ATTACHMENT

**BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

Proposed Revisions to the Definition of Solid Waste 72 FR 14172, March 26, 2007	))	Docket EPA-HQ- RCRA-2002-0031

COMMENTS OF THE AMERICAN CHEMISTRY COUNCIL

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EPA's restructured approach to this proposed rulemaking is a significant step towards meeting the directives of DC Circuit Court decisions because it appropriately focuses on the concept of discard, but it fails to fix the threshold problem of EPA equating recycling with discard.

ACC applauds the approach and initiative that the Agency is taking in this proposed rulemaking as it once again tries to amend its RCRA recycling regulations consistent with a series of rulings handed down by the U.S. Court of Appeals for the District of Columbia Circuit. Over the past 20 years, the court has taken EPA to task for misinterpreting the meaning of the term "solid waste" in RCRA. While this proposed rule, *if* finalized without inclusion of the myriad of potentially constricting issues the Agency seeks comment on, will allow for more recycling and reclamation of secondary materials than the 2003 proposed rule, it nonetheless fails to correct the underlying and longstanding problem of EPA equating recycling and reclamation of secondary materials with "discard."

As discussed in more detail later in our comments, ACC can support much of what the Agency is proposing in this rule. However, we would be remiss if we did not, once again, highlight for the Agency why we believe it continues to unlawfully extend its RCRA regulatory reach to materials that are not "discarded."

As EPA notes in the preamble to this proposed rule, in 1987 the court considered EPA's attempt to regulate the use, as raw materials in industrial processes, of valuable secondary materials that had been removed from other industrial processes. *American Mining Congress v. EPA* (*AMC I*).[1] In addressing the Agency's statutory obligations and jurisdiction, the Court wrote:

> RCRA was enacted, as the Congressional objectives and findings make clear, in an effort to help States deal with the ever-increasing problem of solid waste *disposal* by encouraging the search for and use of alternatives to existing methods of disposal (including recycling) and protecting health and the environment by regulating hazardous wastes. To fulfill these purposes, it seems clear that EPA need not regulate "spent" materials that are recycled and reused in an ongoing manufacturing or industrial process. These materials have not yet become part of the waste disposal problem; rather, *they are destined for beneficial reuse or recycling in a continuous process by the generating industry itself.* (emphasis in the original)[2]

The Court is clear that materials in a continuous process remaining within the generating industry are not wastes, but it does not limit its holding to those materials. The holding of the case is clear:

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[1] 824 F. 2d 1177 (D.C. Cir. 1987)

[2] Id. at 1186.

> Congress clearly and unambiguously expressed its intent that "solid waste" (and therefore EPA's authority) be limited to materials that are "discarded" by virtue of being disposed of, abandoned, or thrown away.[3]

The word "unambiguous" is important. Where the Court finds that Congress has unambiguously expressed its intent on an issue before it, the Court resolves the issue as Congress intended. If the Court finds that Congress has not spoken to the precise issue, it will defer to the Agency's interpretation -- so long as that Agency interpretation is reasonable and consistent with the statutory purpose at hand.[4] This distinction between regulatory arenas where EPA has a mandatory duty and those where it is allowed to exercise discretion forms the backbone of ACC's continued jurisdictional argument. While the Court has made clear that EPA jurisdiction is limited to materials that are "disposed of, abandoned, or thrown away," EPA's current regulations assert today, as they did at the time of the *AMC I* case, that the term "discarded material," and thus EPA's RCRA jurisdiction, extends well beyond the Court's definition. While EPA now recognizes that the court's ruling in *AMC I* does not stand for the proposition that *only* "materials in a continuous process remaining within the generating industry" constitutes legitimate recycling, the Agency continues to unlawfully extend its jurisdiction over valuable secondary material streams that are legitimately recycled and reclaimed, or used for the recovery of energy when the secondary material streams are appropriately fuel-like.

Two cases that followed *AMC I* help in identifying when something is "discarded." In *American Petroleum Institute v. EPA (API I)*,[5] the Court upheld the Agency's finding that a listed hazardous waste that was not part "of an ongoing manufacturing or industrial process within the generating industry, but part of a mandatory waste treatment plan described by EPA"[6] was indeed a discarded material. In *American Mining Congress v. EPA (AMC II)*,[7] the Court again upheld EPA's designation of a material as discarded. This time it was a series of solids precipitated out of wastewaters collected in surface impoundments that "may" be reclaimed in the future. The Court's logic was that because these materials were managed in wastewater treatment systems, they had become part of the solid waste disposal problem, were not part of an ongoing industrial process, and hence could be judged by EPA to be discarded. In both cases, the Court found the issue of discard to be ambiguous and deferred to the Agency's interpretation.

