whether a recycling process is legitimate in the primary mining and minerals processing industry, especially given the fact that products in this industry meet rigid and technical specifications and/or contract limitations. Moreover, the use of in-process materials is intrinsic to the primary metals and minerals industry, making the type of comparison required under the TARs test virtually impossible.

Petition for Non-Waste Determinations. NMA supports a process whereby facilities may receive a case-by-case determination that their materials are not "discarded." NMA, however, supports a less restrictive process than that which the agency proposes. EPA should not impose a more stringent set of requirements for reclamation than the existing regulatory program. In particular, NMA opposes the criterion that asks whether "hazardous constituents in the material are reclaimed rather than discarded to the air, water or land at significantly higher levels from either a statistical or from a health and environmental risk perspective." In the mining and mineral processing industry, it is inevitable in some cases that releases will be at a "significantly" higher level due to the concentration of metals in sequential production operations. These releases, however, may not pose a meaningful risk or represent an indicator of discard. Additionally, EPA should clarify that prior state regulatory determinations are not impacted by this petition process.

Enforcement. NMA supports EPA's enforcement approach, including EPA's explicit recognition that the existence of a RCRA violation by a reclaimer does not invalidate, or have any effect on the burden of persuasion of proof regarding, the "reasonable efforts" determination by the generator under the "transfer-based" exclusion. NMA, however, urges EPA to also recognize that generator liability is incurred only after a material is discarded and not during the period where the secondary material was managed in complete compliance with the exclusions.

EPA's Damage Case Study. EPA's recycling damage case study does not support restrictions on mining and mineral processing land-based production practices. NMA's review of the 208 purported damage cases involved only one primary mining and mineral processing facility. EPA arbitrarily selected 1982 as the date after which industry practice reflected the current regulatory programs. Yet, at this particular site, implementation of all remedial actions pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), which included substantial changes to the plant's handling of secondary materials, extended past 1982. Moreover, all of the plant's secondary materials were exempt from RCRA regulation until 1991. The "alleged" problems at the site are not reflective of practices at this site under the current regulatory program.

III. EPA'S GENERAL APPROACH

A. NMA Supports EPA's Determination That Its "Continuous Process Within The Generating Industry" Paradigm In Its 2003 Proposal Did Not Comport With RCRA Or Relevant D.C. Circuit Decisions

As EPA states in the preamble to the 2007 Supplemental Proposal, EPA developed its 2003 Proposal around a paradigm based on EPA's view of a single sentence in *AMC I*:

> The basis for that [2003] exclusion was the holding in [*AMC I*] that materials destined for beneficial reuse of [sic] recycling in a continuous process by the generating industry are not discarded.

72 Fed. Reg. at 14,175. EPA used this construct to develop a proposal to exclude from the regulatory definition of solid waste any material generated and reclaimed in a continuous process within the same industry. EPA's 2003 Proposal failed to recognize that the recycling of valuable secondary materials in the mining and mineral processing industry often occurs among a variety of "beneficiation" and "processing" operations. As a result, EPA's 2003 Proposal, if adopted as proposed, would have unnecessarily and unlawfully limited and curtailed valuable recycling and reclamation within the mining and mineral processing industry.

NMA argued in its 2004 Comments that EPA's 2003 Proposal was flawed because, under RCRA and relevant D.C. Circuit opinions, EPA could not limit its revision of the regulatory definition of solid waste to materials generated and reclaimed in a continuous process within the same industry. NMA stated that EPA essentially repeated the mistake it made in its 1998 rulemaking attacked in *ABR*, *i.e.*, it had singled out a single phrase in a D.C. Circuit opinion—"immediate reuse" in 1998 and "continuous process within the generating industry" in 2003—and improperly based its entire regulatory approach on that phrase, without evaluating the overall context of the *AMC I* and *ABR* opinions. NMA reminded EPA that in *ABR*, the Court took EPA to task for improperly "parsing" and "dissecting" the *AMC I* opinion.

In its 2007 Supplemental Proposal, EPA properly decides to "restructure its approach" and "examine the principles behind the court's holdings on the definition of solid waste." *Id.* at 14,175. *See also id.* at 14,185 ("[T]he Agency has concluded that its proposed approach to 'same industry recycling' does not accurately delineate EPA's RCRA jurisdiction over hazardous secondary materials."). NMA supports EPA's recognition that its 2003 Proposal was overly limited and restrictive. In particular, NMA supports EPA's 2007 Supplemental Proposal to the extent that it would eliminate the arbitrary distinction, for purposes of the definition of solid waste, between beneficiation and processing operations in the mining and mineral processing industry.

B. EPA's Supplemental Proposal Fails To Fully Recognize That EPA's RCRA Subtitle C Jurisdiction Is Limited To Secondary Materials That Are Abandoned, Thrown Away or Disposed Of, and Thus "Discarded," And That EPA Cannot Regulate Secondary Materials That Are Not Discarded Under RCRA Subtitle C

EPA's 2007 Supplemental Proposal is premised on yet another in a twenty years plus series of flawed EPA readings of the key RCRA statutory term—"discarded"—and the D.C. Circuit opinions interpreting that term. EPA continues to overreach in terms of its purported statutory authority, and still appears not to recognize the clearly defined limits on its regulatory jurisdiction established by the legislative branch, which have now been explicitly endorsed numerous times by the D.C. Circuit. While NMA addresses the specific elements of EPA's proposed exclusions, legitimacy criteria and factors, and the proposed petition process in the 2007 Supplemental Proposal below, NMA's threshold comment is that the RCRA statute demands a simpler and more elegant regulatory definition of solid waste, one that recognizes the straightforward notion that until a secondary material is discarded, EPA has no RCRA jurisdiction over such material.

RCRA is a waste management statute. As the D.C. Circuit has declared, EPA's regulatory authority under Subtitle C of RCRA:

> extends only to the regulation of "hazardous waste." Because "hazardous waste" is defined as a subset of "solid waste," [42 U.S.C.] § 6903(5), the scope of EPA's jurisdiction is limited to those materials that constitute "solid waste."

AMC I, 824 F.2d at 1179.

The pivotal term "solid waste" is defined in RCRA as:

> [A]ny garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and *other discarded material*, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities . . . .

42 U.S.C. § 6903(27) (emphasis added).

In *AMC I*, NMA argued on behalf of the mining and mineral processing industry that EPA lacked jurisdiction over "mineral-bearing dusts, sludges, residuals, and other secondary materials and by-products," including the spent materials and listed byproducts and sludges affected by EPA's 2007 Supplemental Proposal, used as part of mining and mineral processing industry production operations to maximize the recovery of valuable metals or minerals.[2] The

[2] Brief of Petitioner, *AMC I* (filed Sept. 20, 1985) at 3-4.

D.C. Circuit found that Congress used the term "discarded" in its ordinary sense, to mean "disposed of" or "abandoned." *AMC I*, 824 F.2d at 1188-89. The *AMC I* Court reviewed in-depth the Agency's authority and Congress' intent in enacting RCRA and structuring the definition of solid waste. Finding the statute unambiguous and Congressional intent clear, the D.C. Circuit held:

> [I]n light of the language and structure of RCRA, the problems animating Congress to enact it, and the relevant portions of the legislative history, 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. . . . [B]y regulating in-process secondary materials, EPA has acted in contravention of Congress' intent.

Id. at 1193.

In the 1998 rulemaking at issue in *ABR*, EPA proposed to expand its RCRA authority to regulate secondary materials from the mineral processing industry if they were stored as part of mining and mineral processing industry production operations. The D.C. Circuit held that it had previously decided whether such an assertion of EPA's authority was lawful in *AMC I*, and reiterated the *AMC I*'s court finding that EPA's regulatory authority is "limited to materials that are 'discarded' by virtue of being disposed of, abandoned, or thrown away." *ABR*, 208 F.3d at 1051. As the *ABR* court stressed, "secondary materials destined for recycling are obviously not" discarded materials. *Id*. "Rather than throwing these materials away, the producer saves them; rather than abandoning them, the producer reuses them." *Id*. "To say that when something is saved it is thrown away is an extraordinary distortion of the English language." *Id*. at 1053.

EPA states in the preamble to its 2007 Supplemental Proposal that the agency is "more directly [than EPA did in 2003] consider[ing] whether particular materials are not considered 'discarded', and are not solid and hazardous wastes subject to regulation under Subtitle C of RCRA." 72 Fed. Reg. at 14,178. Elsewhere, EPA states that in "restructuring its approach," EPA has decided to "examine the principles behind the court's holdings on the definition of solid waste." *Id*. Even with this renewed focus, NMA believes that EPA has once again failed to adopt the regulatory approach to the definition of solid waste mandated by the D.C. Circuit. A proper reexamination of the case law compels the conclusion that the threshold question in determining the scope of EPA's RCRA Subtitle C jurisdiction is *WHEN* (if at all) is a secondary material disposed of or abandoned? The D.C. Circuit has explicitly stated that prior to that moment in time, EPA does not have jurisdiction over a secondary material, because until that moment the material is not discarded and cannot be a waste. If and when that moment occurs, the secondary material can be seen as crossing a line, or passing through a gate. Once that line has been crossed, or the gate passed through, EPA then—and only then—has the authority to regulate the now discarded material as a solid and hazardous waste.

Despite its "reexamination" of the case law, EPA's 2007 Supplemental Proposal fails to focus on this threshold question. Instead, EPA proposes "generator control" and "transfer-

based" exclusions consisting of limitations on *WHO* is reclaiming the secondary material, *WHERE* it is being reclaimed, and *HOW* it is being reclaimed. EPA refuses to recognize that as a statutory matter, these questions are valid only if the threshold question of *WHEN* has been addressed, and the "discarded line" has been crossed, or the "discarded gate" passed through, making the material discarded. Accordingly, EPA's 2007 Supplemental Proposal fails to properly limit EPA's jurisdiction under RCRA.

C. NMA Supports The Statement In Section 261.2(a)(2)(ii) That Certain Reclaimed Materials Are "Not Discarded"

In proposed 40 C.F.R. § 261.2(a)(2)(ii), EPA makes a long-awaited declaration that certain secondary materials are "not discarded." *See id*. at 14,215. NMA recognizes that at the heart of this statement the agency is finally trying to come to grips with the fundamental principle of "discard" as set forth in the statute and in case law. NMA supports the approach taken by EPA inasmuch as the agency has specifically excluded from the definition of "solid waste," and consequently from the RCRA regulatory program, certain reclaimed materials. Unfortunately, the attempt falls woefully short, especially in the case of secondary materials generated and reclaimed within the mining and primary mineral processing industry.

The Achilles heel of the proposed regulatory language is the insistence that for a secondary material to be "not discarded" it must be "only handled in non-land-based units." *Id.* (proposed 40 C.F.R. § 261.2(a)(2)(ii)). EPA then creates a separate exclusion from the definition of solid waste for secondary materials "managed in land-based units" with the requirement that such materials be "contained." *See id*. at 14,216 (proposed 40 C.F.R. § 261.2(a)(2)(ii)). In the case of the mining and mineral processing industry, a large volume of raw materials and industry-generated secondary materials are used to recover metal values in land-based production units. While NMA believes that the definition of "land-based unit," as discussed in Section III(D) below, does not apply to mining and mineral processing industry land-based production units, NMA fears that EPA and/or authorized state agencies will mistakenly apply the definition to such units. Such an interpretation would unlawfully subject mining and mineral processing industry land-based production units to RCRA regulation.

Furthermore, as argued above in Section III(B) and in more detail in Section IV(A)(1), the *ABR* decision dealt directly with the agency's earlier attempts to prohibit the use of land-based storage practices employed by the mining and mineral processing industry. In striking down such prohibitions on land-based storage, the *ABR* court confirmed the court's earlier judgment in *AMC I* and re-focused attention on the essential factor in determining whether a material was a waste, *i.e.*, was it discarded. While the agency is taking an important step in the proper direction in trying to address the critical issue of "discard," by creating a distinction between the managing of materials in "non-land-based units" versus "land-based units," the proposed rule just as quickly staggers off course in contravention of RCRA and relevant case law. Careful and critical revisions, as suggested below, are essential if the proposed rule is to pass muster.

