ORAL ARGUMENT NOT YET SCHEDULED

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

No. 11-1189 (and consolidated cases)

SOLVAY USA INC.,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Petition for Review of Final Administrative Actions of the
United States Environmental Protection Agency

FINAL BRIEF FOR ENVIRONMENTAL RESPONDENT-INTERVENORS

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DATED: November 12, 2014

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SOLVAY USA INC., *Petitioner*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.	Case No. 11-1189 (and consolidated cases)

ENVIRONMENTAL RESPONDENT-INTERVENORS' CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Louisiana Environmental Action Network, Sierra Club, Clean Air Council, Desert Citizens Against Pollution, Montanans Against Toxic Burning, Huron Environmental Activist League, Downwinders At Risk, Partnership for Policy Integrity, and Environmental Integrity Project (collectively, "Environmental Intervenors") hereby certify as follows:

(A) Parties and Amici

All parties, intervenors, and *amici* appearing in this Court are listed in the Opening Brief for Environmental Petitioners. Circuit Rule 26.1 disclosures for Environmental Intervenors appear in the form filed below.

(B) Rulings Under Review

References to the rulings at issue also appear in the Opening Brief for Environmental Petitioners.

(C) Related Cases

Apart from the consolidated cases, Environmental Intervenors are unaware of currently pending related cases. The Court has ordered these cases be heard by the same panel as will hear the following currently pending challenges in this Court to rules related to the rules challenged herein:

U.S. Sugar Corporation v. EPA, No. 11-1108 (and consolidated cases)

American Forest & Paper Association v. EPA, No. 11-1125 (and consolidated cases)

American Chemistry Council v. EPA, No. 11-1141 (and consolidated cases)

DATED: November 12, 2014

Respectfully submitted,

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ENVIRONMENTAL RESPONDENT-INTERVENORS' RULE 26.1 DISCLOSURE STATEMENT

Louisiana Environmental Action Network

Non-Governmental Corporate Party to this Action: Louisiana Environmental Action Network ("LEAN").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: LEAN is a corporation organized and existing under the laws of the State of Louisiana. LEAN is a nonprofit organization which works with citizens' groups throughout the state of Louisiana to develop, implement, protect, and enforce legislative and regulatory environmental safeguards.

Sierra Club

Non-Governmental Corporate Party to this Action: Sierra Club.

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: Sierra Club, a corporation organized and existing under the laws of the State of California, is a national nonprofit organization dedicated to the protection and enjoyment of the environment.

Clean Air Council

Non-Governmental Corporate Party to this Action: Clean Air Council ("CAC").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: CAC is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania. CAC is a not-for-profit organization focused on protection of public health and the environment.

Desert Citizens Against Pollution

Non-Governmental Corporate Party to this Action: Desert Citizens Against Pollution.

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: Desert Citizens Against Pollution is an organization existing under the laws of the State of California to protect the communities of the desert from pollution and its threat to human health and the environment.

Montanans Against Toxic Burning

Non-Governmental Corporate Party to this Action: Montanans Against Toxic Burning.

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: Montanans Against Toxic Burning, a corporation registered and existing under the laws of the State of Montana, is a nonprofit, grassroots citizens' advocacy group of health professionals, small business owners, farmers, ranchers, builders, and other concerned citizens focused on air quality issues in Montana. Their goal is to educate the public about the human health and environmental risks of toxic waste incineration. They oppose the burning of hazardous, toxic, and solid wastes in industrial facilities not specifically designed for that purpose. They support the responsible disposal of wastes, including true recycling and other alternatives, and the reduction of hazardous air pollutants through the use of best available control technology.

Huron Environmental Activist League

Non-Governmental Corporate Party to this Action: Huron Environmental Activist League.

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: Huron Environmental Activist League, certified and existing as a non-profit educational corporation under the laws of the State of Michigan, was formed by the residents of Alpena County to educate and protect residents of Alpena County (and other counties as dictated by the Board of Directors) from human and environmental contaminants and their impact on the environment and public health and safety; to work with environmental organizations, regulatory agencies, corporations, and lawmakers in seeking solutions and alternatives to human and environmental contamination; and to monitor the activities of companies that generate human and environmental contaminants in Alpena, Michigan (and elsewhere as dictated by the Board of Directors), as well as the regulatory agencies that oversee such companies.

Downwinders at Risk

Non-Governmental Corporate Party to this Action: Downwinders at Risk.

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: Downwinders at Risk, a nonprofit corporation organized and existing under the laws of the State of Texas, is a diverse grassroots citizens' group dedicated to reducing toxic industrial air pollution in North Texas and to continued education and advocacy concerning cement plant pollution.