In 2000, the Agency was challenged again in *Association of Battery Recyclers, v. EPA*,[8] (*ABR*). The material in question was mineral processing materials and again the Court found them to be unambiguously not "discarded." The *ABR* Court reiterated its holding in *AMC I*, expressing exasperation at EPA's lack of action and reminding the Agency that

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[3] Id. at 1193.

[4] *Chevron v. NRDC*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 698 (1984).

[5] 906 F.2d 729 (D.C. Cir. 1990).

[6] Id. at 741.

[7] 907 F.2d 1179 (D.C. Cir. 1990).

[8] 208 F3d 1047 (D.C. Cir. 2000).

the Court's "interpretation of RCRA binds not only this Court, but also EPA."[9] The Court repeated its limitation on RCRA's jurisdiction to "discarded material" and, quoting directly from *AMC I*, defined discarded material as synonymous with material that is "disposed of, abandoned or thrown away."[10]

The type of material that the *ABR* Court explicitly *excludes* from this list of synonyms is "recycled" material,[11] yet EPA's current regulations make clear that the recycling of a material is equivalent to, and a subset of, solid waste disposal unless that material is explicitly excluded by another regulatory provision.[12] The court's rulings make clear that the recycling of spent materials is *not* part of the solid waste disposal problem. Recycling is an alternative to waste disposal, not a subset of it as it appears in the regulations.

More recently, in *Safe Food and Fertilizer v. EPA*[13], the court upheld an Agency rule that excluded from the definition of "solid waste," material being reclaimed outside the industry that generated it. Petitioners argued that *AMC I* and *ABR* limited the definition of "discarded material" such that recyclable material transferred to another firm or industry for recycling must always be viewed as discarded. The Court rejected this argument holding:

> Petitioners have misread our cases. We have held that the term "discarded" cannot encompass materials that "are destined for beneficial reuse or recycling in a continuous process by the generating industry itself." (*AMC I* and *ABR* citations omitted). We have also held that materials destined for future recycling by another industry *may* (emphasis in the original) be considered "discarded"; the statutory definition does not preclude application of RCRA to such materials if they can reasonably be considered part of the solid waste problem. (*API I* and *AMC II* citations omitted). But we have never held that RCRA compels the conclusion that material destined for recycling in another industry is necessarily "discarded." Although ordinary language seems inconsistent with treating immediate reuse within an industry's ongoing industrial process as a "discard," (*AMC I*, citation omitted) the converse is not true. As firms have ample reasons to avoid complete vertical integration, (citation omitted) firm-to-firm transfers are hardly good indicia of a "discard" as the term is ordinarily understood. (emphasis added)

In order to harmonize its regulations to these court holdings, EPA should simply and clearly exclude the legitimate recycling of all secondary materials from its RCRA Subtitle C jurisdiction. It can only do this by revising its definition of "discarded

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[9] Id. at 1052.

[10] Id. at 1051.

[11] "Secondary materials destined for recycling 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, supra* at 1051.

[12] 40 C.F.R. § 261.2 (c) states that: "Materials are solid wastes if they are *recycled* – or accumulated, stored, or treated before recycling."

[13] 350 F. 3d 1263 (D.C. Cir. 2003)

material" at 40 C.F.R. §261.2(a)(2) to mirror the holding of the Court, i.e., "discarded material" is material that is "disposed of, abandoned or thrown away."

In the preamble to this proposed rule, EPA contends that it has always considered hazardous secondary materials destined for "sham recycling" to be discarded and, hence, to be solid wastes for Subtitle C purposes. ACC agrees that secondary materials undergoing "sham recycling" are properly considered to be "discarded." The problem is that EPA seems to believe that *all* recycling is presumptively "sham recycling" and that the secondary materials involved are therefore solid wastes, unless they fall into one of the narrow recycling exclusions identified in 40 CFR 261.2(e) or 261.4(a). This unlawful and unreasonable presumption is the faulty regulatory foundation upon which EPA's present requirements are built. As the court has made clear on a number of occasions, EPA did not and does not have the statutory authority to regulate the legitimate recycling of secondary materials in the first place. To now define a proposed fix to this faulty foundation as "deregulatory" is clearly misleading – the legitimate recycling of secondary materials should not have been "regulated" as solid waste activity in the first place.

In summary, ACC encourages the Agency to reexamine its obligations clearly prescribed in the cases cited above. This rulemaking presents the opportunity to correct those regulatory errors for which the court has repeatedly taken the Agency to task. Instead of maintaining the existing definition of "discarded material" at 40 C.F.R. § 261.2 (a)(2) which includes all recycled material not specifically excluded by EPA in other provisions, the Agency should adopt the court's definition of discarded material, i.e, material that is "disposed of, abandoned, or thrown away." It can then proceed to identify when the recycling or reclamation of secondary materials will be considered to be "sham recycling" and the materials, therefore, to be solid wastes.