D. EPA Must Clarify That Its 2007 Supplemental Proposal Will Not Modify Current Law To Subject Mining and Mineral Processing Industry Land-Based Production Units To RCRA Subtitle C Jurisdiction

As EPA is aware, the mining and mineral processing industry utilizes land-based production units as critical elements of their production operations. The copper and gold sectors in particular use heap and dump leaching technology as integral parts of their production operations. Generally, ores are placed on the ground, sometimes on pads,[3] and leaching solutions, *e.g.*, acids or cyanides, are applied to the ores to recover the desired metal in solution. These valuable, product-laden solutions are collected and then sent to subsequent phases of copper and gold production operations.

EPA's 2007 Supplemental Proposal as drafted raises substantial confusion regarding whether one of EPA's goals is to attempt to exert RCRA hazardous waste jurisdiction over these land-based mining and mineral processing industry production operations, to the extent that they use secondary materials, *e.g.*, secondary acid streams, in production. At its most basic level, this confusion grows out of EPA's failure to respect the jurisdictional bounds of its authority as set forth in RCRA and endorsed by the D.C. Circuit. *See ABR*, 203 F.3d at 1051. When the mining and mineral processing industry uses secondary acid streams, or other secondary materials, in land-based production units, they are not discarded. Under a lawful and proper regulatory definition of solid waste, there would be no question that use of secondary materials in this manner, and the land-based mining and mineral processing industry production operations where they are used, would not be regulated.

As noted above, however, EPA's 2007 Supplemental Proposal fails to respect this jurisdictional line. In fact, both the "generator control" exclusion and the "transfer-based" exclusion provide that if a secondary material "is *managed* in a land-based unit as defined in § 260.10, the material must be contained." 72 Fed. Reg. at 14,216-14,217 (proposed 40 C.F.R. § 261.4(a)(23)(i) & 261.4(a)(24)(iv)(C)) (emphasis added). NMA is concerned that EPA's use of the phrase "managed" in this context could cause confusion in the minds of regulators and others as to whether land-based production units in the mining and mineral processing industry could be subject to RCRA Subtitle C regulation.

NMA believes that a close examination of EPA's proposed 2007 Supplemental Proposal actually reveals that EPA's relevant regulatory language in the "generator control" and "transfer-based" exclusions should not apply to land-based production units. Only secondary materials "managed" in "*land-based units*," as defined in 40 C.F.R. § 260.10, must be contained. EPA's proposed new definition states:

> *Land-based unit* means a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt dome formation, salt bed formation, or underground mine or cave.

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[3] In Nevada, where most of the gold heap leaching occurs, state regulations require that the heaps be placed on lined pads. Nev. Admin. Code § 445A.434.

72 Fed. Reg. at 14,214. "Landfill" is defined in the RCRA regulations as "a disposal facility or part of a facility where hazardous waste is placed in or on land. . . ." 40 C.F.R. § 260.10. A mining industry heap or dump leach production facility is not a "landfill" because it is a production unit, not a "disposal" unit, and is not associated with the placement of a hazardous waste. A "waste pile" requires the placement of "waste," and a "pile" for RCRA regulatory purposes is defined as "any non-containerized accumulation of solid, non-flowing hazardous waste that is used for treatment or storage." *Id*. A heap or dump leach production facility is not a "waste pile" because it is not an accumulation of "hazardous waste," and does not involve "treatment" or "storage." Finally, a mining industry heap or dump leach production facility is not a "land treatment facility" because "no hazardous waste is applied onto or incorporated into the soil surface." *Id*. Accordingly, EPA's proposed regulatory requirements in both the "generator control" and "transfer-based" exclusions that secondary materials "managed" in "land-based units as defined in § 260.10" must be "contained" should not apply to heap and dump leach production units, or to the use of secondary materials as part of these production operations.[4]

NMA also believes that EPA's preamble is clear that EPA's intent is to regulate the storage of secondary materials in the enumerated land-based units, not to regulate the production operations themselves. (NMA sets forth separately in Section VI(A)(I) why EPA's attempted regulation of these storage units is illegal). At virtually every point in the preamble where this condition of the "generator control" and "transfer-based" exclusions is discussed, EPA refers to it as a "storage" condition. 72 Fed. Reg. at 14,186 ("secondary materials can be and are stored in land-based units (such as mineral processing residues)"), *id.* at 14,194 ("general performance standard for storage"), *id.* at 14,195 ("storage conditions," "proposed condition for storage"). Accordingly, in order to avoid the potential confusion addressed in this comment (and subject to NMA's comments below regarding the unlawfulness of EPA's attempt to regulate "storage"), NMA suggests that EPA revise its "generator control" and "transfer-based" exclusions to substitute "stored" for "managed" in both exclusions.

NMA notes that even in EPA's 1998 Final Rule, in which the D.C. Circuit held EPA unlawfully tried to exert RCRA jurisdiction over mining and mineral processing storage of secondary materials, EPA properly recognized that it could not attempt to regulate mining and mineral processing industry land-based production units. In responding to comments on an earlier proposal by public interest groups who argued that EPA's RCRA authority "was essentially unlimited," EPA stated that:

> EPA also disagrees that it is compelled to assert control over land-based units that are actual production units, *i.e.*, that actually recover product. The Agency is aware of only two land-based units which recover metals: gold heap leach piles and copper dump

[4] Obviously, the other types of units specified in the definition of "land-based unit" proposed under § 260.10, including surface impoundment, injection well, salt dome formation, salt bed formation, and underground mine or cave, are not relevant.

> leach piles. Under prior rulemakings (54 FR 36592 and 55 FR 2322), the Agency has defined these land-based units as extraction/beneficiation activities. The Agency believes that regulating such units could pose the possibility of interdicting actual production steps which was the particular focus of the *AMC I* court.

63 Fed. Reg. at 28,582.

In expressly disavowing alleged authority over any activity but the storage of mineral processing secondary materials, EPA stated in the 1998 Final Rule that:

> EPA is thus essentially disclaiming authority over mineral processing secondary materials that are reclaimed within the mineral processing or mining/beneficiation industry sector, so long as there is no land-based storage preceding reclamation. Further, potential jurisdiction affects only *storage*. EPA is not asserting authority over any mineral processing production unit, even if the unit is land-based.

Id. at 28,578 (emphasis added). Finally, in its most definitive statement on this issue, EPA stated that "EPA reiterates that there is a jurisdictional bar against regulating the actual production process (s*ee Steel Manufacturers Association v. EPA*, 27 F.3d 642, 677 (D.C. Cir. 1994). EPA also interprets the holding of *AMC I* to mandate this result)." *Id*. at 28,580.

For the reasons discussed above, NMA requests that: (1) EPA explicitly state in the final preamble language that EPA has no jurisdiction over mining and mineral processing industry land-based production units; and (2) EPA modify the regulatory language at proposed sections 261.4(a)(23) and 261.4(a)(24) as suggested above to eliminate the reference to "managed."

IV. EPA'S PROPOSED EXCLUSIONS

A. NMA Opposes as Unlawful Any Additional Conditions or Performance Standards on "Land-Based Storage" for Generators and Reclaimers under the "Generator Control" and "Transfer-Based Exclusions"

1. EPA's Supplemental Proposal Is Unlawful Because It Regulates The Storage Of In-Process Secondary Materials That Have Not Been Discarded

EPA's proposed "generator control" and "transfer-based" exclusions each include a condition relating to land-based storage of the secondary material. In both cases, EPA requires that if the secondary material is "managed in a land-based unit as defined in § 260.10, the material must be contained." 72 Fed. Reg. at 14,216 (proposed 40 C.F.R. § 261.4(a)(23)), 72 Fed. Reg. at 14,217 (proposed 40 C.F.R. § 261.4(2)(24)). As discussed above, when discussing this limitation, EPA refers to this requirement as a "storage condition." 72 Fed. Reg. at 14,186,

14,194, 14,195. Put simply, and despite EPA's attempts to obfuscate its intentions, EPA claims RCRA Subtitle C jurisdiction over the storage of mining and mineral processing secondary materials prior to recycling. EPA's assertion of RCRA authority over the storage of mineral processing materials prior to reclamation is blatantly illegal under principles of *res judicata* and *AMC I* and *ABR*, where the D.C. Circuit explicitly addressed this issue and rejected EPA's prior attempts in 1985 and 1998 to exert its jurisdiction over stored in-process materials in the mining and mineral processing industry that had not been discarded. *ABR*, 203 F.3d at 1053*; AMC I*, 824 F.2d at 1192-93.

EPA's 1998 Final Rule is clear that the relevant part of that rulemaking, which was overturned in *ABR*, was focused on this precise issue. EPA's introductory statement regarding this issue in its 1998 Final Rule reads:

> [A] threshold question when considering whether wastes are prohibited from land disposal is whether the mineral processing secondary materials are "solid waste" under RCRA. The issue is of importance with respect to land disposal prohibitions for the mineral processing industry because this industry recycles mineral processing secondary materials that exhibit hazardous waste characteristics, *and sometimes uses land-based units - piles and impoundments - to store these materials before recycling*. Thus, there is an issue as to whether such materials are solid waste subject to the land disposal prohibition (as well as to the rest of Subtitle C).

63 Fed. Reg. at 28,577-28,578 (emphasis added). In its characterization of that rulemaking, the *ABR* Court stated that "EPA's dividing line between waste and non-waste is the manner of storage." *ABR*, 208 F.3d at 1051.

Recognizing (at least in 1998) that under RCRA it did not have statutory authority over non-discarded materials, EPA justified its 1998 Final Rule by stating that "EPA believes that mineral processing secondary materials stored on the land are discarded." 63 Fed. Reg. at 28,581. EPA's rulemaking then created a conditional exclusion for the mining and mineral processing industry. As part of that exclusion, and allegedly to prevent releases from "land-based units," EPA established a series of conditions relating to land-based storage. *Id*. Generally, secondary materials had to be stored in tanks, containers or buildings or could be stored on pads, if specifically approved by EPA or an authorized State. *Id.* at 28,589.

In *ABR*, in response to NMA's challenge to the 1998 Final Rule, the D.C. Circuit specifically held that EPA cannot, in the context of the mining and mineral processing industry, exert RCRA jurisdiction over the storage of secondary materials destined for recycling. The D.C. Circuit describes NMA's challenge in *ABR* as asking "how secondary material held for recycling in production could possible qualify as 'waste' when the statute defines 'waste' as 'discarded materials'? 42 U.S.C. § 6903(27)." 208 F.3d. at 1051. NMA raises this same question and challenge today to EPA's 2007 Supplemental Proposal, which again attempts to regulate materials stored and held prior to recycling in industry production operations.

The *ABR* Court noted that this question had actually been answered in 1987—now twenty years ago—in *AMC I*. "The question is not a new one. It was asked and answered in *American Mining Congress v. EPA*, 824 F.2d. 1177 (D.C. Cir. 1987)." The *ABR* Court noted that *AMC I*:

> began by referring to the "ordinary, plain-English meaning" of "discarded" - "disposed of," "thrown away" or "abandoned". [*Id*.] at 1184. Secondary materials are obviously not of that sort. Rather than throwing these materials away, the producer saves them; rather than abandoning them, the producer reuses them.

ABR, 208 F.3d at 1051. The *ABR* Court then reiterated *AMC I*'s holding:

> Congress clearly and unambiguously expressed its intent that solid wastes (and therefore EPA's regulatory authority) be limited to materials that are 'discarded by virtue of being disposed of, abandoned, or thrown away.' [*AMC I*, 824 F.2d] at 1190.

ABR stated explicitly that this *AMC I* holding answered the question before the *ABR* Court that had been raised by NMA, *i.e.,* whether EPA can regulate the in-process materials stored before reclamation in the mining and mineral processing industry. *ABR* stated that EPA's regulation of storage of in-process materials in the mining and mineral processing industry:

> thoroughly ignores the *AMC I* court's holding that under RCRA, materials must be thrown away or abandoned before EPA may consider it to be "waste". As we have said, material *stored for recycling* is plainly not in that category.

ABR, 208 F.3d. at 1053 (emphasis added).

Perhaps because EPA had so clearly distorted the Court's earlier opinion in *AMC I*, the D.C. Circuit continued. It noted that the *AMC I* court "had in mind materials that were being held or stored for later recycling or reuse." *Id.* The Court stated that the *AMC I* Court wrote of secondary material "retained," and that "retaining signifies holding onto, keeping, storing." *Id.* "To say that when something is saved it is thrown away is an extraordinary distortion of the English language." *Id.*

In light of *ABR*'s strong, clear and repeated determination that EPA lacks authority to regulate the storage of in-process materials in the mining and mineral industry prior to recycling, NMA was stunned to discover that in the 2007 Supplemental Proposal EPA had, again, proposed to regulate that very same storage of mining and mineral processing materials in its proposed "generator control" and "transfer-based" exclusions. In both cases, EPA exerts its Subtitle C jurisdiction over the storage of these secondary materials.