Partnership for Policy Integrity

Non-Governmental Corporate Party to this Action: Partnership for Policy Integrity ("PFPI").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: PFPI, a corporation organized and existing under the laws of the Commonwealth of Massachusetts, is a nonprofit organization that uses science, policy analysis, and strategic communications to promote sound energy policy.

Environmental Integrity Project

Non-Governmental Corporate Party to this Action: Environmental Integrity Project ("EIP").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: EIP, a corporation organized and existing under the laws of the District of Columbia, is a national nonprofit organization that advocates for more effective enforcement of environmental laws.

DATED: November 12, 2014

Respectfully submitted,

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

API	American Petroleum Institute
EPA	Respondents U.S. Environmental Protection Agency and Gina McCarthy, Administrator
NACWA	National Association of Clean Water Agencies
NRDC	Natural Resources Defense Council
RCRA	Resource Conservation and Recovery Act

STATUTES AND REGULATIONS

Pertinent statutes and regulations appear in addenda to the Opening Brief for Environmental Petitioners ("Envtl.Pet. Br.") and this brief.

STATEMENT OF THE CASE

Environmental Intervenors are national, state, and local organizations dedicated to protecting the health and welfare interests of their members against harmful air pollution. They have challenged EPA's decision to exempt numerous discarded materials from being "solid waste" and thus exempt the combustion units that burn them from having to meet protective air emission standards. In the instant case, Industry Petitioners seek to compound EPA's already illegal loopholes and allow combustion units to emit still more dangerous air pollution without having to meet those protective standards. In this brief, Environmental Intervenors point out errors that EPA may not have pointed out and supplement EPA's arguments on certain key points.[1]

Environmental Intervenors incorporate by reference their explanation of:

- the Resource Conservation and Recovery Act's ("RCRA's") definition of "solid waste," 42 U.S.C. §6903(27); *see also id.* §6903(26A) (defining "sludge"), Envtl.Pet. Br. 3-4, 6;

[1] We refer herein to Industry's brief as "Ind. Br." and EPA's as "EPA Br."

- Congress's careful connection of RCRA with the Clean Air Act, Envtl.Pet. Br. 4-6;
- the distinction between waste-burners subject to standards under Clean Air Act §129 and plants (industrial boilers, in particular) burning non-waste fuels subject to standards under Clean Air Act §112, 42 U.S.C. §§7429, 7412, Envtl.Pet. Br. 19-20;
- the distinction between "major" and "area" sources of hazardous air pollutants and the laxity of EPA's rules governing emissions from area sources, Envtl.Pet. Br. 19-20;
- how the rules at issue in this case already allow nearly 200,000 area source boilers to burn any materials EPA deems non-waste without any limit on the resulting emissions, *id.* 19-21 (noting also that EPA's regulations for major source boilers allow more emissions of certain pollutants than its regulations for waste-burners); and
- how this Court's rejection, at *Chevron* step one, *Natural Res. Def. Council* ("*NRDC*") *v. EPA*, 489 F.3d 1250, 1257, 1260 (D.C. Cir. 2007), of EPA's prior position that Clean Air Act §129 covers only units that burn solid waste without energy recovery led EPA to promulgate the rules at issue here: 76 Fed. Reg. 15,456 (Mar. 21,

2011), JA0072, and 78 Fed. Reg. 9112 (Feb. 7, 2013), JA0195, Envtl.Pet. Br. 12-13.

In these rules, EPA established a framework for determining whether a "secondary material" has been discarded, examining factors like whether that material was discarded in the first instance, *e.g.*, 76 Fed. Reg. 15,470/2, JA0086, whether any use as a fuel is "legitimate," *e.g.*, *id.* 15,459/1, 15,470/2-3 (explaining "legitimacy criteria"), JA0075, 0086, and whether the material has been transferred, *id.* 15,471/3-73/1, JA0087-89.[2] *See id.* 15,550/2 (codified at 40 C.F.R. §241.2) (defining "secondary material"), JA0166. As well as categorically exempting certain materials, EPA established numerous routes for secondary materials to escape solid waste status. 40 C.F.R. §241.3(b)(1) (material that is burned by generator and meets legitimacy criteria); §241.3(b)(4) (material that is discarded but then sufficiently processed and meets legitimacy criteria), §241.3(c) (non-waste determination process, which uses legitimacy criteria); §241.4(b) (petition process for entire class of material, which allows EPA to ignore violation of legitimacy criteria).

[2] Environmental Intervenors do not concede that EPA properly followed its stated approach in every circumstance or that it rationally developed each legitimacy criterion.