We now turn to the specifics of this proposed rule, and again, applaud the Agency for taking a significant step forward in its efforts to revise its RCRA regulations to encourage more recycling and reclamation of secondary material streams.

EPA should also exclude from the definition of solid waste fuel-like secondary materials that are used for energy recovery and materials used to produce products applied to the land.

As noted in our comments below, ACC supports the Agency's effort in this proposal to exclude certain secondary materials from the definition of solid waste and to increase resource recovery and recycling. However, we do believe that EPA erred in its decision to exclude materials burned for energy recovery or used to produce fuel, and materials used to produce products applied to the land in this proposal. Although the current proposal does have the potential to increase recycling, EPA has missed an opportunity to clearly recognize additional legitimate material "uses" as "non-discard" activities and to encourage increased resource recovery through the legitimate recovery of energy from fuel-like secondary materials and legitimate use of materials with inherent value in products applied to the land (e.g., in cement, fertilizers, etc.). Other EPA efforts to encourage energy recovery (e.g., the recently proposed expansion to the RCRA exclusion

for comparable fuels) are far more limited in scope and potential positive effect than this proposed rule.

ACC supports the Agency's proposed exclusion for hazardous secondary materials that are legitimately reclaimed under the control of the generator.

ACC supports EPA's decision to abandon the NAICS code approach that EPA proposed in 2003. As EPA correctly notes in the preamble to the current proposal, "whether materials are recycled in the same NAICS code is not an appropriate indication of whether they are discarded." (72 FR 14185) EPA is also correct in its conclusion that materials are not discarded and therefore the possibility for environmental releases is low in the three "under control of the generator" scenarios described by the Agency in the preamble. (72 FR 14185) In cases where the facility owner has a valuable secondary material that is reclaimed 1) at the generating facility, 2) at a different facility within the same company, or 3) through a tolling arrangement, the Agency correctly concludes that liability considerations and familiarity with the materials minimizes the chances for mismanagement of these materials. However, EPA should broaden the definition of "generating facility" in paragraph (1) of the proposed definition of hazardous secondary material generated and reclaimed under the control of the generator in 40 CFR 260.10 to include contiguous portions of a generating facility that are owned by another company but are nonetheless co-located (EPA specifically seeks comment on this issue at 72 FR 14186). Because of the number of mergers, business unit sales, and acquisitions that have occurred in the chemical manufacturing industry, it is not uncommon to have individual parts of a single contiguous, integrated manufacturing operation that are owned by different entities. In some cases, one entity may now own a portion of a contiguous facility that is completely surrounded by other portions of an entire integrated facility owned by another entity, even though the entire "facility" was in the past a single, contiguous facility under single ownership. In these cases, the joint familiarity with the materials and the common liability for any mismanagement of materials generated at the facility would provide protections similar to those presented in the case of single ownership. We believe that an exclusion encompassing multiple entities at a single contiguous site is a necessity.

Though ACC does not object to one-time certification requirement for materials reclaimed under the control of the generator, EPA's proposal to equate the same "company" with the same "person" at 72 FR 14186 is internally inconsistent and unworkable. EPA needs to clarify the requirements for certification in cases of entities under common control in a manner that allows for flexibility in reclamation operations that occur among associated entities.

EPA seeks comment on proposed certification requirements regarding facility ownership. (72 FR 14186) ACC believes that one-time certification of ownership and knowledge of/responsibility for the materials is reasonable. However, we do not believe it is appropriate to require a statement in the certification that a parent corporation has "acknowledged" responsibility for the material. This is unnecessary and inconsistent with typical corporate practices, and would require institution of new, burdensome

internal delegation procedures. It should be sufficient for the generator to certify the *fact* that a corporate parent has responsibility, without obtaining some type of formal "acknowledgment" every time a material is sent to another facility under common control with the generator.

EPA has also proposed that hazardous secondary material generated and reclaimed under the control of the generator must be "generated and reclaimed by the same 'person' as defined in § 260.10...." (72 FR 14186) In the certification language that is included in the proposed definition and in the preamble, however, EPA appears to have intended to mean that the generator and the reclaimer must be under "common control" (a concept that is commonly used and well understood under various Clean Air Act regulatory programs, but is not typically used in the RCRA regulatory program). The definition of "person" in § 260.10 does not incorporate the concept of "common control." Therefore, by stating that the generator and reclaimer must be the same "person" the first part of the definition limits it to the same corporation. For example, if Corporation A has two wholly owned subsidiaries, Corporation B and Corporation C, a requirement that a material be generated and reclaimed by the same "person" means that the material cannot be generated by Corporation B and reclaimed by Corporation C. Even though both entities are owned by Corporation A, they are not the same corporations and cannot be the same "person" as defined in § 260.10. EPA needs to clarify the requirements for certification in cases of entities under common control in a manner that allows for flexibility in reclamation operations that occur among associated entities.

