COMMENTS OF
THE AMERICAN CHEMISTRY COUNCIL
On The

Revisions to the Definition of Solid Waste; Proposed Rule
68 Fed. Reg. 61558 (October 28, 2003)

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## I. Introduction

The American Chemistry Council (ACC)[1] is pleased to submit these comments on EPA's recent proposal to amend the definition of solid waste in order to encourage recycling. ACC has a long and abiding interest in this regulatory reform.

ACC fully supports EPA's efforts to encourage the legitimate recycling of secondary materials. In particular, ACC agrees with EPA's stated desire for this rulemaking, as a significant component to the Agency's Resource Conservation Challenge, to "encourage and provide new incentives for increased reuse and recycling of materials, including hazardous wastes and hazardous secondary materials."[2] The rulemaking is also wholly consistent with the voluntary "National Waste Minimization Partnership Program" that has targeted wastes containing any of 30 priority chemicals for reduction, or environmentally sound recycling. We also agree with the Agency's view that it is necessary for the Agency to initiate a rulemaking, "in response to decisions of the United States Court of Appeals for the D.C. Circuit, which, taken together, have provided the Agency with additional direction in this area."[3]

Further, ACC believes that EPA is proceeding in the right direction by seeking to clarify in the rule preamble, criteria that should be considered in making the distinction between legitimate and sham recycling. It has long been ACC's contention that there are certain common-sense conditions that facilities should take into account when making recycling decisions, and those conditions as well as the liability associated with materials mishandling, provide sufficient protection to allow for the removal of all legitimate recycling operations from the jurisdiction of the Resource Conservation and Recovery Act[4] (RCRA) and its regulations. However, ACC is concerned with one major feature of EPA's proposed effort to define "legitimate" recycling in regulation. Specifically ACC does not support the "toxics along for the ride" criterion as proposed. In its place, ACC suggests an alternative criterion, more consistent with a recent holding of the D.C. Circuit Court of Appeals in *Safe Food and Fertilizer v. EPA*[5] that would require that the product made from reclaimed material present no meaningful difference in its constituent makeup.

ACC is encouraged that EPA has approached this proposal with an open mind. It has included in the proposal a broad range of potential options for promoting recycling. That breadth of

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1 The American Chemistry Council represents the leading companies engaged in the business of chemistry. Council members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. The Council is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a $435 billion enterprise and a key element of the nation's economy. It is the nation's largest exporter, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

2 68 Fed. Reg. 61560.

3 *Ibid.*

4 42 U.S.C. 6901 *et seq.*

5 2003 U.S. App. LEXIS 24725, ___ F3d ___(D.C. Cir. 2003).

alternatives will encourage a full spectrum of comment from regulated industries, the states and the environmental community. It also provides the Agency with broad latitude to select among these options and to finalize the best alternative. Albeit, the "best possible rule" would also exclude from the definition of solid waste legitimate energy recovery and legitimate recycling involving land application.

Finally, ACC is concerned that the current regulatory structure presents substantial disincentives to achieving the Nation's resource conservation and recovery goals enunciated in RCRA[6] . Careful revision of the definition of solid waste can correct this error by conforming the regulations EPA seeks to modify in this proposal to the policy Congress established in the Pollution Prevention Act of 1990[7]: that the recycling of industrial secondary materials be given precedence over treatment and disposal of them. This rulemaking presents an opportunity to correct these regulatory glitches and create the incentives to recycle that Congress clearly intended in these two statutes.

ACC's key comments are summarized below:

- ACC's principal concern is that EPA has used a far too narrow reading of the holdings of the Court and that its regulatory proposal fails to meet the Agency's goal of harmonizing its regulatory definition of discard with the Court's.

- Limiting the scope of the rulemaking to excluding materials that are reclaimed "in a continuous process by the generating industry itself" will neither address the Court's earlier rulings, nor create significant incentives to recycle industrial secondary materials.

- ACC supports the option to exclude all legitimate reclamation from the definition of solid waste, and urges EPA to promulgate a direct final rule codifying it. This option would result in a significant increase in resource conservation and recovery.

- Should EPA finalize a rule excluding all legitimate reclamation from the definition of solid waste, ACC would support codifying legitimacy criteria, based on guidance, as principles to be considered on a case-specific basis. If any lesser option is finalized, ACC urges EPA to retain legitimacy criteria solely as guidance.

- Should EPA fail to exclude all legitimate reclamation from the definition of solid waste, codifying an exclusion for on-site and off-site intra-company recycling combined with the proposed Option #1 will enhance recycling prospects. Such an exclusion would recognize the greater opportunities for on-site and off-site intra-company recycling afforded by a scheme that allows for materials reuse across operations that are classified in different NAICS codes.

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[6] 42 U.S.C. § 6902

[7] 42 U.S.C. § 13101 (b)

- ACC finds the Agency's proposal in Option #1 to conditionally exclude from the definition of solid waste only those secondary materials reclaimed in a continuous process within the generating industry to be a missed opportunity to truly enhance industrial recycling. Further, EPA's proposed use of the NAICS codes to delineate valid recycling is inappropriately narrow and contrived.

- Option #2, further restricting Option #1 so that material sent to a reclamation facility within the same four-digit code may not benefit from the exclusion if that facility also accepts materials from outside that code category, is even worse and wholly unacceptable.