As a result of the rules at issue here, the number of commercial and industrial waste incinerators has been "substantially reduce[d]," just as it was by the interpretation this Court rejected in *NRDC*, 489 F.3d at 1258. Of almost 200,000 industrial boilers and cement plants, only 106 are considered waste-burners. Envtl.Pet. Br. 19-21; *cf. NRDC*, 489 F.3d at 1261 (noting that EPA's definition unlawfully shifted thousands of units from being considered incinerators). The now-exempted facilities will avoid the stringent standards that Congress intended to govern units that burn solid waste.

Industry here seeks to expand the existing exemptions to all transferred materials and sewage sludge. "Transferred materials" could include literally anything, including materials that contain heavy metals that can be emitted into the air when burned, and that contain other constituents that can lead to the air emission of other pollutants, including dioxins. For example, treated wood and creosoted railroad ties contain elevated levels of metals like lead, cadmium, arsenic, and chromium, as well as potentially hundreds of other chemicals. EPA-HQ-RCRA-2008-0329-1811 at 9-10, JA0558-59; 76 Fed. Reg. 15,483/2-84/3, JA0099-100; *see also* Envtl.Pet. Br. 7-12 (discussing characteristics of certain wastes EPA partially or wholly exempted).

The pollutants ultimately emitted from burning wastes can cause cancer, liver problems, neurological problems, eye and skin irritation, and a range of harms

to the heart and lungs, including heart attacks, asthma attacks, and other respiratory symptoms that can require emergency room visits and hospitalization. EPA-HQ-RCRA-2008-0329-1973 at 6-13, JA0688-95.

SUMMARY OF ARGUMENT

Transferred Materials. Industry's extremely broad claim that EPA cannot find any material in a "firm-to-firm" transfer was discarded has no support in RCRA or this Court's case law. Industry is also utterly mistaken when it claims EPA found here that all secondary materials transferred from one firm to another are solid waste. Industry's arguments notwithstanding, EPA's approach to transferred materials is consistent with this Court's case law and RCRA. Moreover, Industry's claim that its position is environmentally beneficial is flatly wrong: it would undo the congressionally-established tie between RCRA and the Clean Air Act and would endanger the health and welfare of millions of people by allowing waste-burning without protective standards Congress intended.

Sewage Sludge. The statutory language Industry claims excludes sewage sludge from being waste has no application to sludge. Further, Industry's interpretation of RCRA would have Congress including sewage sludge as solid waste with one hand, but excluding it with the other. Nothing suggests Congress intended such an incoherent result.

ARGUMENT

I. INDUSTRY'S ARGUMENTS ABOUT TRANSFERRED MATERIALS LACK MERIT.

A. Industry Has Not Shown That EPA's Approach to Transferred Materials Is Unlawful or Irrational.

Industry claims (at 9-12) that RCRA bars EPA from finding that secondary materials that have been transferred from one firm to another are solid waste. Industry's claim fails both as a matter of law, for neither RCRA nor the case law Industry relies on compels Industry's interpretation, and as a matter of logic, for EPA has not actually found that all secondary materials transferred from one firm to another are solid waste.

The relevant question under RCRA is whether a particular material was discarded in the first instance. Materials are discarded when their original owner disposes of them because they are not useful to her. *E.g.*, *Am. Mining Cong. v. EPA*, 824 F.2d 1177, 1184 n.7 (D.C. Cir. 1987) ("*AMC I*") (quoting *Webster's Third New International Dictionary* (1981) as defining "discard" as "to drop, dismiss, let go, or get rid of as no longer useful, valuable, or pleasurable"). Thus, when a person tears down her house and gets rid of the debris, she has discarded that debris. *See id.* 1193 ("discarded" unambiguously has ordinary, everyday meaning of "disposed of, abandoned, or thrown away"). In short, the transfer of

discarded materials from one firm to another does not make them any less discarded.

Further, discarded materials do not cease to be discarded "just because a reclaimer has purchased or finds value in [part of them]." *United States v. ILCO, Inc.*, 996 F.2d 1126, 1131 (11th Cir. 1993); *accord, e.g., Am. Petroleum Inst.* ("*API*") *v. EPA*, 906 F.2d 729, 741 (D.C. Cir. 1990) ("*API I*") (rejecting argument that material that "is indisputably 'discarded' before being subject to metals reclamation" becomes not discarded when taken in by waste processor); 76 Fed. Reg. 15,471/3 ("Wastes may have value, but are still wastes."), 15,473/3 ("the cases unmistakably hold that secondary materials do not lose their waste status simply because they have value."), JA0087, 0089.