EPA should clarify its use of the term "tolling contractor."

EPA also requests comments on the "tolling" requirements and the associated contractual agreements. (72 FR 14186) ACC believes that EPA's use of the term "tolling contractor" in this section of the preamble is confusing. EPA should clarify whether this term is intended to denote the entity contracting for the tolling or the entity actually performing the recycling under contract, and should check its preamble and rule language for consistent use of this term.

ACC objects to EPA's proposal to incorporate new, undefined criteria to the classification of recycled secondary materials that are managed in land-based units.

EPA has proposed new criteria for the exclusion for reclaimed secondary materials that are managed in land-based units by requiring that the hazardous secondary material be "contained" in the land-based units. EPA's attempt to define whether a hazardous secondary material is a solid waste or not based on the manner in which that material is managed or stored is inconsistent with previous court rulings. The ABR court noted that, in the portion of the Phase IV regulation that dealt with the definition of solid waste for materials that are generated and reclaimed within the mineral processing industry, "EPA's dividing line between 'waste' and non-waste is the manner of storage." The court concluded that this classification is based "on an improper interpretation of 'discarded' and an incorrect reading of our AMC I decision."[14]

[14] 208 F.3d at 1051 and 1056.

EPA should not seek to alter existing RCRA definitions for surface impoundments.

ACC notes that EPA in the preamble states that "examples of surface impoundments include ditches and sumps." (72 FR 14186) However, EPA explicitly defines both "sump" and surface impoundment in 40 CFR 260.10. EPA should not (either intentionally or unintentionally) change the RCRA sump definition in this proposal. The RCRA definition of surface impoundment in 260.10 does not include any references to the inclusion of trenches. ACC believes that EPA could most clearly accomplish its objective of ensuring "containment" for material managed in land-based units by referring to the existing definitions for land-based units in 260.10.

The proposed general provisions for hazardous secondary materials managed under the control of the generator are sufficient, and ACC does not oppose the proposed one-time notification requirement.

For hazardous secondary materials managed under the control of the generator in non-land-based units, the Agency proposes to ensure that the materials are not discarded by prohibiting speculative accumulation and by noting that any residuals from the recycling are considered to be newly generated solid (and possibly characteristic hazardous) wastes. EPA does not impose additional requirements to demonstrate the absence of discard in these cases, but requests comment on the issue. (72 FR 14187) ACC concurs with EPA that additional requirements are not needed to ensure that the material is not discarded. If the final rule is unduly burdened with reporting and recordkeeping requirements, it will be as a disincentive to legitimate reclamation. ACC notes that the first legitimacy criterion already requires that these materials be managed as a valuable commodity (e.g., if the reclaimed material were to be used as a solvent, it should be managed in a manner similar to the analogous virgin solvent).

ACC has no major objection to EPA's proposed one-time notification requirements (at 72 FR 14187) for hazardous secondary materials recovered under the control of the generator, though it is not clear to us that such notification is necessary, and it is generally inconsistent with the approach used for other existing exclusions (e.g., notification is not required for the exclusion located at 40 CFR 261.4(a)(8), commonly known as the "closed loop recycling exclusion") EPA also requests comment on the use of the Subtitle C Identification form in making notifications. (72 FR 14187) ACC does not object to the use of this form, though the form should be modified to make clear that the material being shipped is a material for reclamation rather than a solid or hazardous waste.

EPA also requests comment on allowing for recycling "under control of the generator" for materials generated or reclaimed outside of the United States. (72 FR 14187) Since EPA proposes to allow exports for transfers to third parties, prohibiting export for reclamation under the control of the generator does not seem to make sense. ACC supports both exports and imports of materials to be reclaimed under the control of the generator.

ACC supports the EPA's proposed conditional exclusion for hazardous secondary materials that are transferred for the purpose of reclamation and agrees with EPA's prohibition of speculative accumulation.

ACC supports the Agency's decision to place what we believe to be generally reasonable conditions on the transfer of secondary materials for the purpose of legitimate reclamation. In crafting this option, EPA has appropriately recognized the substantial efforts of many companies to minimize the prospect of environmental problems (and possible future CERCLA liability) by performing the environmental "due diligence"[15] needed to ensure that their materials are sent to legitimate and reputable recyclers. ACC also supports the first of EPA's proposed conditions to this exclusion, the prohibition against speculative accumulation. EPA is correct in noting that the speculative accumulation prohibition is consistent with other existing conditional exclusions from RCRA. (72 FR 14189)

EPA's decision to impose a blanket prohibition on "middlemen" or "brokers" will limit the potential benefits of the conditional exclusion for transferred materials, especially for low-volume generators of secondary materials.