This time, unlike 1998, EPA proposes that instead of requiring that such storage be limited to certain units, generators and reclaimers of the mining and mineral processing

secondary materials subject to the exclusions must now demonstrate that the secondary materials are "contained" in land-based units. 72 Fed. Reg. at 14,216 (proposed 40 C.F.R. § 261.4(a)(23)(i)); 72 Fed. Reg. at 14,217 (proposed 40 C.F.R. § 261.4(a)(24)). Under the "transfer-based" exclusion, if the secondary material serves as a substitute for an analogous raw material, the reclaimer must "manage the hazardous secondary material in a manner that is at least as protective as that employed for analogous raw material." 72 Fed. Reg. at 14,217 (proposed 40 C.F.R. § 261.4(a)(24)(v)(B)). If there is no analogous raw material, or if the material is managed in a land-based unit, the material must be "contained."

EPA then solicits comments on whether the same types of conditions in its 1998 Final Rule, which were explicitly invalidated by the *ABR* Court, should be imposed on the storage of mining and mineral processing secondary materials, never mentioning the *ABR* decision in this context. *See id.* at 14,187 (soliciting comments on "appropriate limitations on storage, such as performance-based standards"); *Id*. at 14,194 (same); *Id*. at 14,195 (soliciting comment on whether the storage condition should be written in more specific terms).

EPA feebly tries to end run the D.C. Circuit's decisions in *AMC I* and *ABR* by essentially arguing, without statutory or case law support, that its RCRA jurisdiction extends not, as the statute and case law mandates (and as EPA has previously recognized, s*ee* 63 Fed. Reg. at 28,582), only to discarded materials, but to materials that EPA theorizes under some circumstances might be discarded at some future time in some future place. In explaining EPA's mindset, Bob Dellinger, Director of EPA's Office of Solid Waste, Hazardous Waste Identification Division, was quoted in the trade press as follows:

> The term "discard" goes beyond tossing out or abandoning a material, Dellinger said. For a material to be considered as "not discarded" and eligible for the exclusion from hazardous waste regulations under RCRA, the waste generator must ensure the material will be recycled and not just transferred to another facility where it might be abandoned, he explained.

BNA, Daily Environment Report, March 19, 2007, Page A-1.

Mr. Dellinger's declaration, which reflects the regulatory approach taken by EPA in the 2007 Supplemental Proposal, is flat out wrong that the term discard "goes beyond tossing out or abandoning a material." The law, as clearly set forth in RCRA and as held by the D.C. Circuit in *AMC I* and *ABR*, is that EPA's regulatory jurisdiction extends only to materials that, to use Mr. Dellinger's vernacular, are tossed out or abandoned. EPA's proposed regulation of the storage of mining and mineral processing secondary materials prior to production is blatantly and unequivocally illegal because it is not limited to secondary materials that are tossed out or abandoned. EPA must strike its "storage" conditions from the proposed "generator control" and "transfer-based" exclusions.

2. EPA's "Contained" Determinations Should Consider All Methods and Approaches By Which Movement Of Secondary Material Out of A Land-Based Unit Can Be Controlled

As noted above, both EPA's "generator control" and "transfer-based" exclusions require that any secondary materials "managed" in a land-based unit "be contained." "Contained" is not defined in EPA's proposed new regulations, but is discussed in the preamble to the 2007 Supplemental Proposal.

If EPA adopts a "contained" condition in the final rule, NMA generally supports EPA's preamble statement that a "recyclable material is 'contained' if it is placed in a unit that controls the movement of the hazardous secondary material out of the unit," 72 Fed. Reg. at 14,186, presumably meaning that design elements of the unit itself can demonstrate the necessary containment. NMA, however, believes that such containment can also be demonstrated if the potential movement of hazardous secondary materials out of the unit is controlled in some other fashion. EPA itself properly recognizes that "local geological and meteorological conditions can greatly influence whether [materials that are stored in direct contact with the soil in a material or man-made impoundment] would be contained." *Id*. EPA continues that:

> These local conditions, along with specific measures that a facility employs, such as liners, leak detection measures, inventory control and tracking, control of releases, or monitoring or inspection during construction and operation of the unit, may be used in determining whether the hazardous secondary material is contained in the land-based unit.

Id. at 14,186-87. NMA believes that each of these elements should be evaluated and considered in determining whether secondary materials are contained in land-based units.

Existing regulatory programs that control or address releases should also be considered proof that secondary materials are adequately contained. For instance, in Arizona, the Arizona Aquifer Protection Program generally requires facilities where materials, including secondary 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, Arizona air regulations limit fugitive dust emissions from piles of 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). NMA requests that EPA include explicit preamble language in the final rule that facilities that comply with existing state regulatory programs that control or address releases should be considered to have provided proof

that secondary materials are adequately "contained" for purposes of the "generator control" and "transfer-based" exclusions.[5]

In addition, NMA is concerned that certain language in EPA's preamble may cause confusion with regard to "contained" determinations. EPA states that:

> [h]azardous secondary material that remains contained in a land-based unit that experiences a release would still meet the terms of the exclusion in 261.4(a)(23), unless the hazardous secondary material is not managed as a valuable product and as a result, a significant release from the unit occurs. In this situation, the hazardous secondary material in the land-based unit would be considered discarded.

71 Fed. Reg. at 14,186. NMA has no idea what EPA means by this confused passage. NMA agrees that the existence of a release does not mean a secondary material is not contained. However, NMA strongly disagrees with any statement or implication by EPA that if a "significant" release (whatever that might be) occurs, the secondary material in the land-based unit is not contained. For instance, a "significant release" might occur, but be completely controlled in a liner or as part of a different recovery system. Accordingly, EPA should clarify in the final rule that a "significant" release does not mean that a secondary material is not contained, and that the "contained" determination for purposes of the "generator control" and "transfer-based" exclusions should in every instance include a consideration of all of the factors discussed above.

B. EPA's Proposed "Generator Control" Exclusion Should be Clarified and Expanded

One of the conditions attendant to EPA's proposed "generator control" exclusion is that the secondary material must be "generated and reclaimed under the control of the generator as defined in § 260.10." 72 Fed. Reg. at 14,216 (proposed 40 C.F.R. § 261.4(a)(23)(ii)). EPA's proposed definition in 260.10 includes within the first prong of the proposed exclusion situations where the secondary materials are reclaimed "at the generating facility." *Id.* EPA proposes to define generating facility to include "all contiguous property owned by the generator." *Id.*

NMA requests that EPA clarify and expand this exclusion in a number of respects. First, many mining and mineral processing operations in the United States are located, at least in part, on public lands. In some instances, ownership of such public land passes to the operator pursuant to the patenting provisions of the Mining Law of 1872. In many cases, however, an operator on public lands, while having a property interest, would not technically be an "owner" and therefore, conduct operations under an unpatented claim or other leasing arrangement.

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[5] EPA should also be aware that some state agencies have provided interpretations on what constitutes "containment." For example, ADEQ has stated, in the context of its mineral processing regulatory determination, that de minimis losses of mineral processing secondary materials to the environment do not amount to "discard."

Similarly, some mining operations are conducted on private lands pursuant to contracts or leases between the owner and the operator. Again in this instance, the operator may not be the "owner" of the land. Accordingly, EPA should modify the proposed language of 40 C.F.R. § 260.10 to add the underlined language as follows:

> *Hazardous secondary material generated and reclaimed under the control of the generator* means: (1) That such material is generated and reclaimed at the generating facility (for purposes of this paragraph, generating facilities mean all contiguous property owned or operated by the generator) . . .

EPA also seeks comment in the 2007 preamble on the question of whether the exclusion should be expanded to include facilities that may be under separate ownership, but are located at the same site. *Id.* at 14,186. NMA supports such an expansion. In particular, NMA believes such an expansion is justified in the case where a smaller entity that is a tenant produces a secondary material and transfers it at the same site to its landlord, a larger entity who owns (or operates) the facility, and vice versa, where the much larger owner/operator transfers a secondary material to a smaller tenant. In the 2003 Proposal, EPA set forth the policy reasons justifying such an expansion:

> [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.

68 Fed. Reg. at 61,575. NMA suggests the change to the regulatory language (substituted and new language is underlined):

> *Hazardous secondary material generated and reclaimed under the control of the generator* means: (1) That such material is generated and reclaimed on-site (for purposes of this paragraph, on-site means all contiguous property owned or operated by the generator). . .

NMA also urges EPA to clarify in the preamble that reclamation of secondary materials in the context of a landlord-tenant situation, as highlighted above, would fall under this definition.

As part of the second prong of the "generator control" exclusion, if a secondary material is reclaimed by the same person but not at the generating facility (or on-site pursuant to NMA's proposed regulatory change above), EPA's 2007 Supplemental Proposal would require the following certification:

> On behalf of [**insert company name**] I certify that the indicated hazardous recyclable material will be sent to [**insert company name**], that the two companies are under the same ownership, and that the owner corporation [**insert company name**] has acknowledged full responsibility for the safe management of the hazardous recyclable material.

72. Fed. Reg. at 14,214 (proposed revision to 40 C.F.R. § 260.10).

NMA supports the concept that the "generator control" exclusion should apply where the secondary material is recycled by a parent, subsidiary, or affiliate of the generating company. EPA's proposed certification language, however, is unworkable, and must be fundamentally modified. First, EPA must eliminate the reference in the proposed certification to "hazardous" recyclable materials. Under RCRA, a material only can be classified as "hazardous" if it is first a waste; because the materials in question here are not wastes, they are not properly or accurately characterized as "hazardous." Thus, the "hazardous" reference should be stricken from the proposed certification, and should also be stricken from the remainder of the proposed rule and preamble.

Second, EPA's certification is unnecessarily restrictive, and in many cases would render the proposed "generator control" exclusion meaningless. EPA should adopt changes to the certification that clarify that a generator can send secondary material to a parent, a subsidiary, or an affiliate (*e.g.*, joint venture in which it has a substantial interest, a different subsidiary of the same parent, or another company in the ownership chain of a common parent) and be eligible for the generator control exclusion.

In addition, EPA should modify the wording of the proposed certification to provide that the generator, or the eligible entity it sends the secondary material to, can provide the acknowledgement of full responsibility for the safe management of the secondary material sought by EPA. Under EPA's current draft, it is only the common "owner corporation" of the generator and its sister entity that can make the certification. The owner should not be required to, and in most cases would not be willing to, take responsibility for secondary materials generated and managed by separate subsidiaries, given the implications under CERCLA and similar state laws, as well as for the corporate veil under state or federal common law. *See e.g.*, *United States v. Best Foods*, 524 U.S. 51 (1998). Firms may be organized and structured in different ways for a variety of economic reasons. *See Safe Food and Fertilizer v. EPA*, 350 F.3d 1263, 1268 (D.C. Cir. 2003) ("firms have ample reasons to avoid vertical integration") (citing Ronald Coase, "The Nature of the Firm" 4 Economica 386 (1937)). As long as the generating company or the eligible entity to which the secondary material is shipped accept and acknowledge responsibility for the safe management of the secondary material, there is no reason why EPA should try to rewrite traditional principles of corporate law and force the parent to accept responsibility for the secondary materials.

NMA proposes the following changes to EPA's proposed certification language:

> On behalf of [**insert generator company name**] I certify that the indicated recyclable material will be sent to [**insert receiving company name**], a company affiliated with [**insert generator company name**], and that [**insert generator company name or receiving company name**] has acknowledged full responsibility for the safe management of the recyclable material.

C. EPA's Proposed "Transfer-Based" Exclusion Should Be Modified

1. EPA Should Finalize a "Reasonable Efforts" Test that is Objective and Provides a Safe Harbor for Generators

To qualify for the "transfer-based" exclusion, generators must make "reasonable efforts" to ensure that the reclamation facility it sends materials to will "legitimately recycle the material" and "manage the material in a manner that is protective of human health and the environment." 72 Fed. Reg. at 14,217 (Proposed 40 C.F.R. § 260.4(a)(24)(iv)(A). This requirement applies only when generators are shipping materials to reclamation facilities that do not possess a RCRA Part B permit or are not operating under the interim status standards. *Id*. According to the proposed regulatory text, generators "may use any credible evidence available, including information gathered by the generator, provided by the reclaimer, and/or provided by a third party." *Id*. EPA characterizes this requirement as "a type of 'environmental due diligence.'" *Id*. at 14,191.