## II. Jurisdictional Issues

ACC's focus in this rulemaking is on EPA's efforts to square its RCRA recycling regulations with a series of rulings on this issue handed down by the U.S. Circuit Court of Appeals for the District of Columbia Circuit. In these cases, the Court has taken EPA to task for misinterpreting the meaning of the term "solid waste" in RCRA. As a result, the Agency has indicated a willingness to use this rule to harmonize the regulations with the holdings of the Court.[8] However, the Agency also indicates that it considers it expedient to divide regulated solid wastes from unregulated secondary materials by creating a distinction between "discarded material" and "materials that remain in use in a continuous process within the generating industry." ACC believes that this is much too narrow a reading of the holdings of the Court, as EPA notes in the proposed rule.[9]

The phrase, continuous process by the generating industry, first appears in *American Mining Congress v. EPA* (*AMC I*).[10] There the mining and petroleum industries successfully challenged EPA's definition of solid waste. Their complaint was that waste rules regulated the use, as raw materials in industrial processes, of valuable secondary materials that had been removed from other industrial processes. In addressing the Agency's statutory obligations, 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*

[8] 68 Fed. Reg. 61563

[9] Id

[10] 824 F. 2d 1177 (D.C. Cir. 1987)

> *recycling in a continuous process by the generating industry itself.* (emphasis in the original)[11]

While descriptive, this language does not represent the holding of the case. 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 and unyielding:

> 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.[12]

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.[13] 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 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. The Agency, with its limited modifications to its RCRA recycling rules since 1987, has yet to correct this unlawful extension of its authority cited by the Court in *AMC I.*

Two cases that followed on the heels of AMC I help in defining "discarded." In *American Petroleum Institute v. EPA (API I),*[14] 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"[15] was indeed a discarded material. In *American Mining Congress v. EPA (AMC II),*[16] 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 under the *Chevron* test.

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[11] Id. at 1186.

[12] Id. at 1193.

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

[14] 906 F.2d 729 (D.C. Cir. 1990)

[15] Id. at 741.

[16] 907 F.2d 1179 (D.C. Cir. 1990).

In the wake of *API I* and *AMC II*, EPA came to the conclusion that revision of its regulations on the definition of solid waste was not necessary. As a result, the Agency was challenged again in *Association of Battery Recyclers, v. EPA*,[17] (*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 the Court's "interpretation of RCRA binds not only this Court, but also EPA."[18] 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."[19]

The type of material that the *ABR* Court explicitly *excludes* from this list of synonyms is "recycled" material,[20] 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.[21] The first *AMC I* quote above makes 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. The *ABR* Court indicates its frustration with this continued disconnect.[22]

The next case in this series is *American Petroleum Institute v. EPA*,[23] (*API II*). There the Agency dealt with two streams of materials: oil-bearing wastewaters and petrochemical recovered oil. In the former case the dispute revolved around whether primary treatment of oily wastewater was predominantly a step in recovering the oil or a step in making the wastewater ready for disposal. The Court was willing to defer to EPA on the issue because of the obvious ambiguity of the question, but found no explicit reasoning for EPA's judgment on the issue in the rulemaking. It remanded the "discard" issue to EPA to resolve in a method that was not arbitrary. In the second case it found EPA's reasoning that conditions were necessary to avoid "sham recycling" of petrochemical recovered oil to be sufficiently clear and deferred to the Agency's judgment that it was discarded. In neither of its findings did the Court base its decisions on the fact that the recovered material was or was not being recycled within the "generating industry."

EPA's intention to limit the scope of the current rulemaking to materials that "are destined for beneficial reuse or recycling in a continuous process by the generating industry itself" fails to address the full intention of the Court. There is nothing in the case law to support EPA's apparent belief that materials recycled outside the industry that generated them exhibit some

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[17] 208 F3d 1047 (D.C. Cir. 2000).

[18] Id. at 1052.

[19] Id. at 1051.

[20] "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.

[21] 40 C.F.R. § 261.2 (c) states that: "Materials are solid wastes if they are *recycled* -- or accumulated, stored, or treated before recycling."

[22] "EPA nevertheless insists that RCRA may be applied to materials that are not disposed of, abandoned, or thrown away, but are destined for reuse in an on-going industrial process." *ABR, supra.* at 1052.

[23] 216 F.3d 50 (D.C. Cir. 2000).

elements of discard. Pursuing a strategy such as that set out in the principal proposal, will simply append another narrow conditional exclusion to rules that are defective at their core.

The "in the generating industry" phrase was used by the Court in *AMC I* as a floor, not a ceiling. Its use in the subsequent cases illustrates this. While secondary materials recycled within the generating industry are clearly out of RCRA, they are far from the only secondary materials that are. The Court in *Safe Food and Fertilizer v. EPA*[24] recently addressed this very point. In this case, the Agency sought to exclude 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) <u>firm-to-firm transfers are hardly good indicia of a "discard" as the term is ordinarily understood.</u> (emphasis added)

If in the final rule EPA stays with the very limited conditional exclusion from the definition of "solid waste" that the Court rejected and the Agency itself argued against in *Safe Foods*, it will not have addressed the Court's earlier rulings in both the AMC I and ABR cases and it will have created no significant incentives to recycle industrial secondary materials. In order to harmonize its regulations to the *AMC I* and *ABR* holdings, EPA must embrace its obligation to set criteria for identifying <u>all</u> non-discarded secondary materials that are being legitimately recycled. It can only do this by revising its definition of "discarded 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."

It should also be noted that both the House and Senate Appropriations Committees included language in their respective reports regarding the Agency's 2004 budget, encouraging EPA to promulgate a rule in 2004 revising the regulation of recycling to comport with the decisions of

[24] *Supra*, at note 4

the D.C. Circuit by limiting the definition of "discarded material" to materials that are "disposed of, abandoned, or thrown away."[25]

Finally, ACC has concerns about EPA's contention that the statutory terms "solid waste" and "discarded material" appear in several different places within RCRA and thus merit different definitions and usages in those places.[26] The nature of the Agency's proposal leads it to this conundrum because making jurisdictional decisions regarding particular secondary materials based solely on industry classifications and time limits on processing can only work within the very narrow context that the Agency has proposed. Using similar definitions elsewhere in the regulations makes no sense. On the other hand, the statute has a unitary definition for these terms. It does not instruct the Agency to differentiate among "solid waste" for Subtitle C purposes, versus "solid waste" for Subtitle D purposes, versus solid waste for § 7003 purposes. ACC encourages EPA to reexamine whether its need for multiple definitions to fit various usages in the RCRA program isn't a problem of its own making, springing from its refusal to date to adhere to the jurisdictional limitations prescribed by the D.C. Circuit.