Industry does not even consider this question. Instead, it claims (*e.g.*, at 8) that EPA could not lawfully or rationally find a material a solid waste on the sole ground that that material was part of a "firm-to-firm transfer[]." In particular, Industry relies (at 11-12) on *Safe Food & Fertilizer v. EPA*[3] as the basis for arguing that RCRA prohibits EPA from finding that transferred materials are discarded. But far from establishing a *per se* bar on finding that transferred secondary materials are discarded, *Safe Food* says that "materials destined for

[3] 350 F.3d 1263, 1268 (D.C. Cir. 2003), *modified on reh'g in unrelated part* 365 F.3d 46 (D.C. Cir. 2004).

future recycling by another industry may be considered 'discarded'; the statutory definition does not preclude application of RCRA to such materials if they can reasonably be considered part of the waste disposal problem." 350 F.3d at 1268 (emphasis in original); *see* 76 Fed. Reg. 15,472/2, JA0088. Thus, there is no conflict with *Safe Food* here.[4]

In any event, contrary to Industry's belief, *Safe Food* would not be dispositive even if it said what Industry wishes it did. At issue there was the recycling of hazardous wastes as a material in the manufacturing of zinc fertilizer, a useful product. 350 F.3d at 1265. By contrast, here, Industry does not seek to recycle any of the secondary materials at issue as materials in manufacturing any product: it seeks to burn them for energy recovery. As Environmental Intervenors have explained, Congress carefully distinguished between "material" and "energy" recovery under RCRA. Envtl.Pet. Br. 34-36. By collapsing "material" and "energy" into one, Industry's interpretation contravenes congressional intent.

Industry also wrongly claims (at 14) that, by setting up an exemption process for materials that could otherwise be solid waste, EPA has violated this Court's

[4] Although discarded material does not cease to be discarded just because it is transferred, the transfer of a material can be evidence that it is discarded because both when an owner discards a secondary material and when she legitimately transfers it, she gives up control over it. *See* 76 Fed. Reg. 15,472/2, JA0088; EPA Br. 54-55.

case law by taking "jurisdiction" over non-wastes.[5] Not at all. In *API v. EPA*, 216 F.3d 50 (D.C. Cir. 2000) ("*API II*"), this Court specifically upheld EPA's authority to use a similar process that excluded "petrochemical recovered oil from the definition of solid waste, provided that certain conditions [we]re met," but found it would otherwise be solid waste.[6] *Id.* 58. A petitioner (also a petitioner here) argued that EPA lacked "authority to regulate any petrochemical recovered oil…because such materials are not 'discarded'" and thus took the position that "no…conditions may be imposed" under RCRA. *Id.* 59. The Court rebuffed the petitioner and found "the premise of EPA's rule is sound precisely because it is meant to regulate only discarded materials." *Id.* Thus, this Court has already rejected Industry's claim that

[5] Industry returns to this argument elsewhere, Ind. Br. 16-17, including in a footnote without any citation, *id.* 12 n.8. To the extent Industry did not forfeit any of these arguments by making them in a "conclusory fashion," *e.g.*, *CTS Corp. v. EPA*, 2014 WL 3056493, at *10 (D.C. Cir. July 8, 2014), our response here applies to its arguments there, too.

[6] In the hazardous waste context, EPA has established numerous tests that find certain materials are not solid wastes so long as they satisfy certain requirements. 40 C.F.R. §261.2(e)(1) ("Materials are not solid wastes when they can be shown to be recycled [in various ways]."); *see also id.* §261.2(f) (establishing requirements those "who raise a claim that a certain material is not a solid waste, or is conditionally exempt from regulation," must follow, including to "provide appropriate documentation"). Indeed, for hazardous waste, EPA has created exclusions that, in some instances, require a material to be treated in a certain way, *e.g.*, *id.* §261.4(a)(9), require certain documentation and reporting, *e.g.*, *id.* §261.4(a)(20)(ii)(D), (iii)(C)-(D), or allow certain exclusions to be granted only through a petition process that includes public notice and comment, *id.* §261.4(a)(17)(iv).

EPA lacks authority under RCRA to require a secondary material to satisfy conditions before being deemed not solid waste. That holding applies equally here.[7]

Without discussing this holding from *API II*, Industry relies on an out-of-context snippet from *AMC I*. *See* Ind. Br. 14 (citing *AMC I*, 824 F.2d at 1179 ("the scope of EPA's jurisdiction is limited to those materials that constitute 'solid waste.'")). Though *AMC I* sometimes uses broad language about "jurisdiction," like "EPA's regulatory jurisdiction" or "RCRA jurisdiction," *e.g.*, 824 F.2d at 1182-83, the issue the Court addressed was not broad enough to encompass Industry's claims today. There, it was whether EPA "exceeded its regulatory authority in seeking to bring materials that are not discarded or otherwise disposed of within the compass of 'waste.'" *Id.* 1178 (characterizing petitioners' argument). As the Court explained, RCRA has a part addressing "hazardous waste management," under which "EPA is directed to promulgate regulations establishing a comprehensive management system.… EPA's authority, however,