At the outset, NMA opposes requiring generators to meet the "reasonable efforts" condition. As stated throughout these comments, NMA believes that EPA lacks the authority to subject facilities to requirements or conditions when using secondary materials in production operations that are never discarded. If EPA finalizes this condition, NMA urges the agency to provide an objective standard for determining whether a generator has made the required "reasonable efforts." NMA is concerned that too much subjectivity is built into the "reasonable efforts" test as proposed and does not offer an adequate "safe harbor" for generators. What in fact constitutes "reasonable efforts?" Specifically, what is to stop EPA or an authorized state from questioning the efforts of a generator in complying with this standard? Regulatory certainty is of utmost importance if EPA moves forward in finalizing this condition.

EPA states that a generator may use "any credible evidence" to satisfy the condition, providing site audits as one example. NMA's member companies typically complete due diligence reviews, such as site audits, either individually or through a third-party auditor, prior to sending materials to recycling facilities. NMA supports such reviews as good business practice, and believes that they should be counted as satisfying the "reasonable efforts" test. EPA should clarify in the final rule that completion of such reviews constitutes "reasonable efforts," and that a generator would not lose the exclusion because EPA or an authorized state later questions whether the generator conducted an adequate review. Moreover, generators should be assured that if a site audit is conducted, that the exclusion will not be lost if the reclaimer later was found not to have conducted legitimate recycling. Flexibility should be provided to generators in how

they complete their due diligence review of reclaimers. The "reasonable efforts" test should not be a "one-size-fits-all" standard.

EPA also solicits comments on whether generators should maintain at their facility a signed certification statement providing that they complied with the "reasonable efforts" standard and are managing the materials in a "manner protective of health and the environment." NMA opposes this certification requirement. The current RCRA regulatory program does not require facilities to certify their hazardous waste determinations. Similarly, EPA should not require a certification statement here, especially given the fact that EPA has identified no justifiable reason for requiring a certification statement in this context. EPA should refrain from including additional conditions on generators in order to take advantage of the proposed "transfer-based" exclusion, particularly since the proposed exclusions are supposed to be "de-regulatory" in nature.

2. NMA Supports EPA's Approach to Residuals from Reclamation Activities

In its discussion of "management of recycling residuals" under the "transfer-based" exclusion, EPA seems to take a reasonable approach. The agency states:

> If the residuals exhibited a hazardous characteristic, or they themselves were a listed hazardous waste, they would be considered hazardous wastes, and would have to be managed accordingly. If they did not exhibit a hazardous characteristic, or were not themselves a listed hazardous waste, they would need to be managed in accordance with applicable state or federal requirements for non-hazardous wastes.

42 Fed. Reg. at 14,195-14,196. NMA agrees with the agency that there is no need to create a new regulatory system to address the management of discarded residuals from recycling activities.

The agency also declares that it "does not believe it is necessary to apply the 'derived from' principle to the residuals generated from the recycling of excluded hazardous secondary materials." *Id.* at 14,195. NMA applauds the agency for not applying the "derived from" principle to these residuals, for such an application could only be described as a serious discouragement to recycling and reclamation of hazardous secondary materials.

The language of the preamble, however, could be read to imply that any residual displaying a hazardous characteristic would fall under existing Subtitle C regulation. Were that to be the intent of the proposed rule, then a normally "Bevill-covered" waste in our industry might be subjected to Subtitle C regulation if all or any part of that waste came from reclamation of an excluded secondary material, even an excluded secondary material generated and reclaimed on-site or within the mining and mineral processing industry.

Such a result would directly intrude upon this industry's normal, routine production practices. It would clearly constitute an unwarranted and unjustified narrowing of the coverage of the Bevill Amendment for this industry's wastes. This would fly in the face of case law and the agency's own regulatory determinations on those wastes. Further, it would no longer be possible in fairness to describe this proposed rule as "de-regulatory" in nature.

EPA can resolve any such problems by expressly clarifying in the final rule that the rule is not intended to narrow the scope of any existing RCRA exclusions, including any existing Bevill-related exclusions. The clarification should emphasize that, to the extent that mining and mineral processing wastes now meet the requirements for such exclusions, the rule does not alter the current regulatory status of these industry wastes and does not impose new regulatory burdens on them.

3. EPA Should Not Require Subtitle C Level Financial Assurance For Reclaimers Under the "Transfer-Based" Exclusion

One of the elements of the "transfer-based" exclusion proposed by EPA is that to be eligible, a reclaimer must "comply with the financial requirements of 40 C.F.R. Part 264, Subpart H." *Id.* at 14,217 (proposed 40 C.F.R. § 261.4(a)(24)(iv)(D)). In other words, reclaimers managing valuable secondary material would be subject to the identical financial assurance requirements imposed on facilities that treat, store and/or dispose of hazardous waste.

NMA opposes this proposed requirement that reclaimers of secondary materials be subject to Subtitle C type financial assurance. First, for the reasons described in detail above, EPA lacks authority under RCRA to impose financial assurance requirements on facilities using secondary materials in production operations which are never discarded. Second, NMA believes that this requirement will essentially keep new reclaimers out of the recycling market. NMA members, who are in the business of making metal, have evaluated whether they could reclaim additional materials with mineral value in their production operations under EPA's proposed "transfer-based" exclusion. While such additional reclamation would make sense from an economic and environmental perspective, *i.e.*, additional valuable product could be produced, more secondary materials could be reclaimed, less virgin material would need to be used, NMA members will not engage in this additional reclamation if they would be required to provide Subtitle C level financial assurance.

D. NMA Opposes the Notification Requirements on Generators and Reclaimers under the "Generator Control" and "Transfer-Based" Exclusions as an Unlawful Assertion of Jurisdiction over Non-Discarded Materials

By requiring generators and reclaimers to provide "one-time" notification under the "generator control" and "transfer-based" exclusions, EPA improperly extends its jurisdiction over materials that the agency expressly states are "exclude[d] from regulation." *See* 72 Fed. Reg. at 14,215 (Proposed 40 C.F.R. § 260.42); 72 Fed. Reg. at 14,216 (proposed 40 C.F.R. § 261.4(a)(23)(iv)); 72 Fed. Reg. at 14,217 (proposed 40 C.F.R. § 261.4(a)(24)(iii)). As NMA argues above, EPA continues to overreach in terms of its purported statutory authority. Until a secondary material is discarded, EPA has no RCRA jurisdiction over it and thus cannot subject

generators or reclaimers to conditions when handling non-discarded materials. EPA argues in the preamble that "RCRA section 3007 allows it to gather information with regard to any material when the Agency has reason to believe that the material *may be a solid waste and possibly a hazardous waste* within the meaning of RCRA section 1004(5)." *Id*. at 14,187 (emphasis added). The materials covered by the "generator control" exclusion, however, are not discarded and thus not a "solid waste" or "possibly a hazardous waste." Thus, it is inappropriate to subject facilities handling such materials to a notification requirement. Accordingly, NMA urges EPA to eliminate the notification requirements in the final rule.

If EPA moves forward with finalizing any notification requirements, NMA strongly urges the agency to limit the requirement to the "one-time" notification proposed. While NMA recognizes that the information solicited in the proposed notification requirement may be useful to the agency in cataloguing the types of secondary materials that are being recycled, NMA strongly objects to placing additional notification or recordkeeping requirements on generators or reclaimers. EPA solicits comments on numerous additional notification requirements in the preamble. *See id.* at 14,187 & 14,189. Specifically, EPA is considering requiring: (1) more detailed information in the "one-time" notification; (2) the signature of an authorized representative; and (3) periodic (*i.e.*, annual reports) detailing recycling activities at the facility. NMA strongly urges EPA to refrain from finalizing any of these additional requirements as they would only unnecessarily increase the burden on generators and reclaimers with no attendant environmental benefit.

EPA should be mindful that those facilities considered under RCRA to be conditionally exempt small quantity generators (CESQGs) (generate < 100 kg of hazardous waste per month) generally have no federal notice or recordkeeping requirements. Some mining facilities may be considered CESQGs due to small amounts of solvents (parts cleaners) are used or generated at the mine site. These products are usually picked up, transferred offsite, and recycled by a vendor. As it currently stands, these sites submit a one-time application to receive their EPA identification number. The mine retains records of the hazardous waste manifests onsite. Otherwise, there are no reporting requirements for these generators. If EPA finalizes the "one-time" notification or other detailed notification and recordkeeping requirements, the agency will be imposing more burdensome requirements than the current RCRA regulatory system.

E. EPA Should Adopt an Alternative Speculative Accumulation Approach for the Mining and Mineral Processing Industry

To qualify for the "generator control" and "transfer-based" exclusions, generators may not speculatively accumulate secondary materials as defined in 40 C.F.R. § 261.1(c)(8). 72 Fed. Reg. at 14,215-14,217 (proposed §§ 261.2(a)(2)(ii), 261.4(a)(23)(iii), & 261.4(a)(24)(i)). Pursuant to this definition, if a generator does not recycle or transfer to another site for recycling 75 percent by weight or volume of the secondary materials accumulated during a calendar year, the generator may not claim the exclusion. 40 C.F.R. § 261.1(c)(8). NMA understands that EPA has long used this definition to identify when materials have crossed the line and become discarded. While this definition has worked well for a wide variety of industries, NMA believes—as previously stated in comments to the 2003 Proposal—that this definition is too restrictive given the operational realities of the primary metals and minerals industry.

In response to the 2003 Proposal, NMA argued that the speculative accumulation restriction results in the unlawful classification of in-process materials as wastes whenever they are stored longer than one year. NMA maintains this position. The D.C. Circuit has explicitly stated that "temporary storage can be a necessary phase of reclaiming mineral processing secondary material." *ABR*, 208 F.3d at 1054, n.2. This "necessary phase" of the production process must in many instances continue for longer than a year. Consequently, the existing regulations—and the "generator control" and "transfer-based" exclusions if finalized as proposed—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.").

NMA recognizes, however, that at some point in time a material may cross the line of discard and become abandoned or disposed of if it is stored for use but not actually being used. Yet, as mentioned above, there are many instances where temporary storage of mining and mineral processing secondary material must continue past the one-year timeframe imposed under the current definition of speculative accumulation. NMA provided several examples in its comments to the 2003 Proposal to demonstrate that the standard speculative accumulation rules that apply to secondary materials should not apply to the in-process materials used in the primary metals and mining industry. These examples are again provided below.

Furnace bricks, which are high in metal values and contain readily visible "veins" of solid copper, are introduced into the metals production process as a feedstock. For the following reasons, however, 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.

Given the fact that 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.

Certain other materials used in the primary metals and minerals industry are similar to 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 period of time to have enough for use in a large batch production operation. Finally, extended storage may also sometimes be required in other situations, such as when a production unit is undergoing prolonged maintenance, a substantial renovation, or upgrade.

These examples show that EPA's current speculative accumulation rules should be revised in the context of the primary metals and minerals industry. To this end, NMA again recommends that the EPA 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 percent 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.

NMA believes that this approach properly recognizes 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.[6]

F. The Proposed Exclusions Should Include Exports of Materials Under Control of The Generator But EPA Should Not Impose Notice, Consent or Other Export Controls On Any Secondary Materials Excluded Under the Proposal

1. EPA Should Expand Its "Generator Control" Exclusion To Include Exports

As drafted, EPA's "generator control" exclusion is limited to secondary materials generated and reclaimed "within the United States or its territories." 72 Fed. Reg. at 14,216 (proposed 40 C.F.R. § 261.4(a)(23)). EPA should expand the proposed "generator control" exclusion to permit export of secondary materials. NMA members have worldwide operations and processing and manufacturing operations may occur in more than one facility in more than one country. An exclusion from the definition of solid waste for secondary materials exported for recycling would improve members' ability to most efficiently manage manufacturing and associated recycling.