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 utilize the Court's definition of discarded material, material that is "disposed of, abandoned, or thrown away." It can then proceed to identify such material using criteria somewhat similar to those it set out in this proposal.

## III. Regulatory Proposal

ACC's first observation about the proposal is that its scope is somewhat muddled. While it initially purports to be wholly deregulatory in nature and to modify only the regulatory requirements that affect specific secondary materials now considered to be solid waste, i.e., spent materials, listed sludges and listed byproducts being reclaimed, it also tinkers with broader concepts that affect other materials already excluded from regulation such that the proposal could be considered more stringent than the existing regulatory scheme. It is especially the concepts of "harmonizing" existing categorical exclusions, applying legitimacy criteria to all secondary materials recycling, and the potential for increased reporting and record keeping that concern ACC and lead us to believe that portions of the proposal are regulatory rather than "deregulatory." These concerns are discussed more fully below.

[25] *See* H. Rep. 108-235 at 102, and S. Rep. 108-143 at 96.
[26] 68 Fed. Reg. p. 61563

A. EPA's Proposed Use Of The NAICS Code To Delineate Valid Recycling Is Inappropriately Narrow And Contrived.

As stated above, the Court has opened the door for EPA to make significant modifications to the current regulatory framework by removing inappropriate barriers to resource conservation and recovery. With that in mind, ACC finds the Agency's proposal to conditionally exclude from the definition of solid waste only those secondary materials reclaimed in a continuous process within the generating industry to be a missed opportunity to truly enhance industrial recycling. Instead of reexamining the term "discarded material," EPA proposes yet another narrow, convoluted, conditional exclusion. Rather than simplify an already confusing and inefficient regulatory scheme, the proposal adds yet another layer of complexity involving NAICS codes. Instead of focusing public comment on enlarging the universe of environmentally sound recycling and promoting resource recovery, the proposal provides only a long exegesis on the terms "continuous" and "industry" – replacing substance with sophism.

ACC members will realize only a very limited increase in recycling from an exclusion premised only on reclaiming secondary material within a four-digit NAICS code. Many ACC facilities contain multiple NAICS code "installations" and facility operators associated with multiple, highly integrated processes do not distinguish between them for practical plant purposes. For example, one member company manufacturing location comprises 5 separate 4-digit NAICS codes (3251, 3253, 3261, 3262 and 4862). The purpose of the NAICS scheme is to gather data for the Census Bureau and nothing more. It was not designed to have regulatory compliance or enforcement connotations for industrial activities; although EPA has increasingly and with much difficulty sought to so use it. In fact, use of industrial classification schemes in a regulatory context also poses implementation difficulties for EPA. Where previously adopted regulations use the SIC codes, such as the Petrochemical Recovered Oil exclusion at §261.4(a)(18), EPA will now need to update the outdated SIC codes with their corresponding NAICS codes. Use of NAICS in a regulatory context is a Procrustean bed[27] into which this regulatory program is being forced to fit. Further, ACC strongly believes that nothing but mischief can come from premising RCRA enforcement actions on a classification scheme designed without any connection to enforceable regulations.

Chemical facility operators are not familiar with using the NAICS regime to classify facility operations within "industries" or "establishments" because it is a program that was intended for use only by their accountants. We are aware of a number of instances where corporate accounting staff and facility staff disagree on the appropriate NAICS code for a particular operation. State enforcement officers will also have uncertainties about the appropriate NAICS coding of facility operations. In fact, we know of instances in some states where NAICS codes, instead of SIC codes, were used for the first time in completing annual waste reports in 2003. Facilities assigned a NAICS code to each waste stream, and state personnel subsequently

[27] Procrustus was an antagonist of Theseus who was known to make wayfarers recline in one of his beds. Small persons were put into a long bed and stretched until they fit it. Tall persons were put into a short bed and had overlapping appendages sawed off.

changed some of those NAICS codes. In the context of this proposal, such inconsistencies between a facility's and the state's coding assignment would be critical and could result in enforcement action. ACC believes that this lack of familiarity will cause plant operators to avoid the complexity and confusion entailed in the NAICS regime and thus it will serve as a disincentive to recycling.

In the last several decades, chemical companies have often reorganized their operations and product lines by buying and selling parts of plant operations. As a result, a company's operation may be "hard-piped" to an operation on its site that now belongs to a different corporate entity in a different four-digit NAICS code. Physical plant integration and corporate ownership no longer follow the same flow patterns. Further, in the case of the chemical industry, one company may have multiple operations, classified under multiple NAICS codes located at one integrated facility. These co-located production units will often be able to beneficially reuse secondary materials across their operations. For example, at a company facility, secondary material generated by a pharmaceutical operation may not meet the FDA purity requirement for use in pharmaceutical manufacturing. However, it may be a perfectly acceptable feedstock for another of its co-located operations that manufactures pesticides or plastics because of less demanding raw material specifications in those industries. The use of a four-digit NAICS code as a limiter in moving secondary material between them will be a significant barrier to resource conservation and recovery and will provide no additional environmental protection.

If EPA decides to base a final rule on the use of NAICS codes, ACC strongly urges the agency to use those codes at the 3-digit level, and not the 4-digit level. At large integrated facilities, extremely large volumes of secondary materials destined for reuse with and without reclamation flow back and forth between multiple processes that are classified under varying 4-digit codes, yet often fall under the same 3-digit code.

Finally, if EPA implements a NAICS-based exclusion, any NAICS-based regulatory definitions must be identical to, or at least consistent with those used by the Department of Commerce's NAICS Manual. By way of example, the preamble to the proposed rule uses the terms "establishment," and "industry" in ways that are unclear and appear to be inconsistent with the NAICS Manual. For these reasons, should EPA proceed to promulgate a rule that still uses NAICS nomenclature, ACC recommends that for clarity's sake all references used in the rule be to the NAICS Manual and not to EPA-derived variations from it. Furthermore, where questions arise regarding the appropriate NAICS classification of facility operations, deference should be given to the secondary material generator's classification of its own operations.