[7] In dicta, the *API II* Court speculated that if the rule at issue "incidentally regulate[d]" oil that was not discarded, "[p]resumably," an affected party "could attempt to show" that the materials at issue were not discarded. *Id.* 59. To the extent that speculation has persuasive force, EPA has more than satisfied it by building into its rule numerous ways for an affected party to make such a showing and escape regulation. (Environmental Intervenors do not concede all these escape hatches are lawful and rational.)

extends only to the regulation of 'hazardous waste[,]'" and "the scope of EPA's jurisdiction is limited to those materials that constitute 'solid waste.'" *Id.* 1179. As used in *AMC I*, "jurisdiction" is thus shorthand for EPA's authority to regulate "hazardous waste management" (a statutorily defined term, 42 U.S.C. §6903(7)) and does not address EPA's authority to determine what is solid waste, the issue here.

Fundamentally, too, Industry's argument begs the question: does EPA's rule classify all transferred materials as solid waste? Industry's arguments focus almost exclusively on the "starting point" of EPA's rule. Ind. Br. 12; *accord, e.g.*, *id.* 8, 13. By definition, therefore, Industry is not looking at the entire rule at issue. As EPA explained, what the agency did in the rule as a whole was to treat a secondary material's transfer as a relevant factor in determining whether that material is a solid waste. 76 Fed. Reg. 15,471/3-73/1, JA0087-89; *see also supra* n.4; EPA Br. 55-56, 60-61. A transferred secondary material can be not solid waste under a variety of circumstances. *See supra* p.3 (citing regulations). As a result of all the exclusions EPA initially proposed and then expanded in the two actions at issue, the universe of waste-burners has already been cut to 175 (on initial proposal) and then to 106 (after EPA expanded its exclusions). Envtl.Pet. Br. 21.

In attacking EPA's approach to transferred materials, Industry wants even more materials excluded, but fails to show that EPA's approach on this issue is

inconsistent with RCRA. The Clean Air Act requires EPA to define "solid waste" under RCRA, and RCRA authorizes EPA to "prescribe…such regulations as are necessary to carry out [EPA's] functions under this chapter." 42 U.S.C. §§6912(a)(1), 7429(g)(6); *see* 78 Fed. Reg. 9135/2 (invoking both authorizations), JA0218; 76 Fed. Reg. 15,458/1-2, 15,549/3 (same) (second reference codified at 40 C.F.R. pt.241), JA0074, 0165. Although EPA cannot lawfully classify discarded materials as not discarded or vice versa, Industry identifies nothing in RCRA that requires EPA to arrive at the classification for any particular transferred material in the way Industry prefers.[8] *See* EPA Br. 56-57; *cf. EPA v. EME Homer City Generation*, 134 S. Ct. 1584, 1603-06 (2014) (statute has unambiguous mandate for EPA "to reduce upwind pollution," subject to certain limits, but "does not dictate" how EPA should allocate those reductions).

Moreover, Industry's claim that EPA "concede[d]" that it "cannot" take the approach it took to transferred materials is utterly mistaken, Ind. Br. 17-18 (quoting 76 Fed. Reg. 15,471/2, JA0087). Industry fails to recognize that the purported concession was merely EPA's summary of industry comments and thus no concession at all. *See* 76 Fed. Reg. 15,471/1-3 (summarizing industry

[8] Industry claims (at 14 n.9) two out-of-Circuit Clean Water Act cases support it. Those cases are inapposite. Petitioners there showed the statute unambiguously foreclosed EPA's position in relevant part; here, Industry makes no such showing.

comments), 15,471/3-73/1 ("EPA disagrees with these comments to the extent they argue that the Agency has arbitrarily determined that secondary materials transferred between companies are wastes."), JA0087, 0087-89.

Industry adds (at 15-16) an argument that the mere existence of transfers of secondary materials somehow renders it impossible for EPA to find those materials have been discarded under RCRA. But the existence (or volume) of firm-to-firm transfers in no way shows EPA's rule is inconsistent with RCRA or irrational. As EPA explained, contrary to Industry's insistence (at 16-18), it is consistent with RCRA and reasonable for EPA to protect human health and the environment and to place the burden of showing that a particular material is not discarded in a fact-specific context on industry. EPA Br. 56-57, 58-59 (discussing *Am. Chemistry Council v. EPA*, 337 F.3d 1060, 1065-66 (D.C. Cir. 2003)); EPA-HQ-RCRA-2008-0329-1837 at 166-69, JA0620-23.[9]

Also, Industry wrongly claims (at 19-20) that EPA's approach lacks record support because none of the incidents described in EPA-HQ-RCRA-2008-0329-

[9] *See also, e.g.*, EPA-HQ-RCRA-2008-0329-1825 at 4 ("The composition of spent solvents can vary widely depending on the original chemical structure and the solvent, and the substance with which it was first used."), JA0592; EPA-HQ-RCRA-2008-0329-1974 at 14 ("[Construction and demolition waste] as a waste fuel is extremely variable."), JA0716; *cf. Gonzalez v. Dep't of Labor*, 609 F.3d 451, 458-59 (D.C. Cir. 2010) (agency acted consistently with statute when it established "customary allocation" of payment and "provided several opportunities for [plaintiff] to submit evidence and argument justifying a higher allocation").