Under the terms of the proposed "generator control" exclusion, the generator would remain responsible for environmentally sound management of the materials through the modified certification proposed by NMA above, or contractually through tolling or batch manufacturing agreements. *See* Proposed 40 C.F.R. 261.4(a)(23)(ii). Additionally, as discussed below in Section IV(F)(2), additional, export-related conditions are not needed. Existing EPA regulations, as well as the laws of importing countries and international regimes, are sufficient to ensure that

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[6] 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]"); 40 C.F.R. § 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.").

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.

exported secondary materials will be recycled in an environmentally sound manner. Additional controls on exported secondary materials could serve as a barrier to the environmentally sound recycling of secondary materials in other countries, discourage recycling of secondary materials where U.S. recycling facilities are operating at capacity, and limit development of potential markets for secondary materials. For the reasons described above, EPA should strike the language "within the United States or its territories" from the proposed generator control exclusion.

2. EPA's Proposed Approach To Exports Under the "Transfer-Based" Exclusion Would Unnecessarily Encumber Export and Curtail Recycling

EPA's export controls for the "transfer-based" exclusion, proposed at 40 C.F.R. 261.4(a)(25), will thwart EPA's goal of increasing recycling of hazardous secondary materials, without the guarantee of environmental benefits. Existing domestic and international controls are sufficient to ensure environmentally sound recycling of these excluded materials. The proposed notice and consent procedures are inconsistent with EPA's existing export procedures and will confuse importing countries. Erecting such barriers to the export of excluded materials for recycling will not only limit development of markets for secondary materials abroad but it may discourage overall recycling of secondary materials where U.S. recycling facilities are operating at capacity.

a. The Proposed Export Procedures Are Unnecessary Given Existing Controls

Exports of secondary materials that otherwise meet the criteria for the exclusion would not require additional export controls to ensure environmentally sound management. Under the terms of the proposal, a generator would be required to assure itself through "reasonable efforts" that the reclaimer will manage recyclable materials and residues in an environmentally sound manner. 72 Fed. Reg. at 14,190-91. Any person claiming the exclusion would bear the burden of demonstrating that the materials satisfy the conditions of the exclusion (*e.g.*, that the materials will actually be recycled after they are exported). 40 C.F.R. § 261.2(f).

National laws of importing countries and international regimes will continue to apply to exports of these materials. As EPA acknowledges, an importing country will continue to control recycling activities in accordance with both its national laws and the importing country's implementation of relevant international regimes. *See* 72 Fed. Reg. at 14,207 ("such excluded hazardous secondary materials may be subject to regulation as hazardous wastes in the receiving country, even if they are excluded from the definition of solid waste domestically"). Where the laws of the importing country treat these materials as commodities, additional U.S. export controls would unduly restrict commerce in these secondary materials. Imposing additional controls on these excluded materials will restrict legitimate markets for secondary materials in other countries, and in turn limit options for recycling of secondary materials generated in the U.S. when U.S. recycling facilities are operating at capacity.

b. The Proposed Export Controls Are Inconsistent With Current U.S. Law

A number of the existing exclusions from EPA's regulatory definition of solid waste are not subject to notice and consent procedures for export. Imposing notice and consent procedures on the spent materials and listed sludges and by-products at issue in the 2007 Supplemental Proposal is arbitrary and serves no environmental purpose. Where a particular secondary material is eligible for more than one exclusion, the generator is likely to choose the exclusion for which no export requirements apply. And regardless of which exclusion applies, U.S. exporters must still comply with the importing country's requirements in addition to all the conditions of the U.S. exclusion. Importing countries will be confused by the differing export requirements for secondary materials, *i.e.*, some secondary materials excluded from U.S. hazardous waste regulations require importing country consent and others do not.

The proposed notice and consent procedures are also inconsistent with EPA's existing regulations for exports of hazardous wastes to countries that are members of the Organization for Economic Cooperation and Development ("OECD"). 40 C.F.R. Part 262, Subpart H implements OECD Council Decision C(92)(39), which provides specific procedures for exports and imports of hazardous wastes between OECD member countries for the purposes of resource recovery. The OECD Council Decision (and Subpart H) allow for *tacit* consent, *i.e.*, by not objecting within a certain period of time, to imports of hazardous wastes from the United States for purposes of recovery. *See* 40 C.F.R. § 262.83(b)(ii). EPA's proposal for the excluded secondary materials would require *affirmative* consent. *See* 72 Fed. Reg. 14,218 (proposed 40 C.F.R. § 261.4(a)(25)(v)). This will be an obvious point of confusion for importing countries since fully regulated hazardous wastes are eligible for tacit consent, while materials excluded from hazardous waste regulation under U.S. law because EPA has concluded they present reduced hazards when recycled, require affirmative consent. At a bare minimum, EPA should revise the 2007 Supplemental Proposal to provide for tacit consent of importing countries that are members of the OECD.

c. Imposing Export Controls On Excluded Secondary Materials In Anticipation Of U.S. Basel Ratification Is Premature And Potentially Overreaching

Future actions by the United States related to international agreements should not influence EPA's 2007 Supplemental Proposal. EPA did not propose export controls in the 2003 Proposal, and there is no need to propose them now. In the 2003 Proposal, EPA acknowledged that changes to RCRA and EPA regulations may be forthcoming in order to implement both the 2001 OECD Decision C(2001) 107 Concerning the Revision of Decision C(92)(39) on the Control of Transboundary Movements of Wastes Destined for Recovery Operations, and, in the event of U.S. ratification, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, March 22, 1989, 1673 U.N.T.S. 126 (Basel Convention). Under the Basel Convention, some materials that may be excluded from regulation as solid wastes and hazardous wastes in the United States may be subject to regulation under international regimes when exported. 68 Fed. Reg. at 61,589-61,590. As EPA notes, U.S. implementation of the Basel Convention may result in notice and consent requirements for

certain exported materials that would otherwise be excluded from export controls under U.S. law. *Id.* at 61,589. However, under the Basel Convention, whether export and import controls will apply is a case-by-case determination that depends heavily on whether the importing country classifies the materials as hazardous wastes. *See id.* at 61,590. Where the importing country considers the secondary materials to be non-hazardous wastes or commodities, notice and consent would not be required. Therefore, to the extent the proposed notice and consent requirements in the 2007 Supplemental Proposal are an attempt to anticipate Basel controls, they are premature, overly broad, and unnecessarily burdensome at this time.

For the reasons stated above, EPA should strike proposed 40 C.F.R. § 261.4(a)(25). As an alternative, NMA suggests a one-time notification to EPA of the intent to export secondary materials that would be excluded from the definition of solid waste by the proposed rule. This notification could be made as part of the one-time notification of the generator[7] or as a subsequent notification if a generator having made an initial notification to EPA decides at a later time to export excluded secondary materials. Such notification would allow EPA to track exports, but without imposing undue burdens on exporters, importing countries, and markets for recycling of secondary materials. As proposed, the notice and consent procedures will serve as a barrier to recycling of secondary materials in other countries and discourage overall recycling of secondary materials.

V. NMA SUPPORTS RETENTION OF THE EXISTING EXCLUSIONS TO THE REGULATORY DEFINITION OF SOLID WASTE

In the 2007 Supplemental Proposal, EPA proposes to retain the existing exclusions from the regulatory definition of solid waste. 72 Fed. Reg. at 14,205. NMA supports the retention of these existing exclusions. In particular, NMA supports the retention of the following exclusions from EPA regulation, as they currently exist:

CITATION	EXCLUSION
40 C.F.R. § 261.2(c)(3)	Unlisted byproducts or sludges that are reclaimed
40 C.F.R. § 261.4(a)(5)	In-situ mining exclusion
40 C.F.R. § 261.4(a)(4)	Spent sulfuric acid exclusion
40 C.F.R. § 261.4(a)(8)	Secondary materials that are reclaimed and returned to the original process exclusion
40 C.F.R. § 261.4(a)(13)	Recycled scrap metal exclusion

[7] While NMA takes the position that the one-time notification in the 2007 Supplement Proposal is unlawful, *see* Section IV(D) *infra*, a one-time notification with regard to exports of excluded secondary materials is preferred to the notice and consent procedures as proposed.

CITATION	EXCLUSION
40 C.F.R. § 261.4(a)(14)	Shredded circuit boards exclusion
40 C.F.R. § 261.4(a)(17)	The exclusion applicable to spent materials generated within the mineral processing industry that are recovered by mineral processing or beneficiation
40 C.F.R. § 261.4(a)(20),(21)	The zinc fertilizer exclusions

In addition, NMA requests that EPA clarify that the adoption of the proposed "generator control" exclusion and "transfer-based" exclusion would have no impact on:

CITATION	EXCLUSION
40 C.F.R. § 266.70	The precious metals exemption
40 C.F.R. § 266.100(g)	The counterpart to the exemption for precious metals
40 C.F.R. § 266.100(d)	The "smelting, melting and refining furnace" exemption

Furthermore, NMA urges EPA to clarify in the final rule that existing EPA and authorized state regulatory determinations regarding the RCRA status of mineral processing materials will remain valid. For example, following a number of "hazardous waste" inspections of primary mineral processing facilities in 2000, EPA issued inspection reports that applied a "traditional" RCRA analysis and existing regulatory exclusions in 40 C.F.R. Part 261 to conclude that certain materials generated and reused within the primary copper industry are not subject to RCRA Subtitle C regulation. The Arizona Department of Environmental Quality also issued in 2000 a "jurisdictional-based" regulatory determination concluding that certain primary copper mineral processing material streams are not "discarded" and, as such, are not "solid wastes."[8] EPA should state in the final rule that these regulatory determinations remain in place and unaffected by the final rule. Further, in the event of determinations for a given primary mineral processing material stream that are based on both a "traditional" waste analysis and "jurisdictional-based" analysis, EPA should clearly state in the preamble to the final rule that a "jurisdictional-based" conclusion that the material is not "discarded" should control.

Finally, NMA strongly urges EPA to expressly confirm that nothing in the proposed rule would adversely affect the status of wastes subject to the Bevill Amendment exclusion, including wastes subject to the "Bevill Mixture Rule." EPA must make abundantly clear that the proposed rule does not in any sense narrow the scope of the existing regulatory exclusions applicable to this industry's operations. To do otherwise might encourage some to mistakenly read into the

[8] NMA incorporates by reference the regulatory determinations provided in Section III.C(2) of the comments submitted to EPA by Freeport-McMoRan Copper & Gold Inc.

agency's authorized RCRA jurisdiction materials and wastes that have never before been subject to Subtitle C regulation. Such a result would most certainly render baseless any claims that the proposed rule is "de-regulatory" in nature, as the agency repeatedly states in the preamble. *See e.g.*, 72 Fed. Reg. at 14,175. NMA does not believe EPA intends such a result, nor that the proposal, rightly interpreted, would lead to such a result. NMA requests confirmation of this position.

EPA also seeks comment "on the option of allowing a regulated entity to choose which exclusion the person is subject to in those cases where more than one exclusion could apply." 72 Fed. Reg. at 14,205. NMA believes the law currently allows generators to choose among potentially applicable exclusions, and generators should continue to have that right.

EPA also seeks comment on whether a generator should be required to document the choice made among potentially available exclusions. The answer is no. Using EPA's regulations on hazardous waste determinations as a model, generators are required to determine if a solid waste is a hazardous waste. 40 C.F.R. § 262.11. As part of that overall determination, a generator must decide whether any of the exclusions in 40 C.F.R. § 261.4 apply. For almost 30 years, this system has worked well with no requirement that a generator document that a particular exclusion applies. No reason exists now to modify that system to require documentation of which exclusion might apply. Moreover, EPA has not even suggested a possible rationale in the 2007 Supplemental Proposal to require such documentation.

VI. EPA'S PROPOSED LEGITIMACY CRITERIA AND LEGITIMACY FACTORS

A. EPA Need Not, and Should Not, Revisit the Existing Legitimacy Criteria and Should Not Codify the Legitimacy Criteria in the Final Rule but Maintain Such Criteria as Guidance

As NMA expressed in its 2004 Comments, 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 provided in the "Lowrance Memo" (OSWER directive 9441.1989(19) (April 26, 1989) has proven to be inadequate. 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 likely to be counterproductive, leading to over-simplification that brands legitimate recycling processes as illegitimate and thereby causes valuable resources to be wasted.

In its 2004 Comments, NMA recommended that EPA can and should address any identifiable deficiencies in the existing criteria through more targeted approaches. NMA maintains this position. As noted in the preamble to the 2003 Proposal, "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." NMA believes that 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.