### B. EPA Has Used Invalid Economic Assumptions To Reach Its Conclusion That The Proposal Will Foster Recycling.

ACC believes that the Agency's economic analysis is premised on several assumptions that are not well grounded and thus predicts increases in recycling that are highly unlikely. First, it projects that the generating industry is the best equipped to handle and reclaim secondary materials that it produces. In fact, facilities within a single NAICS code are likely to produce very similar secondary materials and if they cannot recycle them in an already permissible, closed-loop method, they are unlikely to be able to recycle them at all. It is much more likely

that a different industrial operation, with needs for input material different from that of the generating industry, will find a use for the output of the generator. For example, ACC's pharmaceutical manufacturing members (NAICS code 3254) submit that the Agency assumptions used in the Economic Assessment regarding their industry sector are not correct. Because of the US Food and Drug Administration's (FDA) regulatory food/drug purity requirements, all of the potential secondary materials identified by the Economic Assessment for reclamation within the industry are prohibited from being recycled for pharmaceutical use unless extensive testing and FDA approval is granted. The Economic Assessment did not include this cost, which would easily diminish the estimated $ 57,330 per affected facility (124), or $7,108,920 savings (see Table 6-27 in the Economic Assessment) attributed to this industry sector. These costs would not be incurred if these materials could be moved to other industries (outside pharmaceutical manufacturing) for recycling.

Second, the Economic Assessment assumes that generator facilities will create industrial operations, not linked to their existing operations, to process and reclaim secondary materials in a continuous process. In actuality, like all industrial processes, reclamation is cost effective only with certain economies of scale. Thus it is more likely that a company in another industry will have the expertise and industrial infrastructure to reclaim significant secondary materials from a different generating industry. For example, chemical operations generate secondary metals in catalyst production, but no chemical plant is likely to build a metal processing, beneficiation or smelting operation to address its material flows. It is more likely to seek out a company in the metal processing industry that also accepts and reclaims the secondary materials that others in its generating industry generate.

Another example might involve a large company generating many different spent solvent streams at many U.S. sites. While at some sites the volume and quality of spent solvents justifies the expense of installing on-site reclamation facilities, at most sites, the volumes would be too small to justify the capital investment required to reclaim these materials. It is more likely that the materials would be sent off-site for commercial reclamation. Removal of the RCRA regulatory barriers from these streams will not change the economics such that reclamation facilities will be built on site. However, it may very well make the economics more favorable for commercial reclamation instead of disposal by lowering the transportation and management costs now associated with handling the material as a hazardous waste.

Third, many of the benefits that the Economic Assessment attributes to the proposal are premised on the assumption that most large quantity hazardous waste generators will become small quantity generators because of the regulatory changes and thus experience significant relief. ACC member companies do not expect this to happen in their operations. This is because the regulatory proposal is too narrowly scoped to accommodate a significant increase in reclamation of secondary materials, and because the volumes of secondary materials produced are such that the small quantity generator status will not be attainable at most facilities.

C. EPA's Proposed On-Site Recycling Option, In Addition to Option #1, Though Still Too Restrictive, Will Produce More Recycling.

EPA is closer to a pragmatic and implementable approach to increasing recycling by considering an exclusion for on-site recycling in addition to the proposed Option #1. Such exclusion would recognize the greater opportunities for recycling afforded by a scheme that allows for materials movement across operations that are classified in different NAICS codes. Unfortunately, the availability of recyclable materials within the chemical industry would only be incrementally improved.

Should EPA adopt this approach, ACC urges that the term "on-site" be defined to include all contiguous industrial operations located together. As explained above, chemical industry operations that are "hard-piped" together may no longer belong to the same corporate entities. Many of these would be considered separate "facilities" as defined by RCRA.

EPA considers the movement of secondary materials on-site less likely 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 transportation 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."[28] ACC asserts that the same reasoning (absent the mention of risks from off-site transport) applies to transfers of secondary material among sites owned by the same parent company (including majority owned joint ventures and subsidiaries). Transportation risks are minimal, and should not factor into a determination of "disposal," because U.S. Department of Transportation hazardous materials requirements will still govern these movements where necessary. For these reasons, ACC requests that EPA consider adding intra-company off-site transfers for reclamation to this exclusion because they are just as benign as on-site transfers.

D. Retention Of The Speculative Accumulation Requirement May Be Acceptable

EPA has wisely proposed to use legitimacy criteria as indicators, rather than determiners, of when discard occurs. Speculative accumulation restraints can be used the same way. Ideally, EPA would treat speculative accumulation like other legitimacy criteria -- as a condition to be considered in determining if a particular material is in fact being beneficially reused rather than discarded, but with some flexibility to allow for specific circumstances that may be involved. For example, if a secondary material is being used as a legitimate and valuable feedstock in the production of products, effectively substituting for, and thereby conserving, virgin materials, the Agency should be less concerned with whether something less than 75% of the inventory present on January 1 has been used during a given year. Under demonstrated adverse market conditions, this should not result in the remaining material being classified as a waste, so long as a legitimate market still exists. Nevertheless, ACC is willing to accept a speculative accumulation provision consistent with the existing provisions of 40 CFR 261.2(c)(4) if EPA believes it is critical to successfully promulgating the regulatory proposal.

[28] 68 Fed. Reg. 61575.

E. A One Time Notification Requirement May Be Acceptable

As a legal matter, the notification requirement appears problematic. If these materials are not solid waste, ACC believes that the Agency lacks the authority to require the handlers of non-waste to provide notification. Furthermore, we note that conditional exclusions provided under § 261.4 are generally self-implementing and do not require notifications. ACC is unaware of any of these conditionally excluded operations being misused or resulting in environmental harm. The proposed rule would require a one-time notification to the Agency by generators utilizing the new exclusion, although EPA states that it will also consider requiring updated notifications yearly, every five years, or when significant changes occur. The proposal provides no apparent or stated basis for requiring one-time or more frequent notifications in this case. Although ACC is not convinced that any notification is necessary, as a policy matter, ACC would not necessarily object to a one-time notification where the material is being managed at a site other than the site of generation.