0423, JA0317, "involved burning alternative fuels for energy recovery." In fact, record evidence shows that one of those incidents involved a facility that "was burning wood in a furnace." EPA-HQ-RCRA-2008-0329-1402 at 22, JA0532. In any event, Industry misses the point: EPA must determine whether a material has been discarded at any point, including when or after it is transferred, just like in the incidents EPA described. *See* EPA Br. 59-60.

Industry also asserts (at 20-21) that EPA's treatment of transferred materials conflicts with the goals of RCRA and is economically and environmentally harmful. To the contrary, EPA's rule determines whether a stationary source will be regulated under the Clean Air Act as a waste-burner, and thus provides health and welfare protections that are fully consistent with RCRA and the Clean Air Act. 42 U.S.C. §§6901(b)(3), 6902(a)(10), 7401(b), 7429. Industry's claim (at 2-3, 20-21) that the rule will essentially eliminate productive waste-burning is entirely baseless. *See supra* p.4 (existing exclusions drastically reduce number of sources that are considered waste-burners).

As for economic harms, Industry overstates the impact of EPA's rule. It claims (at 21) that the rule will cause facilities to stop burning materials identified

as wastes. Yet it provides no reason to believe that facilities burning wastes would not clean up their emissions enough to meet any relevant requirements.[10]

For environmental harms, Industry fails to acknowledge that its preferred approach allows for waste materials to be burned without the waste-burners being regulated as waste-burners, with the wastes' noxious constituents released and then breathed or otherwise taken into the bodies of their neighbors. Already, significant numbers of units that burn, among other things, demolition debris claim to be "area" source boilers that escape the more protective regulations applicable to waste-burners and "major" source boilers. EPA-HQ-RCRA-2008-0329-1974 at 4, 9, 13-14, JA0709, 0711, 0715-16; EPA-HQ-RCRA-2008-0329-1393 at 1, 3, 13-24, JA0494, 0496, 0506-17. Industry's approach would allow even more area sources to escape any meaningful limits on their emissions of air pollutants. Millions of

[10] Past claims of "economic catastrophe" from environmental regulation have often fallen short. *E.g.*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 492 (2001) (Breyer, J., concurring in part and concurring in the judgment) (discussing development of catalytic converter); EPA Admin'r Lisa P. Jackson, Remarks on the 40th Anniversary of the Clean Air Act, As Prepared, yosemite.epa.gov/opa/admpress.nsf/12a744ff56dbff8585257590004750b6/7769a6b1f0a5bc9a8525779e005ade13!OpenDocument (Sept. 14, 2010) ("Today's forecasts of economic doom are nearly identical—almost word for word—to the doomsday predictions of the last 40 years. This 'broken-record' continues despite the fact that history has proven the doomsayers wrong again and again."), JA0861-62. Further suggesting Industry's claimed harms are chimerical, the air emission standards implicated in the instant case come from what the best-performing sources actually achieve using existing control methods. *See* 42 U.S.C. §§7412(d), 7429(a).

Americans—including especially sensitive groups—live, work, pray, and play near facilities that can burn wastes. EPA-HQ-RCRA-2008-0329-1973 at 2-4, JA0684-86. People breathe in the pollution from these sources and face the ongoing threat of serious health harms, like cancer, neurological problems, eye and skin irritation, and a range of harms to the heart and lungs, including heart attacks, asthma attacks, and other respiratory symptoms that can require emergency room visits and hospitalization. *Id.* 6-13, JA0688-95. Industry ignores these effects.

B. Industry's Arguments Are Inconsistent with This Court's Case Law and Would Vitiate the Careful Connection Congress Forged Between RCRA and the Clean Air Act.