NMA also encouraged EPA, in its 2004 Comments, to not codify the legitimacy criteria, but instead to keep the criteria as guidance. These reasons are provided again here in abridged form. First, guidance provides greater flexibility for the case-by-case evaluation and weighing of multiple factors, which EPA has acknowledged 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. 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. This effect will be particularly noticeable if EPA finalizes the proposed regulatory language that the regulated community must "demonstrate" they comply with the "legitimacy criteria."

NMA continues to be concerned with EPA's 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. By incorporating into the proposed regulatory text that "persons claiming to be excluded" from regulation due to recycling "must be able to demonstrate that the recycling is legitimate," reinforces the conclusion that generators and other handlers of recyclable secondary materials would face a new and substantial hurdle.

B. The Criteria Should be Factors for Consideration, Rather than Mandatory Requirements

EPA's restructured approach would codify two of the four legitimacy factors proposed in 2003 as mandatory criteria, while leaving the other two criteria as factors for consideration. NMA urges EPA to reconsider this approach. In the preamble to the 2003 Proposal, EPA stated that the application of the legitimacy criteria "will require some subjective evaluation and balancing." 68 Fed. Reg. at 61,583. Yet, by making certain criteria mandatory, the agency strips the subjectivity out of the legitimacy determination. EPA recognizes in the 2007 Supplemental Proposal the concern of certain stakeholders that codifying the legitimacy factors "could eliminate the flexibility in the existing guidance for subjective evaluation and balancing of factors when making a determination." 72 Fed. Reg. at 14,198. EPA then seeks additional comment on this point. *Id*.

By making certain factors mandatory the agency is creating a less flexible framework in which to determine whether a particular recycling practice is legitimate. Particular recycling practices should not have to satisfy all of the listed criteria to be deemed legitimate. Instead, if a recycling operation is "weak" on one criterion, it should still be considered legitimate based on other criteria. A determination of legitimacy can be based on a wide range of factors. No single factor is necessary in all cases, and thus EPA should not 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.

Even though EPA is proposing to make two of the four criteria proposed in 2003 as factors for consideration, the agency states that failure to meet these factors "may be an indication that the material is not legitimately recycled." *Id*. at 14,216 (proposed 40 C.F.R. § 261.2(g)). While EPA states that "there may be some situations in which a legitimate recycling process does not conform to one of these factors," *id.* at 14,198, NMA finds no reassurance that implementing agencies will properly apply these as factors instead of mandatory criteria.

C. NMA Supports EPA's "2 Plus 2" Approach as a Preferred Alternative to the Four Mandatory Criteria Proposed in 2003

NMA supports EPA's proposed "2 Plus 2" approach to codifying legitimacy criteria as a preferred alternative to the four mandatory criteria proposed in 2003. While NMA maintains that the legitimacy criteria should be kept as guiding factors, as described in detail above, NMA prefers the "2 plus 2" approach as an alternative because it makes mandatory the only two criteria that NMA believes directly relate to the issue of legitimacy.[9] Also, as EPA correctly acknowledges, there are "situations in which a recycling scenario appears to be legitimate, but one of [the] factors [proposed for consideration] was not met . . . because that factor is not applicable or relevant to the materials being recycled or to the particulars of the recycling process." *Id*. at 14,199. NMA agrees with EPA that not making the other two criteria mandatory would "allow flexibility for these types of situations." *Id*. NMA, however, still has outstanding concerns with the proposed legitimacy criteria, as detailed below.

Furthermore, NMA urges EPA to not apply the "2 plus 2" approach to recycling operations or secondary materials not otherwise addressed by the 2007 Supplemental Proposal. EPA acknowledges that "[the agency] generally do[es] not see the need for the regulated community or overseeing agencies to revisit previous determinations and expect[s] any written determination from these agencies to, in effect, be grandfathered." *Id*. at 14,198. If EPA believes this statement to be true, there is no reason to apply the "2 plus 2" approach to the legitimate recycling of secondary materials outside the scope of the proposed exclusions.

1. NMA Supports the First Mandatory Criterion that a Material Must be Useful to be Legitimately Recycled

NMA believes that the first mandatory criteria proposed (*i.e.*, that the secondary material "provides a useful contribution to the recycling process or to a product of the recycling process") is 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.").

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[9] While NMA supports these two criteria as being directly related to the issue of legitimacy, NMA does have concerns relating to the proposed regulatory text for the second criterion. *See infra* Section VI(C)(2).

2. NMA Supports the Second Mandatory Criteria that a Product from the Recycling Process is Valuable But Urges EPA to Clarify

NMA also believes that the second mandatory criterion proposed (*i.e.*, that the recycling process "must produce a valuable product or intermediate") is also appropriate because it relates to the issue of legitimacy. The proposed regulatory text, however, is flawed in a number of respects. First, the proposed regulatory text requires that the product or intermediate of the recycling process either be: (1) sold to a third party; or (2) used by the generator or recycler. *See id.* at 14,216 (Proposed 40 C.F.R. § 261.2(g)). EPA should make clear that a product may be "valuable" even if it is "sold at a loss." EPA should also make clear 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.

Second, the proposed regulatory text would allow the products to be used by the generator (or the recycler), instead of being sold to a third party. The term "generator," however, 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.[10]

3. EPA Should Eliminate the "Management As a Valuable Commodity" Factor

The first of EPA's two factors to be considered as part of a legitimacy determination is "[h]ow the hazardous secondary material to be recycled is managed." 72 Fed. Reg. at 14,216 (proposed 40 C.F.R. § 261.2 (g)(3)(i)). EPA continues, and states that:

> The generator and the recycler should manage such material as a valuable commodity. Where there is an analogous raw material, the hazardous secondary material should be managed, at a minimum, in a manner consistent with the management of the raw material. Where there is no analogous raw material, the hazardous secondary material should be contained.

Id. For the reasons set forth below, NMA urges that EPA's "management as a valuable commodity" legitimacy factor be deleted.

a. How Secondary Materials Are Stored Is Not Relevant To Whether They Are Being Legitimately Recycled

[10] 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). 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 second mandatory criterion, might not be able to use the secondary material (unless the material is "sold" to the related corporate entity).

The purpose of EPA's legitimacy criteria and factors, including the "management as a valuable commodity" factor, is to help determine whether a recycling activity is legitimate, or is instead discard (and therefore subject to EPA treatment and disposal regulations). As an initial matter, NMA believes that EPA's "management as a valuable commodity" legitimacy factor is inconsistent with RCRA and the decision of the D.C. Circuit in *ABR*, and should not be included as a legitimacy factor.

Under *ABR*, the fact that a material is stored prior to recycling, as well as the manner of such storage, have no bearing on whether the material has been discarded or is instead legitimately recycled. *ABR* stated that EPA's regulation of storage of in-process materials in the mining and mineral processing industry:

> thoroughly ignores the *AMC I* court's holding that under RCRA, materials must be thrown away or abandoned before EPA may consider it to be "waste". As we have said, material *stored for recycling* is plainly not in that category.

ABR, 208 F.3d. at 1053 (emphasis added). The Court then noted that the *AMC I* court "had in mind materials that were being held or stored for later recycling or reuse." *Id.* The Court stated that the *AMC I* Court wrote of secondary material "retained," and that "retaining signifies holding onto, keeping, storing." *Id.* "To say that when something is saved it is thrown away is an extraordinary distortion of the English language." *Id.*

From this language, it is clear that the *ABR* Court believed that when a material is saved, and stored prior to recycling, it is not discarded. Under the *ABR* decision, HOW a material is stored is irrelevant to determining whether a material is being legitimately recycled or in some way is being discarded and disposed. Accordingly, EPA's evaluation of how a material is stored as part of a legitimacy determination is contrary to RCRA and *ABR*.[11]

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[11] This conclusion is consistent with the 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.

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 not legitimately recycled but is discarded, the particular benchmarks set forth in the 2007 Supplemental Proposal would not be appropriate. Under the first measure, "the Agency would expect the secondary materials . . . to be managed in a manner" consistent with any "analogous" raw material. For these purposes, materials would be deemed analogous if they have "similar" physical and chemical characteristics. 72 Fed. Reg. at 14,199. 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."

Moreover, EPA is ignoring the possibility that there may be valid reasons for handling "analogous" materials differently. Segregation and differential management 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). According to EPA, however, any differences between the types of management could cause the entire recycling operation to be deemed a sham.

c. EPA's Legitimacy Factor As It Applies To Storage of Materials That Are Not Analogous to Any Raw Materials Should Be Interpreted Consistently With EPA's Proposed Exclusions

The second yardstick under this factor specifies that secondary materials without any analogous raw materials should be "contained." 72 Fed. Reg. 14,216 (proposed 40 C.F.R. § 261.2 (g)(3)(i)). NMA notes that this requirement expands upon the "generator control" and "transfer-based" exclusions, which require only that the storage of materials in "land-based units" be "contained." Under this legitimacy factor, it appears that all storage of materials lacking "analogous raw materials" must independently meet this "contained" requirement, regardless of whether such storage is land-based.

If EPA were to adopt this factor in the final rule, NMA urges that it be interpreted consistently with the "contained" requirements for land-based units proposed for the "generator control" and "transfer-based" exclusions. If EPA adopts a "contained" condition in the final rule, NMA generally supports EPA's preamble statement that a "recyclable material is 'contained' if it is placed in a unit that controls the movement of the hazardous secondary material out of the unit," *id.* at 14,186, presumably meaning that design elements of the unit itself can demonstrate the necessary containment. As stated above, NMA believes that such containment can also be demonstrated if the potential movement of hazardous secondary materials out of the unit is controlled in some other fashion. EPA itself properly recognizes that "local geological and meteorological conditions can greatly influence whether [materials that are stored in direct contact with the soil in a material or man-made impoundment] would be contained." *Id*. EPA continues that:

> These local conditions, along with specific measures that a facility employs, such as liners, leak detection measures, inventory control and tracking, control of releases, or monitoring or inspection during construction and operation of the unit, may be used in determining whether the hazardous secondary material is contained in the land-based unit.

Id. at 14,186-14,187. NMA believes that each of these elements should be evaluated and considered in all legitimacy determinations.

The existence of state regulatory programs to control or address releases should also be considered proof that secondary materials are adequately contained for purposes of the legitimacy determination. A summary of examples of these types of programs is found above in Section IV(A)(2) .

4. EPA Should Eliminate Its Proposed TAR Factor

EPA's second legitimacy factor that must be considered under the 2007 Supplemental Proposal as part of the legitimacy determination, is the "toxics along for the ride" (TAR) factor. A recycling process would not be deemed legitimate under this factor 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 compared to those that are found in analogous products; or (3) exhibits a hazardous characteristic that analogous products do not exhibit. 72 Fed. Reg. at 14,198. As discussed below, and as NMA discussed in its 2004 Comments, NMA believes this TAR factor is flawed for several reasons.

a. TARs In a Product Are Not an Indicator of Sham Recycling or Disposal in the Mining and Mineral Processing Industry

As an initial matter, NMA does not believe that the "TAR factor" has any bearing on whether a recycling process is legitimate in the primary mining and minerals processing industry. Products in the mining and mineral processing industry meet rigid and technical specifications and/or contract requirements. Thus, there is no question that the recycling process is legitimate. 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 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 under one of the TAR factor prongs, thereby raising concerns that the reclamation is not legitimate. Nonetheless, the copper producer would be recovering valuable copper from the secondary material and producing a product that meets high-grade specifications. In this instance, 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 would 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 EPA's proposed TAR factor, the now 50-fold increase in selenium concentration might be viewed as "significant," and thus the process might be viewed as a sham method of discarding the selenium.[12]

NMA notes in addition that the virgin raw materials (*i.e.,* ores) in the mining and mineral processing industry 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 other metals might end up in the (virgin) product. However, EPA could not claim that the raw material is being disposed of under a theory that the product contains "toxics along for the ride."[13] Similarly, the Agency should not be able to argue that a recycled secondary material is being discarded, just because some metallic impurities end up in the finished product of the recycling process.[14]

b. TARs In A Product Of The Mining And Mineral Processing Industry 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 in the mining and mineral processing industry 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

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[12] 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 actually produced in the industry are produced from a combination of primary and in-process materials. Nevertheless, NMA includes 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 the concentration of constituents in the products, the recycling process could still be legitimate.