ACC urges that any notification requirement only apply to new recycling activities under the new 261.2(g), after the effective date of rule. If existing exclusions, that do not now require notification, are replaced by a new exclusion, future reliance on that exclusion for those same materials should not trigger the new notification requirements if the rule change is to be wholly deregulatory. In a similar vein, ACC urges that notifications not be required for each specific type of material being recycled. A single notification would suffice for processes making use of multiple reclaimed materials. Lastly, ACC objects to requiring a responsible corporate official to sign a notification. This is not required in other conditional exclusions and is simply administrative overkill.

F. Continued Use Of The Existing Record Keeping Requirement Is Sufficient

The keeping of on-site records to document that the types and volumes of materials being recycled are moving in a manner consistent with the regulatory conditions is fair and consistent with existing requirements. These records would be available for inspection by enforcement/compliance personnel. More detailed records that trace material flows on a shipment-by-shipment basis are unwarranted and would present a disincentive to recycle. The current requirements of § 261.2 (f) are sufficient regardless of which option EPA chooses to promulgate.

G. EPA's Proposed Enforcement Scheme is Fundamentally Unfair

ACC understands the Agency's desire to maintain strong incentives for both generators and reclaimers of secondary material to engage in only legitimate recycling, as well as ensure an enforcement mechanism to catch and punish those that abuse a conditional exclusion. However, several facets of EPA's proposed enforcement regime present both policy and legal problems.

First, as the proposal explains, the conditional exclusion remains in effect only so long as all parties involved in the reclamation activity adhere to the requirements of the exclusion. Secondary material generated according to the conditions of the exclusion could still be deemed "solid waste" at the point of generation if a subsequent handler or reclaimer of the material deviated in some way from his obligations to meet regulatory conditions. For example, a generator may, in good faith, sell his secondary material to a party who is a *bona fide* legitimate reclaimer of the material. If that reclaimer suffers an accident that releases the material into the environment, EPA would consider the generator to be out of RCRA compliance regardless of his lack of control over the circumstances that led to the accident and his level of due diligence in selecting a reclaimer with whom to do business. While such a level of stringency – strict liability – was built into the Comprehensive Environmental Response, Compensation and Liability Act[29], it is not a part of RCRA.

Second, the proposal asserts that a party wishing to use the conditional exclusion assumes the responsibility for documenting his activities regarding the conditions imposed by regulation. While most facility operators will likely keep such documentation in the ordinary conduct of their businesses, EPA takes this requirement one step farther. The proposal indicates that EPA, in commencing an enforcement action, will shift the burden of proof, including the burden of persuasion, to the respondent to demonstrate that the material has been managed in a manner that maintains the exclusion from its point of generation. This reverses the ordinary burden of proof applicable in administrative law proceedings and requires the regulated entity to prove itself to be compliant. ACC objects to both of these enforcement provisions.

### H. Certain Existing Exclusions Should Not Be Eliminated

EPA states that nothing in the proposed rule is intended to increase regulatory scrutiny over, or place administrative burdens on secondary materials that are currently excluded from Subtitle C regulation.[30] With that in mind, ACC urges the Agency to examine more closely the elimination of the exclusion at § 261.2 (e)(1)(iii), which excludes materials from the definition of solid waste if they are recycled by being "returned to the original process from which they are generated, without first being reclaimed or land disposed." As currently formulated, this exclusion does not require that the secondary materials remain within the same four-digit NAICS industry. Nor does this exclusion require closed-loop recycling, though EPA refers to it as such. Certain complex chemical processes may begin within one such four-digit code and generate secondary materials in another before being returned to the original operation. It is important to some ACC members that they retain the ability to continue to use this exemption under these circumstances in the future. ACC therefore requests that this exclusion be retained.

Likewise, § 261.4 (a)(8), referred to as the "closed loop reclamation" exclusion, allows certain types of reclamation when returning secondary materials to the original process or processes that generated them. Virtually all manufacturing requires some degree of closed-loop, internal process recycling in order to produce an economically viable product. In company facilities, it is

[29] 42 U.S.C. 9601 *et. seq*

[30] 68 Fed. Reg. pp. 61560, 61577, & 61580

not uncommon for a single process to have hundreds of internal recycling points. For example, a facility may have a centralized, closed-loop solvent recovery unit that receives and reclaims solvent from multiple processes (under multiple NAICS "industry" codes).

Facilities may also have multiple, highly integrated processes that use this exclusion to use, reclaim and reuse acids or other materials. The narrow exclusion outlined in the regulatory proposal would not replace this exclusion, and a great deal of legitimate reclamation would be barred. For example, several member companies have facilities that comprise two or more operations with different 4-digit NAICS codes. These operations utilize the same on-site reclamation facility to recover solvents from spent solvents. These operations utilize the reclamation facility in a closed-loop manner per 40 CFR 261.4(a)(8). If EPA eliminates this exclusion, one of the spent solvent streams would likely have to be shipped off-site to a commercial reclaimer or, if the economics cannot justify the added expense, sent for disposal.

In addition to retaining these exclusions, EPA needs to make clear in the final rule that materials presently using these exclusions would not be subjected to new evaluations of legitimacy, notification or record keeping requirements that are not now applicable.

EPA should not eliminate the closed-loop exclusion based on an assumption that no facility with multiple 4-digit NAICS codes is utilizing this exclusion. Indeed, there are probably many facilities that use a common reclamation facility based on the need to justify the expense of installing such a system. ACC strongly urges EPA to keep the closed-loop exclusion under 40 CFR 261.4(a)(8). This type of situation argues strongly that EPA should retain the closed loop reclamation exclusion and place no new administrative requirements on it.