Under Industry's overly broad argument, it is difficult to conceive what would be solid waste. Nothing that ever goes from one firm to another and is burned for energy would be solid waste. Ind. Br. 7-20. In effect, as soon as someone decides to start burning a waste as a fuel, the waste is no longer waste. That position conflicts with RCRA for the reasons given above. It also conflicts with Clean Air Act §129, which requires any unit burning any solid waste for any purpose (subject to a few narrowly-drawn exceptions) to comply with protective emission standards. 42 U.S.C. §7429; *NRDC*, 489 F.3d at 1259-60 (rejecting EPA attempt to exempt units burning solid waste for energy recovery from standards this provision requires). Congress carefully and purposefully linked RCRA and the Clean Air Act and expressly directed EPA to "integrate" RCRA "with the

appropriate provisions of the Clean Air Act," as practicable, and "to the extent that [such integration] can be done in a manner consistent with the goals and policies" in both statutes. 42 U.S.C. §§6905(b)(1), 7429(g)(6); *see also, e.g.*, *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942) (agency must provide a "careful accommodation of one statutory scheme to another"); Envtl.Pet. Br. 26-27, 37-38, 42. Industry's arguments severely undercut the Clean Air Act and the protections Congress sought to ensure when it linked that statute with RCRA.

At times, Industry appears to claim that because some materials ultimately get purchased, they cannot be solid waste. *See* Ind. Br. 15-16. But the fact that money changes hands does not prove discard has not occurred. *See* 76 Fed. Reg. 15,471/3 ("Wastes may have value, but are still wastes."), JA0087. Indeed, this Court has already held that used oil remains discarded through its collection, processing, and sale. *E.g.*, *Ass'n of Battery Recyclers v. EPA*, 208 F.3d 1047, 1054-55 (D.C. Cir. 2000). Yet, used oil recyclers typically pay for the used oil that they collect. EPA-HQ-RCRA-2008-0329-1827 at 10 ("At current oil prices, used oil recyclers pay between $0.60 and $1.07 per gallon for used oil." (citation omitted)), JA0603. Thus, that someone paid for a secondary material does not render it automatically not solid waste.[11] *See also ILCO*, 996 F.2d at 1131.

[11] Industry would make the directional flow of money dispositive when convenient to Industry, but not dispositive when inconvenient. An industry commenter

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II. RCRA DOES NOT BAR SEWAGE SLUDGE FROM BEING SOLID WASTE.

Industry bases its argument that sewage sludge cannot be solid waste on Congress's excluding "solid or dissolved material in domestic sewage" from being solid waste. 42 U.S.C. §6903(27), *quoted in* Ind. Br. 22. But the "solid or dissolved material" that was in domestic sewage is now in sludge and not "in domestic sewage." *Id.*; *see* EPA-HQ-RCRA-2008-0329-1828 at 1 ("The suspended and dissolved solids generated in the wastewater treatment process are called sludges or sewage sludge."), JA0608. The sole exclusion Industry relies on thus has no application.

Moreover, Industry's contention (at 22) that, because sewage sludge "contain[s] materials from domestic sewage," it is statutorily excluded from being solid waste has no legal merit. Under RCRA, though sewage sludge results from processing domestic sewage, sewage sludge is not the same thing as domestic sewage. 42 U.S.C. §6903(26A)-(27). Congress defined "any solid, semisolid or

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recognized approvingly that EPA has said "receipt of a tipping fee [*i.e.*, a payment going the opposite direction, from generator to hauler/processer] is not dispositive of whether the material received is a waste." EPA-HQ-RCRA-2008-0329-2009 at 2 & n.5 (quoting 73 Fed. Reg. 64,668, 64,703 (2008)), JA0744. The Court should reject Industry's attempt to play "a game of heads [Industry Petitioners] win; tails [Environmental Intervenors] lose." *Sierra Club v. EPA*, 755 F.3d 968, 975-76 (D.C. Cir. 2014).

liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant, water supply treatment plant, or air pollution control facility" to be "sludge." *Id.* §6903(26A) (emphasis added). It further defined "any…sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility" to be "solid waste." *Id.* §6903(27). Municipal wastewater treatment plants generate sewage sludge. *See* EPA-HQ-RCRA-2008-0329-1828 at 4, JA0611. Sewage sludge is thus a type of sludge, and sludge is in turn solid waste.

Industry claims, however, that, by excluding materials "in domestic sewage," RCRA also excludes sewage sludge from being solid waste. This interpretation makes no sense and runs afoul of the Supreme Court's admonition against "attributing to Congress an intention to render a statute so internally inconsistent." *Greenlaw v. United States*, 554 U.S. 237, 251 (2008); *accord Nat'l Shooting Sports Found. v. Jones*, 716 F.3d 200, 213 n.11 (D.C. Cir. 2013) (rejecting interpretation that would have Congress authorize an action "while simultaneously prohibiting it").