While ACC agrees that historically there may have been an increased risk when a secondary material is transferred indirectly to a reclamation facility (i.e., by a broker), the proposed blanket prohibition on the use of brokers will obviously limit the opportunity to recycle certain secondary materials generated in relatively small volumes. ACC believes that EPA or state concerns about the generators' lack of knowledge about who will be reclaiming these materials and how they will be managed could be addressed by placing additional environmental due diligence and/or materials management requirements on indirect transfers of secondary materials. These conditions could include requirements that are appropriately more conservative, albeit still reasonable, than those required of direct transfers. This type of "sliding scale" for conditions placed on indirect transfers versus direct transfers would be consistent with and analogous to EPA's proposal to place more conditions on transferred materials versus materials reclaimed under the control of the generator. Each additional level of potential risk could require additional levels of control requirements, and a relatively small quantity generator of secondary materials that wanted to indirectly transfer the secondary material for reclamation would make the decision to do so or not based on the increased cost and effort needed to meet the increased regulatory requirements

[15] ACC notes that EPA has used the term "due diligence" throughout the preamble to refer to certain reasonable efforts to evaluate reclaimers and reclamation facilities. While ACC has also used this terminology in our comments for clarity in referring to statements in the preamble, EPA should consider using alternative terminology (e.g., "appropriate inquiry") in the final rule. This is because term "due diligence" is a legal term that has specific legal connotations that may not precisely match the context EPA intends in this proposed rule.

Notification requirements for transfer of secondary materials should not be so burdensome that they limit the opportunity to make use of this option.

ACC has no major objection to EPA's proposal to require one-time notification when secondary materials are transferred for the purpose of reclamation. (72 FR 14189) Though the proposed elements of this notification are reasonable, some of the alternative notification requirements mentioned in the preamble to the proposal are potentially burdensome and unworkable. Specifically, EPA requests comment on alternative requirements to provide identification of the reclamation facility, how the material will be stored by the generator, and/or "detailed characterization" of the secondary material and of the reclamation process. (72 FR 14189)

While ACC does not object to a requirement to identify the receiving facility, we believe that the additional requirement to provide information on the materials storage at the generating facility is burdensome. It is also not necessary in light of the existing legitimacy criterion that recycled materials be handled in a manner similar to analogous virgin materials.

ACC strongly opposes any requirement to provide "detailed characterization" of the secondary materials. This requirement would be wholly unworkable, as it could be interpreted as a requirement to perform detailed and costly analytical testing of the materials without any commensurate environmental benefit.

EPA also solicits comment on alternative requirements that an authorized representative of the generator sign the notification form, that periodic reports be prepared to detail recycling activities, and that such information be submitted in a specific form or be required to be maintained on site in lieu of being sent to the implementing agency. (72 FR 14189) As a matter of principle, ACC believes that this proposed conditional exclusion from RCRA should have the same notification/recordkeeping requirements, if any, as present RCRA exclusions. This said, we recognize that some minimal recordkeeping and reporting (e.g., annual reporting) could be helpful in measuring the impact of the rulemaking. To this end, we do not object to providing basic information (e.g., general type of material, receiving facility identification) in a one-time notification. We also do not object to requirements that similar, basic recordkeeping be maintained on site and available for periodic review by the implementing authority (e.g., a site would record that 20,000 pounds of mixed spent solvent were transferred to facility X in a specified calendar year). These types of reporting are minimally burdensome and would be acceptable.

EPA should not, however, impose a burdensome "backdoor manifesting" system through onerous recordkeeping and reporting requirements. Doing so would be inconsistent with the requirements of existing RCRA exclusions and is not necessary to measure the overall impact of the rulemaking. ACC also believes strongly that records should be maintained on site and available to the implementing authority rather than submitted on a regular basis. We see no reason to require submission of all recordkeeping to the implementing authority when some of these records might never even be reviewed. This

approach serves only to create a burden on both the generator and the implementing authority. Moreover, the "maintain on site" approach reduces the probability of complications resulting from the potential inclusion of confidential business information in the required reports. With respect to requiring an "authorized representative" to sign the notification, we do not object to this as long as EPA is clear that the identity of the appropriate representative should be decided by the generator, and should generally be the person at the facility that is most familiar with the material being transferred. Here also EPA also requests comment on the use of the Subtitle C Identification form in making notifications for materials transferred for reclamation. (72 FR 14189) As with the "under control of the generator option, ACC does not object to the use of this form, though the form should be modified to make clear that the material being shipped is a material for reclamation rather than a solid or hazardous waste.

ACC supports EPA's recordkeeping and "reasonable efforts" requirements for generators as proposed.