## I. Proposed Option #2 Should Not Be Adopted

As discussed above, ACC believes that Option #1 that restricts recycling to secondary materials that stay within a four-digit NAICS code is so restrictive that it will result in little increase in recycling in our industry. Option #2, further restricting such recycling so that material sent to a reclamation facility within that four-digit code may not benefit from the exclusion if that facility also accepts materials from outside that code category, is even worse and wholly unacceptable. Under this approach, the generator of secondary materials that establishes the *bona fides* of a reclamation facility through due diligence and is later notified that the facility accepted recyclable hazardous waste from another generator outside the proper NAICS code could face a RCRA enforcement action for actions outside his control. Further, as the "conforming changes for co-proposed regulatory Option #2"[31] make very clear – administering this option, for the states and regions, and figuring out how to use it, for generators and reclaimers, is jaw-droppingly complex. Option #2 will not encourage anyone in the generating industry to assume the risk of an enforcement action just to increase recycling opportunities.

[31] 68 Fed. Reg. p. 61580

J. Applicability of Closure and Corrective Action Requirements should be Clarified

ACC agrees with EPA's conclusion, expressed in the preamble, that permitted or interim status hazardous waste storage units managing material subsequently excluded by this proposal would not need to undergo regulatory "closure" once they ceased storing "hazardous wastes" due to this exclusion, unless they were previously used to store other non-excluded hazardous wastes.[32] However, in order to ensure regulatory certainty, EPA should amend the language in 40 CFR 264.113 and 265.113 to clearly state the concept described in the preamble. One option that would accomplish that necessary clarity would be to add a new paragraph (f) to each of those sections that reads:

> (f) The exclusion from the definition of solid waste or hazardous waste under §§ 260.30, 261.2, 261.3, or 261.4 of a material previously classified as a solid and hazardous waste does not operate to trigger the closure requirements of paragraphs (a) and (b) of this section, except where the unit has previously managed other non-excluded hazardous wastes and does not continue to manage other hazardous wastes."

ACC also agrees with EPA's conclusion that residuals from formerly listed hazardous wastes would not be considered hazardous wastes under the derived-from rule if recycled under the new exclusion.

ACC does not agree, however, with EPA's position on the potential applicability of corrective action subsequent to materials becoming excluded. EPA states that a permitted or interim status facility managing only secondary materials that become excluded under this proposal (i.e., a facility that would no longer be considered a hazardous waste management facility, and therefore no longer require a hazardous waste operating permit) would still be required to complete facility-wide corrective action.[33] This conclusion is inconsistent with the clear jurisdictional basis of RCRA. Because these excluded materials would, by definition, not be classified as either solid or hazardous waste, EPA has no jurisdiction over them under RCRA. Thus, any corrective action requirements that had been triggered only by a previous erroneous assumption that these recycled materials had been "discarded" should not continue to apply.

## IV. Legitimacy Criteria

In the context of the Agency's narrow NAICS codes proposal, innumerable conditions will still stand in the way of legitimate recycling. ACC sees very little extra recycling within the chemical industry if EPA finalizes this approach, and we see no benefit to codifying the legitimacy criteria under this narrow exclusion. The regulated community has used the legitimacy guidance found in Sylvia Lowrance's memo of April 26, 1989[34] without incident in

[32] 68 Fed. Reg. p. 61580-61581

[33] Id. at p. 61580

[34] OSWER Directive 9441.1989 (19)

the intervening 15 years and found no need to clarify it absent a major change in the regulations. That is, until EPA adopts a regulatory scheme making legitimacy criteria the centerpiece of the Agency's efforts to distinguish legitimate recycling from "discard," we oppose any codification of legitimacy criteria.

ACC strongly encourages EPA to adopt the broader exclusion, which would exclude all legitimate reclamation from regulation.[35] Should EPA adopt the broader exclusion in the final rule, the legitimacy criteria become a useful tool in ensuring continued protection of the environment. For that reason, ACC concurs that a substantially greater burden will rest on the evaluation of whether the reclamation is indeed legitimate. Under those circumstances, ACC would support codifying legitimacy criteria, based on the guidance, as principles to be considered on a case-specific basis.

ACC agrees with EPA that legitimacy criteria, based on existing guidance, are best left for subjective evaluation and balancing because there will be situations where a recycling activity may fail to meet one or more of the criteria, yet still be legitimate recycling.[36] Were these criteria made hard and fast determiners of legitimacy, ACC is concerned that enforcement personnel would use them as presumptive indicators of RCRA violations and institute enforcement actions without understanding the unique aspects of a recycling operation and the market conditions that make it possible. To avoid this potential misuse of the criteria, if EPA proceeds to add legitimacy criteria to the code under any of the options, we urge the Agency to codify language that reiterates what is currently reflected only in the preamble; that these criteria are general principles, the consideration of which will require some subjective evaluation and balancing, and that circumstances are anticipated where legitimate recycling could occur without one or more of these criteria being met. We suggest this or similar language proceed the discussion of the criteria:

> *Determinations as to the legitimacy of specific recycling activities are to be made on a case-by-case basis. While not needing to meet all four of the following criteria, these criteria should be considered when determining the legitimacy of a recycling activity:*

We further recommend that EPA clarify that these criteria, while appropriate for use in evaluating reclamation excluded by the broader exclusion, should not be imposed as additional conditions on existing exclusions or existing hazardous waste recycling. Those 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 inconsistent with EPA's statements that this proposal is de-regulatory in nature.[37]

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[35] 68 Fed. Reg 61588

[36] .Id. at 61583.

[37] Id. at 61560, 61577, & 61580

As discussed more fully below, ACC is in substantial agreement with EPA over the first three criteria proposed. However we have significant concerns with the fourth, "toxics along for the ride" criterion.