[13] 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.'").

[14] Of course, EPA may argue 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 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.

avoid engaging in "illegitimate" recycling) would apparently be to landfill these 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, or further the goals of RCRA.

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.[15]

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

EPA's proposed "TAR" test is particularly inappropriate for in-process materials within the primary mining and minerals processing industry. As an initial matter, it is unclear how the test could be applied within the industry, because as a practical reality there are no products made without the use of in-process materials. The recycling of in-process materials is intrinsic to mining and mineral processing production, as the industry seeks to maximize the recovery of the target metal(s) and mineral(s) present in the virgin ore. 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 ores). It would probably not be sufficient to make these changes temporarily; the composition of ores is

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[15] 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.

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 mining and mineral processing industry production process, the product could conceivably have higher concentrations of non-target metals than would otherwise be the case. However, this result would in no sense 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, in the mining and mineral processing industry, 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.[16] Finally, the only non-target metals in the in-process materials (and therefore in the final products) are indigenous to the ores.

d. Evaluating Products Based on Hazardous Waste Characteristics Is Inappropriate

Finally, NMA objects to the use of the hazardous waste characteristics in one of EPA's TAR prongs to evaluate products. 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). These 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.

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[16] 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. Impact On Legitimacy Determination In the Mining and Mineral Processing Industry

In defense of its legitimacy criteria and factors, EPA states that:

> As part of proposing regulatory provisions on the legitimacy of recycling, we are simply reorganizing, streamlining, and clarifying the existing legitimacy principles. We believe that the regulatory definition of legitimate recycling, when applied to specific recycling scenarios, will result in [legitimacy] determinations that are consistent with the earlier policy.

72 Fed. Reg. 14,198. EPA adds that:

> Therefore, we generally do not see the need for the regulated community or overseeing agencies to revisit previous determinations and expect any written determinations from these agencies to, in effect, be grandfathered.

Id. NMA supports the position that all prior determinations that a mining and mineral processing recycling activity is legitimate should remain in place. EPA should make it clear in the final rule that all prior legitimacy determinations are grandfathered and remain valid.

E. NMA Opposes the Use of Economics as a Separate and Additional Legitimacy Factor

NMA supports EPA's decision of not requiring the consideration of economics as a separate and additional legitimacy criterion. NMA urges EPA to maintain this approach in the final rule. EPA states in the preamble that "consideration of economics could be a factor in informing whether the hazardous secondary material input provides a useful contribution and whether the product of the recycling operation is of value." 72 Fed. Reg. at 14,200. In discussing the applicability of economics to these two criteria, EPA states: "[M]etal prices fluctuate and at times are below the cost of processing. However, recovery of metals is usually legitimate recycling." *Id*. at 14,200 n.6. NMA strongly supports EPA's recognition of this important truth.

NMA also supports EPA's recognition that "many recyclers are paid by generators to accept hazardous secondary materials," and that this situation may still be a "legitimate recycling operation properly excluded from regulation." *Id*. at 14,201. In addition, NMA urges EPA to recognize that even if reclamation broke even or lost money, it still can be an act of corporate social responsibility that provides a social good by conserving raw materials. Finally, NMA believes that economics can and should be used to demonstrate that the recycling process produces a valuable product, and thus could be used as a safe harbor in demonstrating legitimate recycling.

VII. NMA SUPPORTS A LESS RESTRICTIVE PETITION PROCESS FOR NON-WASTE CLASSIFICATIONS

EPA is proposing a process whereby facilities may petition the agency for three types of non-waste determinations. *See* 72 Fed. Reg. at 14,214. These non-waste determinations would apply to materials: (1) reclaimed in a continuous industrial process; (2) indistinguishable in all relevant aspects from a product or intermediate; and (3) reclaimed under the control of the generator. *Id*. (Proposed 40 C.F.R. § 260.30(d)-(f) & 260.34). The purpose of this non-waste petition process, as declared by EPA in the preamble, is to provide facilities "an administrative procedure for receiving a formal determination that their recycled hazardous secondary material is not discarded." *Id*. 14,201. If the agency grants a non-waste determination to the facility, none of the restrictions and conditions embedded in the "generator control" and "transfer-based" condition would apply to the materials covered by the determination. *See id*. at 14,202.

NMA supports a process whereby facilities may receive a case-by-case determination that their materials are not "discarded." NMA, however, supports a less restrictive process than that which the agency has proposed. EPA should not impose a more stringent set of requirements for reclamation than the existing regulatory program. Furthermore, the process, if adopted as proposed, should not be used to reevaluate prior state determinations on whether materials are subject to RCRA Subtitle C jurisdiction. EPA should clarify in the final rule that the "non-waste" determination process does not alter prior authorized state regulatory determinations, nor does it require an authorized state to submit to EPA for approval these determinations.

As proposed, EPA requires facilities' to meet a set of criteria in order to obtain a non-waste determination. One of these criteria, which apply to all three non-waste determinations, would address:

> Whether the hazardous constituents in the material are reclaimed rather than discarded to the air, water or land at significantly higher levels from either a statistical or from a health and environmental risk perspective than would otherwise be released by the production process.

72 Fed. Reg. at 14,215 (Proposed 40 C.F.R. §§ 260.34(b)(3), 260.34(c)(3), & 260.34(d)(2). According to EPA, "[t]o the extent that the hazardous constituents are a continuation of the original hazardous secondary material, their release to the environment is an indicator of discard." *Id*. at 14,203.

NMA opposes this criterion. In the mining and mineral processing industry, it is inevitable in some cases that releases will be at a "significantly" higher level due to the concentration of metals in sequential production operations. These releases, however, may not pose a meaningful risk. Thus, NMA objects to the notion that not meeting this criterion is an "indicator of discard" or that the secondary material is not "being 'reused within an ongoing production process." *Id*. As EPA acknowledges, "production processes can vary widely from industry to industry." *Id*. at 14,202. Thus, EPA should not burden the non-waste determination

process with criteria that do not accurately assess whether a material has in fact been discarded, particularly within the mining and mineral processing industry.

VIII. IMPLEMENTATION ISSUES

A. ENFORCEMENT

1. EPA Has Properly Recognized That Generators Should Not Be Liable If Downstream Reclaimers Do Not Meet All Of The Conditions Of the Proposed "Transfer Based" Exclusion

In the preamble to EPA's 2007 Supplemental Proposal, EPA makes necessary and important modifications to the enforcement approach set forth in the 2003 Proposal. In the 2003 Proposal, EPA provided that if a generator managing a secondary material as a non-waste sent the material to a reclaimer who did not comply with all of the requirements of the exclusion, the materials would lose the exclusion "from the point when the material was first generated." 68 Fed. Reg. at 61,581. Under this approach, the generator could have been targeted for enforcement even if he or she had no knowledge of or control over the actions of "the [reclaimer] who actually cause[d] the loss of the exclusion." *See* NMA 2004 Comments 47, fn. 51.

EPA has properly addressed significant egregious aspects of this enforcement approach in the 2007 Supplemental Proposal. EPA describes its enforcement approach as follows:

> If a reclaimer were to fail to meet any of the above-described pre-conditions or restrictions on the management of hazardous secondary materials that are applicable to the reclaimer, then the materials would be considered discarded by the reclaimer and would be subject to RCRA Subtitle C regulation from the point at which the reclaimer failed to meet a condition or restriction, thereby discarding the material.

72 Fed. Reg. at 14,197.

EPA, however, clarifies that in such circumstances the generator would not be liable if the generator has met the conditions attendant to the "transfer-based" exclusion:

> Please note that the failure of the reclaimer to meet conditions or restrictions does not mean the material was considered waste when handled by the generator, as long as the generator can adequately demonstrate that he has met his obligations, including the obligations under proposed 40 C.F.R. 261.4(a)(24)(iv)(A) to make reasonable efforts to ensure that the material will be recycled legitimately and otherwise managed in a manner that is protective of human health and the environment. A generator who met his reasonable effort obligations could in good faith ship his excluded materials to a reclamation facility where, due to circumstances

> beyond his control, they were released and caused environmental problems at the facility. In such situations, and where the generator's decision to ship to that reclaimer is based on an objectively reasonable belief that the hazardous secondary materials would be recycled legitimately and otherwise managed in a manner consistent with this regulation, the generator would not have violated the terms of the exclusion.

Id.

NMA supports the above aspects of EPA's enforcement approach, including EPA's explicit recognition that the existence of a RCRA violation by a reclaimer does not invalidate, or have any effect on the burden of persuasion or proof regarding, the "reasonable efforts" determination by a generator required under EPA's proposed "transfer-based" exclusion.

2. EPA Must, However Also Recognize That Generator Liability Is Incurred Only After A Material Is Discarded, Not During The Period When Discard Has Not Occurred

EPA's enforcement structure remains flawed, however, because if a generator were to not comply with all of the conditions of the "generator control" exclusion at some point in time, EPA would impose RCRA liability retrospectively during a time period when secondary materials were managed in complete compliance with the exclusion and not discarded. EPA's 2007 Supplemental Proposal states that:

> Persons that handle these hazardous secondary materials would be responsible for maintaining the [generator control] exclusion by ensuring that these restrictions are met. If the hazardous secondary materials were not managed pursuant to these restrictions, they would not be excluded. They would then be considered solid and hazardous wastes if they were listed or they exhibited a hazardous waste characteristic for Subtitle C purposes from the time they were generated.

Id. at 14,188.

For example, assume that secondary material was stored in compliance with the EPA "generator control" exclusion for six months in complete compliance with the proposed exclusion 40 C.F.R. § 261.4(a)(23), with the proper notice made to EPA. Then, six months and one-day out, the generator's name changes, but no revised notice is ever sent to EPA. Under EPA's proposal, EPA could "reach back" and the generator would be in violation of RCRA for the entire initial six month period, even though during that time frame the material was not discarded, and the generator complied with all conditions. Given that the penalties for a single RCRA violation can be $32,500 per day, the result in the above scenario would be that the generator would be potentially exposed to upwards of $5.8 million in penalties for a time period where it managed secondary material in complete compliance with EPA's regulations, and the secondary material in question was not discarded.

NMA believes that the proper, and lawful, approach under RCRA would be that a generator would be in violation of RCRA, and subject to enforcement action, only for the period of time after the generator did not meet the terms of the "generator control" exclusion. NMA requests that EPA adopt this approach in its final rule.

B. FEDERAL RULES FOR TRANSPORT OF HAZARDOUS WASTE PREEMPT STATE RULES THAT ARE MORE STRINGENT OR BROADER IN SCOPE

In the preamble to the 2007 Supplemental Proposal, 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 revised 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. 72 Fed. Reg. at 14,209.

NMA 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 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).[17]

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 2007 Supplemental Proposal, materials covered by the "generator control" or "transfer-based" regulatory exclusions 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

[17] *See also N.Y. Dep't of Envtl. 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].").

materials would clearly be preempted.[18] Moreover, other state requirements for transport of excluded materials would also be preempted.[19]

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. EPA, in fact, has been willing to do so in the past.[20] The Agency should likewise do so in the current case, because preemption will significantly advance the goal of facilitating nationwide recycling operations.

C. IMPLICATIONS FOR F006 RECYCLING

NMA seeks clarification on the application of the 2007 Supplemental Proposal to the environmentally beneficial recycling of F006. EPA has recognized that "F006 represents one of the largest hazardous waste streams amenable to recycling." 68 Fed. Reg. 72,568, 72,569 (Dec. 12, 2003). The agency has engaged in ongoing efforts to encourage F006 recycling.[21] EPA's 2003 Regulatory Plan included the consideration of changes to existing RCRA regulations to "eliminate existing disincentives to the safe recycling of F006." *Id*. at 72,569. EPA subsequently withdrew this potential rulemaking, supposedly preferring to link F006 recycling with this rulemaking on the regulatory definition of solid waste.

The Phelps Dodge Miami Inc. (PDMI) smelter 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

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[18] *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).

[19] *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. 61,908 (October 30, 2003).

[20] *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.").

[21] *See* 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 (Aug.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 (Feb. 20, 2004) (proposing to exclude the F006 generated by one company from the definition of solid waste).