EPA proposes more specific recordkeeping requirements for generators, along with "reasonable efforts" requirements at 72 FR 14190. EPA proposes that the generator maintain for three years, for each waste shipment, documentation of when the shipment occurred, who the transporter was, the name and address of the receiving facility, and the type and quantity of material transferred. ACC supports these proposals and agrees with the Agency's understanding that generators would typically maintain these records in the normal course of business. ACC also supports EPA's proposal to not specify the format in which the records must be kept. EPA requests comment on additional, more burdensome recordkeeping requirements. As we noted above, ACC objects to these additional burdensome requirements and agrees with EPA's stated commitment to not propose these requirements because the Agency prefers to limit requirements to those that are essential to allowing proper oversight of secondary materials managed outside the RCRA system. (72 FR 14190)

EPA also requests comment on export of secondary materials at 72 FR 14190. As we stated in our comments on reclamation under control of the generator, ACC supports both import and export of materials for reclamation under this proposal.

EPA also proposes that generators make "reasonable efforts" to ensure that the secondary materials they transfer are to be safely and legitimately recycled before transferring the materials. Although this is a requirement beyond that which is required under other existing RCRA exclusions, ACC supports this proposal. EPA notes in the preamble, and we agree, that the proposed condition reflects the methods that reputable generators now use to maintain their commitment to sound environmental stewardship and to minimize their potential regulatory and liability exposures. (72 FR 14191) ACC supports the Agency's proposals that generators maintain records (either at the site or at a headquarters facility) documenting that the "reasonable efforts" were made and that the records are signed by an authorized facility representative. As with the notification statement, the generator should be free to determine who is the appropriate "authorized facility representative."

EPA should not prescribe the specific set of questions defining "reasonable efforts" that are discussed, though not proposed, in the preamble to the proposed rule. ACC agrees with EPA's expressed concern that these more specific requirements, though they might be good guidance, would limit the flexibility of the generator if they were explicitly required by the rule.

In the preamble to the proposed rule, EPA discusses in detail (but does not propose) a set of specific questions that would very prescriptively define "reasonable efforts." EPA should not consider specifying in the final rule these or any other set of specific, prescriptive questions to define reasonable efforts. (72 FR 14192) The "A through F" questions that EPA mentions in this section could serve as guidance on what constitutes "reasonable efforts," but should not be prescriptive requirements. An approach that explicitly and prescriptively defines reasonable efforts would not only serve as a tremendous disincentive to recycling (even for those generators currently conducting reasonable efforts in good faith), but requiring or codifying this specific prescriptive approach is completely unnecessary in light of the legitimacy criteria.

As EPA notes in the preamble, many generators now use an "environmental due diligence" approach to maintain their commitment to sound environmental stewardship and to minimize their regulatory and liability exposures. (72 FR 14191) The reasons for continuing to employ this type of effort would not "go away" if the current proposal were finalized as proposed – these incentives would remain just as strong if not stronger.

If EPA were to make final a burdensome, overly prescriptive approach to due diligence such as that described in the preamble (at 72 FR 14192-94), the disincentive to recycling would be obvious: generators currently performing due diligence that does not conform precisely to the approach required in the preamble would be forced to choose to change their whole approach to due diligence when using this conditional exclusion, or else they would have to choose not to make use of the exclusion for their reclamation. In like fashion, generators not currently performing any due diligence would be deterred from making use of the exclusion at all due to the high "burden of entry" imposed by a prescriptive approach. Moreover, this prescriptive approach is completely unnecessary in light of the force of the existing legitimacy criteria and CERCLA liability. All of the "A through F" questions mentioned by EPA in the preamble are meant to compel the generator to provide a detailed documentation of the "legitimacy" of the reclamation operation to which they wish to transfer the material. But all generators are ***already*** compelled by regulatory compliance and liability concerns to evaluate the legitimacy of reclamation in the context of the 4 legitimacy criteria, which currently exist as guidance but would be codified by this proposed rule, and by CERLA liability concerns. They are just not compelled to do so in such an explicit and prescriptive manner. Because the legitimacy criteria are subjective judgments, one of the great strengths of using them to evaluate reclamation is their flexible nature. EPA recognizes this indirectly elsewhere in the proposed rule by adopting the "two-plus-two" approach to which criteria are mandatory and which are "also to be considered."

In summary, EPA should finalize the reasonable efforts requirements as proposed, and should reject requiring the alternative prescriptive requirements discussed in the preamble at 72 FR 14192-94. Doing so would ensure that efforts at performing environmental due diligence prior to recycling can continue to develop in an organic manner in response to existing regulatory and liability drivers (including the legitimacy criteria), rather than being stifled and "force-fit" into a specific set of federal requirements.