Criterion 1 – Managed As a Valuable Commodity

ACC believes this is a reasonable indicator of legitimate recycling. It ties closely with the Agency's revocation of excluded status for secondary material that escapes into the environment during reclamation operations. The D.C. Circuit Court has placed substantial weight on objective indications of the intentions of the generator of secondary materials in determining whether material is or is not "discarded." Handling the material in a way that is consistent with the handling of the competing virgin alternative is such an objective measure.

Criterion 2 – Useful Contribution – Economics of Recycling

Again, ACC believes this is a reasonable indicator of legitimacy. We agree with the Agency that the value of a particular secondary material to the manufacture of a product should be determined on a case-by-case basis, evaluating the particulars of the transaction and process. In conducting such an evaluation, it should be recognized that new opportunities for recycling arise from new technologies, new product development, or the recognition of new market opportunities. Materials that have been managed as waste in the past may now present a fresh, useful contribution to new products or processes. The economics and available substitutes will vary greatly between, for example, metals recycling and chemical recycling. Similarly, commodities, be they virgin or secondary, will fluctuate in price in the marketplace due to innumerable market conditions. This argues strongly against a numerical trigger for evaluating all recycling transactions for economic sufficiency. A company may enter into a long-term contract to supply a material that may later be considerably less valuable. This should not jeopardize the validity of the original recycling transaction. EPA acknowledges this in the proposal:

> "EPA is not proposing a particular economic test for evaluating this criterion, nor do we necessarily believe that a secondary material must be marketable to the public in order for it to have sufficient value for the recycling to be legitimate recycling. ... The question of who pays whom, the amounts of money involved, and other aspects of the transaction between generator and recycler can be an indicator as to whether or not the recycling is legitimate or disposal in the guise of recycling. It is EPA's experience that in many legitimate recycling transactions, the generator pays the recycler to accept the material recycled."[38]

ACC fully agrees with this statement.

[38] 68 Fed. Reg. 61584.

Criterion 3 – Recycling Yields a Valuable Product/Substitute

This criterion is closely related to the second. In looking at the value/usefulness of the product produced using a secondary material, the Agency will likely get an even better gauge of legitimacy, since the manufacturing process is much further along and the intentions of the parties are likely to be more obvious. ACC agrees with EPA's preamble discussion of this criterion, but has one concern. In evaluating value/usefulness, the Agency should examine the product's fate over a reasonable stretch of time. Market conditions will fluctuate and may cause the "value" of the product to decline precipitously at times. Again, the evaluation of a product's value/usefulness should be a case-by-case determination – there being no universal litmus test applicable to the wide range of secondary industrial materials available for recycling.

Criterion 4 – Toxics Along for the Ride ("TAR")

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.

Having said that, however, ACC's major concern among the criteria is with this one. 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. We encourage EPA to use these raw material, secondary material and product specifications as part of the evaluation as to whether a secondary material has been adulterated in order to avoid the cost of disposing of the adulterant.

While ACC agrees that intentionally hiding toxic materials in products is not acceptable, neither is it a realistic threat. There are redundant mechanisms in our society, such as toxic tort liability, to deal with irresponsible producers. 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.

In addition, ACC suggests that the Agency adjust this criterion to reflect the D.C. Circuit's recent opinion in *Safe Food and Fertilizer.*[39] There the Court was faced with the "toxics along for the ride" issue. Petitioners argued that fertilizers made with secondary zinc must have levels of other trace metals, not necessary to fertilizer use, that are equal to or less than those of fertilizers made using virgin zinc inputs in order to be excluded from the definition of solid waste. The Court disagreed. The Court held that as long as the levels of constituents in the secondary material represented no substantive increase in risk when compared to their virgin alternatives, the differences in trace metals were meaningless.

The Court's approach is different from EPA's "risk based" approach in the proposed rule in that it involves a limited examination for a significant risk differential, not a full risk analysis that is performed every time the constituent concentrations in a secondary material feedstock shift. ACC's concern with TAR lies less with the elements of the current criterion than with the potential for EPA or the states to undertake an exercise in setting precise ingredient specifications for various products made with secondary materials (the "bright line" approach). This would be an endless, prohibitively expensive and futile process. While EPA's preamble discussion raises many of the same implementation concerns with the "bright line" approach, its discussion of evaluating different constituents at the parts per million level is counterproductive and inconsistent. Each generator of a reclaimable secondary material should satisfy itself as to why there are no significant differences between the risks of products produced from their material and those of its virgin alternative, and be prepared to demonstrate this when asked to do so.

ACC believes that the TAR criterion proposed by EPA will present significant uncertainties and additional expense in implementation because it appears to require the measuring of statistical differences in numerous constituent concentrations in materials that are by their nature heterogeneous. In addition, the preamble discussion suggests a generator of secondary material might need to know the use to which the material is being put at stages of the manufacturing process that occur many steps downstream.[40] It is likely that many secondary materials, as well as some products made from those materials, will have concentrations of constituents that are different from their virgin analogues. This should not render their recycling illegitimate. It merely means that the secondary material and/or resultant product was made from different inputs, and came from a different industrial process

We recommend that EPA focus its evaluation of the TAR criterion on a comparison of recycled products, or when necessary their secondary material inputs, to the product and process specifications for their use. In using process and product specifications as the primary benchmark, the regulator can better assess whether the secondary material or recycled product is meeting its intended use as specified by the user, and whether meaningful differences—representing a significant risk differential to the public—exist between the recycled material and its virgin analogue. EPA should avoid making regulatory decisions under RCRA on the relative risks of products. RCRA is not a product-regulating statute and there already exist a number of mechanisms, enforced by EPA and other federal agencies, to ensure product safety.

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[39] *Supra*, note 19.