Hazardous Waste No. F006). These sludges are received at the facility as hazardous wastes (e.g., accompanied by a hazardous waste manifest). The facility, however, does not require a hazardous waste permit for F006. The F006 is scheduled by appointment to ensure it is delivered and unloaded directly into the smelter's concrete floor bedding plant where it is mixed with other feedstocks to produce a smelter-ready feed. The F006 is inserted into the process without prior storage. PDMI's recycling of F006 is subject to EPA's "boiler and industrial furnace" (BIF) regulations. 40 C.F.R. §§ 261.100(d) and 266.122.

In its 2002 Inspection Report for PDMI, EPA Region IX, applying a "traditional" waste analysis, concluded that the F006 is a listed "hazardous waste" sludge being reclaimed by PDMI (40 C.F.R. § 261.2(c)(3)). Furthermore, EPA found that the blending of F006 with other smelter feedstocks in the bedding plant is an integral part of the smelting (reclamation) process, and as such, that the reclamation process commences in the bedding plant. Because F006 is not stored prior to reclamation, EPA Region IX ultimately concluded that the F006 recycling is subject to the limited requirements of 40 C.F.R. § 261.6(c)(2). Region IX also evaluated PDMI's activities using F006 purchased from World Resources Company (WRC). The issuance of the Region IX Inspection Report coincided with EPA Headquarters' handling of the then proposed variance from the definition of "solid waste" for WRC-generated F006.[22] Region IX ultimately concluded that WRC-generated F006 is subject to 40 C.F.R. § 261.6(c)(2) because there is no storage of the F006 prior to reclamation.

While EPA's proposed exclusions pertain to the reclamation of listed sludges, NMA is of the understanding that the 2007 Supplemental Proposal will not alter these prior determinations made by EPA Region IX. NMA urges EPA to explicitly state in the final rule preamble that the contemplated exclusions will not supersede any prior F006 determinations or the WRC F006-granted variance. EPA's proposed "transfer-based" exclusion, and in particular the financial assurance requirement placed on reclaimers under this exclusion, would create a large financial disincentive to purchasing F006. If EPA were to ignore the prior determinations and the WRC F006-granted variance and instead apply the proposed "transfer-based" exclusion to PDMI's handling of F006, PDMI may not continue to purchase F006 as the financial assurance requirement would likely negate any economic incentive to purchase F006. Consequently, environmentally sound recycling of F006 would be discouraged, thus undermining EPA's intended goal of "encourage[ing] safe, environmentally sound recycling and resource conservation." 72 Fed. Reg. at 14,172.

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[22] *See* 64 Fed. Reg. 68,968 (Dec. 9, 1999). On August 13, 2002, EPA published its final rule granting WRC's variance request from the definition of "solid waste" for F006 sold to smelters for metals recovery. 67 Fed. Reg. 52,617.

IX. EPA'S RECYCLING STUDIES

A. EPA's Recycling Damage Case Study Does Not Support Restrictions on Mining and Mineral Processing Land-Based Storage Practices

EPA's "Assessment of Environmental Problems Associated with Recycling of Hazardous Secondary Materials" (Damage Case Study or DCS) is intended to support EPA's imposition of limitations on the land-based storage of secondary materials and residuals from recycling such secondary materials. In the case of the mining and mineral processing industry, however, the study provides no support for the limitations proposed by EPA.

The Damage Case Study itself rests on three supporting appendices. The first of these appendices is a "Summary Table of Damage Cases from Recycling of Hazardous Secondary Materials." The Summary Table lists the 208 individual damage cases examined by the EPA contractor, ICF, Inc., and provides a matrix-type, abbreviated description of each site, including the recyclable materials at issue, the alleged damage, the alleged cause of the damage, source of cleanup funding and cost of cleanup. Appendix 2 consists of more detailed, one-to-three page descriptions of the 208 damage cases. Appendix 3 contains a listing of additional "Sites Considered But Not Included in the Damage Case Analysis."

Three main criteria governed inclusion of a particular damage case in the study:

1. The alleged damages should be attributable to recycling practices at the site.

2. The study would rely only on those cases in which some damage from recycling occurred after 1982 (*i.e.*, after the enactment of both RCRA and CERCLA) but would not exclude cases in which damages occurred both pre-and post-1982.

3. The site's recycling practices must have involved either the recycling of regulated hazardous wastes or recycling of hazardous secondary materials excluded from RCRA regulation.

DCS, pp.2-4

Regarding this third point, the Damage Case Study declares: "The Agency is interested in these types of damage cases because they may indicate the extent to which environmental damages can occur even when recycling is conducted under a stringent regulatory regime [*e.g.*, RCRA Subtitle C], *and whether such damages may be more or less prevalent for materials that are explicitly exempted or excluded from RCRA regulatory controls*." DCS, p.4 (emphasis added).

1. Only One Of the 208 Purported Damage Cases Involved A Primary Mining or Mineral Processing Facility

After reviewing the Study and its appendices, NMA could identify only a single damage case—out of a total of 208 cases—involving a primary mineral processing facility. While there

were several other smelting sites in the 208 damage cases described in the first two appendices, those sites were almost entirely secondary smelters operating with RCRA permits. *See, e.g.*, Appendix 2 (site descriptions for Encycle, Inc. (p. 313), Federated Metals (p. 24), and Refined Metals Corporation (p. 303)). In a small handful of cases, the facility at issue may have first been constructed as a primary mineral processing facility, but soon lost that identity and became either a secondary smelter or a facility of an entirely different nature. *See, e.g*. Appendix 2 (site descriptions for Circle Smelting Corporation (originally constructed in 1904 as a primary zinc smelter . . . converted in 1920 to a secondary zinc and aluminum smelter (p.121); River Recycling Industries, Inc. ("developed in the later half of the 1800s as a copper refinery and then converted to a brickworks" (p. 243)).

The P4 Production LLC/Monsanto site in Soda Springs, Idaho is the only primary mineral processing facility in the 208 damage cases. The site description notes: "Contamination occurred both before and after 1982. Contamination occurred from a variety of sources, some of them not recycling related and the clean up cost [up to $9.5 million], therefore, is not completely related to recycling." Appendix 2, p. 120. EPA recognized that industrial recycling practices changed substantially following the enactment of RCRA and CERCLA and concluded that industry practice occurring during the current regulatory programs under those statutes are "most relevant to the definition of solid waste rulemaking." Damage Case Study, p. 3. EPA, however, arbitrarily selected 1982 as the date after which industry practice reflected the current regulatory programs.

In the case of the Monsanto facility all of the alleged issues were addressed pursuant to CERCLA. Implementation of all remedial actions, which included substantial changes to the plant's handling of secondary materials, extended past 1982. In addition, all of the plant's secondary materials were exempt from RCRA regulation until 1991. Therefore, the alleged "problems" described n the Damage Case Study reflect practices that were significantly changed pursuant to the CERCLA process and do not reflect practices at that plant during the current regulatory program.

2. Sixteen Other Potential Cases Rejected – Appendix 3

While there is only a single primary mineral processing damage case cited in the first two appendices, Appendix 3 in contrast cites several mining and primary mineral processing cases that were "considered but not included in the damage case analysis." By NMA's count, Appendix 3 contains 16 mining and primary mineral processing industry sites, not one of which was included in the damage case analysis. While "insufficient information" was the reason cited for not including four of these cases in the overall analysis, four other cases were dismissed because the alleged damages were "pre-RCRA." Seven cases were not included because the alleged damages were "unrelated to recycling." The final case was dropped because, according to Appendix 3, there was "no damage."

Appendix 3 is proof that the Study's authors clearly sought information on the mining and mineral processing industry's recycling practices and possible adverse environmental impacts from those practices. Nonetheless, only one site was included in the damage case study and even in that solitary case the Study recognized that the alleged damages "occurred from a

variety of sources, some of them not recycling related." Sixteen other industry sites were rejected. The Damage Case Study thus cannot support the imposition of any additional controls on the mining and mineral processing industry's land-based storage of secondary materials destined for recycling or the residues from recycling such materials.

B. EPA's Good Recycling Practices Study

NMA recognizes the good work that went into the preparation of the agency's study, "An Assessment of Good Current Practices for Recycling of Hazardous Secondary Materials" (Good Practices Study or GPS). The study can serve as a helpful compilation of factors to consider when conducting recycling practices across a broad spectrum of industries. In short, many of the "good recycling practices" that the Study extols have been in place for years within the mining and mineral processing industry

The mining and mineral processing industry generates secondary materials that are or can be:

1. utilized on-site as feedstocks to or ingredients in the normal minerals production process;

2. shipped off-site for further use in the minerals production process at a facility within the generating company; or

3. shipped off-site to a facility within the industry (but owned by a company other than the generator) for further mineral production.

In each of these instances, the secondary materials at issue are not wastes because they have not been discarded and are part of the normal production process.

1. Materials Management Incentives

NMA agrees with the Good Practices Study's conclusion that liability obligations created by statutes such as CERCLA and RCRA, and their counterparts at the state level, are meaningful incentives to encourage a company to manage its secondary materials in a responsible manner. This is particularly true of CERCLA's strict, joint and several and retroactive liability provisions. With regard to RCRA as an incentive, the greatest volumes of the mining and mineral processing industry's wastes remain subject to the Bevill Amendment. Nonetheless, to the extent that our industry facilities generate non-Bevill wastes—and especially if these are hazardous wastes—RCRA responsibilities contribute to good materials management practices.

The mining and mineral processing industry's operations also are subject to increasingly stringent and comprehensive state regulatory programs (*e.g.*, the Arizona Aquifer Protection Plan). State water and waste management statutes and regulations, along with state regulatory requirements pertaining strictly to mining and mineral processing operations, are major factors in NMA members' operational decisions.

Liability concerns are certainly, however, not the sole incentive for responsible management of secondary materials. Economic incentives are equally real. In the mining and primary mineral processing industry, one of (if not the single) largest costs is the initial cost of extracting mineral values from the earth. Once that matrix of mineral values is extracted, subsequent steps in the beneficiation and processing operations are designed to recover as product as much of the mineral values as can be done in an economically efficient manner, consistent with good materials management requirements. It simply makes more economic sense to recover as product those mineral values from the already-extracted ores and concentrates, than to engage unnecessarily in the single most costly step of the whole process—further extraction.

The Good Practices Study also discusses environmental management systems (EMS) as an additional incentive for good recycling practices. The Study recognizes the importance of obtaining an EMS and ISO 14001 certification, recognizing it as evidence of an industry's generally responsible operating practices. Some of NMA member facilities have ISO-certified EMS programs. Other NMA member facilities are currently working on developing EMS programs.

2. Materials Management Tools

"Due diligence" audits are standard industry practice in the case of property transfers among different companies. These audits have also become an increasingly common tool if and when an industry facility needs to transfer RCRA hazardous waste to an off-site RCRA-permitted treatment, storage or disposal facility (TSDF) or to, for example, used oil, battery or solvent reclaimers. While the Study is right to note that due diligence audits can vary in their specifics, the types of topics noted by the Study are generally the same areas of inquiry that industry due diligence audits are designed to explore.[23] *See* GPS, p. 11.

Secondary materials generated and used by NMA member companies—whether used on-site, off-site but within the same company, or at a different company's site—must all satisfy certain basic technical criteria. The secondary materials and the production technology must "fit" each other. That is why, for example, a primary copper production operation that also generates lead matte would likely ship that lead matte to a lead production facility that has the technical capability of extracting and processing lead values in the material. Technology at the copper smelter is geared towards copper production, not the efficient extraction and processing of lead values.

Over the years, these secondary material transfers have become an integral part of the industry's overall production process. These material transfers are normal, routine business transactions and as business transactions they follow a developed system. Upon arrival at the receiving facility shipments are routinely checked to ensure that the material meets the

[23] While NMA members can and do conduct many of their own due diligence audits, a number of member companies also participate in audit consortiums such as CHWMEG, Inc. and the Waste Facilities Audit Association, described in the Study at pp. 15-18.

specifications set forth in the business arrangement between the generating and receiving company. Should a shipment not meet those specifications, the general industry practice is for the receiving company to notify the generator and return the materials to the generator.

A very similar approach is taken when secondary materials generated outside the mining and mineral processing industry are shipped to facilities within the industry, including when such materials have heretofore been regulated as hazardous wastes. To date, examples of such shipments are limited principally to shipments of F006 to PDMI and shipments of K061 to Horsehead facilities. In both cases the secondary materials must meet specific requirements to be successfully employed as feedstock materials (in the case of F006 as a copper feedstock; in the case of K061 as a feedstock to produce zinc oxide).