EPA also requests comment on the typical frequency of due diligence reassessment. (72 FR 14194) ACC believes that reassessment frequency should be flexible so long as generator can demonstrate reasonable diligence, per general industry standards. Generators should be free to choose an appropriate review frequency, which may vary depending on the reclamation activity, results of the previous review, or history and familiarity with the reclaimer.

EPA does not need to impose storage conditions for transferred materials. The legitimacy criteria already ensure that the material is managed in a manner similar to a virgin material.

EPA also request comment on potential storage requirements for secondary materials that are to be transferred for the purpose of recycling. (72 FR 14194) As in the case of materials reclaimed under the control of the generator, prescriptive storage requirements at the generating facility are not necessary in light of the existing legitimacy criterion that recycled materials be managed in a manner similar to analogous virgin materials.

ACC does not object to the recordkeeping, storage, and management requirements for reclaimers as proposed.

EPA takes the right approach in subjecting reclamation facilities to storage requirements that are consistent with the legitimacy criteria and the reasonable efforts requirements for generators. (72 FR 14195) As ACC notes in the above section on storage requirements for generators, prescriptive storage requirements at the generating facility are not necessary in light of the existing legitimacy criterion that recycled materials be managed in a manner similar to analogous virgin materials. This is precisely what EPA proposes for reclaimers, and ACC supports this approach.

ACC supports EPA's clarifications regarding application of the "derived-from" rule and regarding enforcement cases where the generator acts in good faith but problems occur at the reclamation facility.

ACC also supports EPA's proposal not to apply the "derived-from" rule in the case of residuals management for reclaimed materials. (72 FR 14195)

EPA provides a useful clarification in the preamble regarding enforcement in cases where a generator acts in good faith and meets the reasonable efforts requirements of the rule. (72 FR 14197) Generators should clearly not be held in violation of the terms of the

exclusion due to releases that occur at the reclaimer so long as the generator met reasonable efforts requirements and acted in good faith.

Though ACC does not agree with the need to codify any of the legitimacy criteria, we do not object to the Agency's proposed approach to restructuring these criteria.

EPA discusses proposed changes to the use of the legitimacy criteria, (i.e., the guidance found in Sylvia Lowrance's RPA memo of April 26, 1989[16]) in both the current and the 2003 proposed rules. (72 FR 14197-14201 and 68 FR 61581-61588, respectively) As we stated in our comments on the 2003 proposed rule, ACC does not see the need for codification of these criteria, which have been used by industry and EPA alike to distinguish between cases of legitimate recycling and discarded materials for more than 18 years.

In the current notice, EPA proposes to restructure the proposed criteria (factors) to make two of them mandatory and leaving the other two as "factors to be considered." (72 FR 14197) With the exception noted in the following section, ACC does not object to this overall approach.

ACC does not support EPA's proposal to apply the new approach to the legitimacy criteria to secondary materials excluded or exempted from the definition of solid waste under previous regulatory provisions and to other existing exclusions in 40 C.F.R. §§ 261.6 and 266. This approach is completely unnecessary, and is contrary to the Agency's stated intent that the current proposal is designed to be deregulatory in nature.

EPA states its intent in the current proposal to apply the legitimacy criteria to both recycled secondary materials excluded from Subtitle C regulation as wastes under the current proposal and to recycled secondary materials, "excluded or exempted from Subtitle C regulation under other regulatory provisions (e.g., see the exclusions in 40 CFR 261.2, 261.4, 261.6, & 266)." EPA further states that "the concept of legitimate recycling is designed to be used ***in addition to*** and in concert with more specific criteria when they have been established in the regulations…" (72 FR 14197, emphasis added) Yet EPA also states in the preamble that, "today's supplemental proposal is deregulatory in nature…" and that, "the factors to consider for legitimate recycling codify existing principles without increasing regulation. This proposal is not intended to bring new wastes into the RCRA regulatory system." (72 FR 14174) ACC does not see the logic in these seemingly contradictory statements. If EPA intends no changes to the universe of materials currently excluded or exempted from RCRA regulation, then why would EPA propose to apply the revised legitimacy criteria to materials already excluded or exempted under alternative RCRA provisions? In any event, the legitimate reclamation of these already-excluded materials has been subject to evaluation vis-à-vis the legitimacy criteria for up to 18 years, so there is no demonstrated need to apply the same "codified criteria in the current rule. ACC cannot support applying the revised legitimacy

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criteria to the existing RCRA exemptions and exclusions. The existing exclusions and recycling requirements have previously gone through notice and comment rulemaking, and any conditions determined by EPA to be necessary have already been imposed. Imposing newly codified criteria on those existing exclusions and recycling provisions would be flatly inconsistent with EPA's statement that this proposal is deregulatory in nature and subject those exclusions to new requirements without notice and comment.