Further, Industry's reading renders meaningless Congress's inclusion of the phrase "generated from a municipal…wastewater treatment plant" in RCRA's definition of "sludge": these plants are precisely the facilities that generate sewage sludge. *E.g.*, *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001); *New York v. EPA*, 443 F.3d 880, 887 (D.C. Cir. 2006). Here, there is an easy, natural reading that

maintains consistency and gives meaning to each word: the solid and dissolved materials in sewage discharged by a dwelling are not solid waste; the sludge resulting from treatment of that sewage is solid waste. *See* EPA Br. 61-63; *see also Nat'l Ass'n of Clean Water Agencies* ("*NACWA*") *v. EPA*, 734 F.3d 1115, 1127 (D.C. Cir. 2013) ("EPA regulations recognize that sewage sludge is distinct from domestic sewage").

Rather than engage with RCRA's full text—Industry passes (at 22) swiftly over Congress's inclusion of sludge in the solid waste definition and cites RCRA's definition of "sludge" only once (at 24)—Industry turns to mischaracterized case law, a footnote from a preamble from 1990, and off-point legislative history. Industry wrongly claims (at 24) that *NACWA*, 734 F.3d at 1127, "rejected the argument that sewage sludge and domestic sewage should be treated as distinct substances." But the Court was reviewing EPA's construction of Clean Air Act §129(g)(1)'s phrase "from…the general public"—not anything relating to the definition of solid waste—and it held that EPA had reasonably interpreted "'from…the general public' as meaning the original, but-for source of sewage sludge." *Id.* 1127-30. That holding does not say that sewage sludge is actually domestic sewage, just that EPA could reasonably interpret sewage sludge as coming "from the general public," albeit at a remove.

Industry's claim (at 25) that EPA historically viewed sewage sludge as covered by the domestic sewage exclusion is irrelevant. Whatever the merits of that argument, EPA Br. 63; 76 Fed. Reg. 15,514/2, JA0130; 45 Fed. Reg. 33,084, 33,101/2-02/2 (1980), JA0777-78, it is well-established that an illegal interpretation of a statute doesn't somehow become legal because it is repeated. *See New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008) ("previous statutory violations cannot excuse the one now before the court."). *A fortiori*, a single instance of EPA giving, in a footnote, EPA Br. 63, an illegal interpretation proves nothing about the interpretation.

None of the legislative history Industry cites is on point. Some comes from 1965, before Congress included sludge in the definition of solid waste and added a definition of sludge to RCRA in 1976.[12] The other legislative history cited comes from 1992—well after both the domestic sludge exclusion and modern definitions of "solid waste" and "sludge" were enacted—and thus "is entitled to little

[12] *Compare* Ind. Br. 26 (citing H.R. Rep. No. 899, at 444 (1965)), *and* Pub. L. No. 89-272, §203, 79 Stat. 992, 997-98 (1965) (definitions section of 1965 Solid Waste Disposal Act, defining "solid waste" to mean "garbage, refuse, and other discarded solid materials" and lacking definition of "sludge"), *with* Pub. L. No. 94-580, §2, 90 Stat. 2795, 2800-01 (1976) (definitions section of 1976 amendments, providing current definition of "solid waste" and adding definition of "sludge") (codified at 42 U.S.C. §6903(26A)-(27)).

weight."[13] *Friends of the Earth v. EPA*, 446 F.3d 140, 147 (D.C. Cir. 2006); *accord Bruesewitz v. Wyeth*, 131 S. Ct. 1068, 1081 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation.").[14]

Finally, Industry wrongly claims (at 22, 28-30) that EPA's finding that sewage sludge is solid waste somehow causes duplication and conflict between its RCRA regulations and its Clean Water and Clean Air Act regulations and thus contravenes RCRA. As EPA explains, this Court has already rejected Industry's argument with regard to that purported conflict. *See* EPA Br. 64-65 (citing *NACWA*, 734 F.3d at 1129). To the extent Industry also complains (at 29-30) that EPA violated some purported obligation to avoid conflict with state law, it is wrong because RCRA §1006, upon which Industry relies, imposes no such obligation. 42 U.S.C. §6905. Industry's sewage sludge arguments thus lack any merit.

CONCLUSION

For the reasons given above, the Court should deny Industry's petitions.

[13] Moreover, Industry relies on a single Senator's statement and even itself acknowledges that he made it in a different context. Ind. Br. 26-27.

[14] Even if there were some ambiguity about sewage sludge's status, EPA's interpretation would still be reasonable, contrary to Industry's position (at 27-28), because it reasonably interprets the statute for the reasons given above.

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Respectfully submitted,

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CERTIFICATE REGARDING WORD LIMITATION

Counsel hereby certifies, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), that the foregoing Final Brief for Environmental Respondent-Intervenors contains 5,019 words, as counted by counsel's word processing system, and thus complies with the applicable word limit established by the Court.

DATED: November 12, 2014

/s/Seth L. Johnson
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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November, 2014, I have served the foregoing **Final Brief for Environmental Respondent-Intervenors** on all registered counsel through the Court's electronic filing system (ECF).

/s/ Seth L. Johnson
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