Though ACC does not object to the proposed "two plus two" reorganization of the legitimacy criteria, ACC continues to believe that codification of the "toxics along for the ride" criterion would be problematic.

EPA proposes to reorganize and codify the legitimacy criteria guidance by making two of the criteria in the guidance (factors 2 and 3) mandatory factors for legitimate recycling while including the other two factors (factors 1 and 4) as factors that need to be considered when determining whether reclamation is legitimate. (72 FR 14198) Although we continue not to recognize the need to codify the legitimacy criteria that have been in place as guidance since 1989, we do not object to this regulatory scheme because the "toxics along for the ride, or TAR" criterion justifiably remains a non-mandatory factor.

ACC believes that EPA provides some useful examples in the preamble that illustrate the problems that could be encountered should TAR be codified as mandatory. (72 FR 14199) As a general principal, ACC agrees with EPA that any TAR criterion is more appropriately focused on the products of the recycling operations than on the secondary materials themselves. This approach is fully supported by *Safe Food and Fertilizer v. EPA* where the Court focused on whether the use of secondary materials resulted in any meaningful difference in the products. Manufacturing operations, by their very nature, are designed to safely and effectively remove undesired constituents from varying feedstocks and to ensure consistent product quality.

If the secondary material has functional value as a raw material, is an effective substitute for a virgin material, meets the specifications of a raw material for the process, and the resultant product meets product specifications, then we believe that the material is being legitimately recycled. Users of secondary material inputs also have specific performance specifications for materials they purchase, just as they do for virgin feedstock materials. Similarly, producers of products that utilize these inputs have specifications that their products must meet in order to be marketable.

While ACC agrees that intentionally hiding toxic materials in products is not acceptable, neither is it a realistic threat. This can be illustrated by considering the preamble example of lead contaminated foundry sand being sold as a children's play sand. (72 FR 14199) There are redundant mechanisms in our society, such as toxic tort liability, to deal with irresponsible producers in cases such as this. We believe that a much better legitimacy test would focus on whether the secondary material used in a production process is suited for that use, not merely whether it has more or less toxic constituents than the feedstock it is replacing or results in different levels of constituents in the recycled product compared

to analogous products. In most instances, secondary materials or the products made from them may have constituent levels different to some degree from their virgin analogs, but not to such an extent that the material should be automatically disqualified from consideration as being legitimately recycled.

ACC supports EPA's consideration of economics in legitimate recycling, particularly the recognition that the economics of many legitimate recycling operations that use secondary materials differs from the economics of traditional manufacturing operations.

ACC supports EPA's discussion of the consideration of economic factors in identifying legitimate recycling operations, particularly the Agency's recognition in the preamble discussion that a recycler may be able to charge generators and still be a legitimate recycling operation properly excluded from regulation. (72 FR 14201)

ACC supports EPA's petition process for non-waste classifications, but we believe that the proposed scope of the scenarios that EPA has included is far too narrow.

EPA proposes to allow non-waste determination petitions for three cases: 1) reclamation in a continuous process, 1) materials indistinguishable in all relevant aspects from a product or intermediate, and 3) reclamation under control if the generator. (71 FR 14202) ACC supports the petition process in these cases, but this scope of acceptable petitions is far too narrow. EPA has asked for comment on the idea of including cases of burning for energy recovery or products applied to the land. (72 FR 14204) ACC strongly believes that EPA should open up the petition process to these additional scenarios. As we noted previously in these comments, EPA has missed an opportunity to encourage increased resource recovery through the legitimate recovery of energy from fuel-like secondary materials by excluding these materials from the current proposal. At a minimum, EPA should allow for consideration of these cases through the non-waste determination petition process.

ACC supports EPA's proposal to not make any changes to the existing RCRA solid waste exclusions and exemptions.

EPA proposes in the preamble to retain the existing RCRA solid waste exclusions "exactly as written." (72 FR 14205) ACC supports this decision but we reiterate that the decision not to affect any of the existing exclusions is in conflict with EPA's stated intent to apply the reorganized and codified legitimacy criteria. EPA is correct that modification or deletion of existing exclusions could have unintended consequences, and this is precisely the same concern that we have with the idea of applying the legitimacy criteria to the existing exclusions.

ACC does not support EPA's proposal to compel generators with currently-excluded secondary materials to be required to meet conditions of the existing exclusion rather than using a different exclusion. We support the alternative in which the regulated entity chooses the most appropriate exclusion to be used.

EPA requests comment on whether the regulated entity should be allowed to choose which exclusion a reclaimed material is subject to in cases where more than one RCRA exclusion could apply. (72 FR 14205) EPA's proposal to compel the regulated entity to continue using an existing exclusion rather than making use of a different exclusion limits the flexibility of the generator with no concurrent environmental benefit.