[40] 68 Fed. Reg. p. 61587

In evaluating whether hazardous constituents are being inappropriately passed-through to recycled products, ACC believes that a more effective focus of the TAR criterion is to evaluate whether the generator's adulteration of the secondary material being used or sold is designed to avoid disposal costs. ACC is not seeking to burden the Agency with the obligation to prove "intentional conduct" in a legal sense, but rather is hoping to shift EPA's focus to consideration of the following factors: 1) Does the suspect recycling product or secondary material contain constituents that one would not expect to find given the production process from which it was generated?; 2) Are there constituents in the material or product, which are unrelated to any of the original feedstocks or their chemical reaction products?; and/or 3) Do the suspect constituents conflict with the user's relevant product or process specifications? ACC believes that existing requirements under 261.2(f) are sufficient.

As stated above, ACC believes that if EPA promulgates the broader exclusion, codification of the legitimacy criteria is best characterized as principles to be assessed on a case-specific basis rather than codified as mandatory regulatory requirements. They are, by their very nature, general criteria that will vary in their use depending on a great number of contingencies: type of secondary material, process that generates it, type of use contemplated, type of virgin alternative, etc. For any lesser option that might be promulgated, ACC members support retention of the existing guidance approach.

## V. Potential Exclusion of All Legitimate Reclamation

ACC wholeheartedly supports this option and urges EPA to promulgate a direct final rule codifying it. While it does not go all the way to redefining "discard" as defined by the D.C. Circuit in its decisions, it accomplishes significantly more than any of the other alternatives offered. This option would result in a significant increase in resource conservation and recovery.

ACC believes that the environmental benefits from this option would far exceed those of the primary proposal. As the Agency recognizes, many manufacturing operations do not have the capital to invest in reclamation operations that would allow them to take advantage of reclaiming secondary material that they generate, or that their competitors within their four digit NAICS code generate.[41] ACC differs with the Agency regarding the assumption that it is only small business entities that find themselves in this situation. Chemical manufacturing, including that done by large commercial entities, produces many secondary material streams that, by themselves, would not justify the building of reclamation facilities. These materials, while valuable, are produced in volumes that are too small to ever support the investment necessary to reclaim them. Only by consolidating many of these streams from many manufacturers (not necessarily within the same four digit NAICS code) does the reclamation become cost effective. Whether a generator of the secondary material undertakes the reclamation, or a third party that recognizes an opportunity to enter the reclamation business, the broader option would produce substantial incentives to reclaim material that is currently being disposed of because reclamation is hamstrung by the current regulations.

[41] Id. at p. 61588

ACC anticipates that others, particularly those who stand to lose substantial fees from burning or landfilling valuable secondary material streams as "waste," will protest that this option is not environmentally sound. ACC believes that the benefits of conserving virgin resources and materials, and moving towards a more sustainable society far outweigh the economic losses to the hazardous waste disposal industry. In similar rulemakings dealing with exclusions from the definition of solid waste the hazardous waste disposal industry has argued that removing strict RCRA Subtitle C status from materials that they currently dispose of will create new Superfund sites. They maintain, with no supporting data, that reclaimers without RCRA permits will have no incentive to operate in a clean manner and that "businesses" will crop up, take materials into "storage" and then disappear, leaving the cleanup to the taxpayer. ACC would like to refute these allegations.

Indeed, many Superfund sites from years past did result from unscrupulous or short-sighted "waste entrepreneurs." Generators of secondary materials found contaminating these sites have paid enormous clean-up costs to remedy these past practices. In today's legal and regulatory environment, no responsible generator would take the chance of facing such liability without doing a due diligence examination of any recycling facility to which it might send secondary materials. It is very difficult to imagine any corporate official choosing to save a few dollars on secondary material recycling by sending it to a "low bidder" recycling facility that cannot document adequate environmental safeguards. Not when the official and the corporation could face unlimited strict, joint and several Superfund liability in the future. The desire to avoid any potential liability will remain a goal of generators of secondary material whether or not EPA identifies those materials as "solid waste."

In addition, there exists an analogue that demonstrates this. Since 1985, characteristic byproducts and sludges that are reclaimed have not been classified as "solid waste." These materials are commonly reclaimed outside the generating industry. ACC is unaware of any cases of environmental irresponsibility regarding the reclamation of these materials outside the scope of RCRA. It follows that the legitimate reclamation of other secondary materials will not result in a reversion to pre-RCRA and pre-CERCLA conditions and practices.

As stated above, ACC would be willing to accept the one time notification and speculative accumulation requirements set out by EPA if the broader exclusion were adopted. More detailed record keeping or storage safeguards are unnecessary because the legitimacy criteria already prohibit the handling of secondary material in a sloppy manner. Abuse of this prohibition would subject the handler to RCRA enforcement.

Finally, EPA has requested comment on whether a broad exclusion from solid waste regulation could be implemented effectively through a variance procedure such as that set out in the current § 260.30 provisions. Such a procedure would have the advantage of moving the determination process closer to the administering and enforcing entity, i.e., the state or the region. However, ACC believes that this advantage is outweighed by the loss of uniformity in implementation that will be necessary to achieve the substantial increase in resource conservation and recovery that the broader reclamation option promises. ACC members would certainly ship secondary materials to reclamation facilities in other states under the broader exclusion. However, the

possibility of administrative difficulty in having states disagree on elements of legitimacy would diminish the incentives to recycle that this option clearly offers.

## VI. Opportunity to Modify Precious Metals Recovery Regulations to Encourage Additional Recycling

As part of EPA's effort to encourage additional recycling of secondary materials, ACC suggests that the Agency also consider modifying its precious metals recovery regulations at 40 CFR 26.6(a)(2)(iii), 266 subpart F. Many of ACC's members generate such precious metals-containing materials, which, due to their value, are carefully managed. While these regulations eliminate some of the burden associated with managing materials destined for recovery as hazardous waste, they still pose unnecessary restrictions that can make recovery uneconomical, particularly having to transport the secondary material as a hazardous waste. Commercial precious metals reclamation facilities are usually located far from generating facilities. Due to the distances involved and the extra cost associated with shipping a material as a hazardous waste, the economic threshold justifying recovery vs. disposal is higher than it would be if the material were not classified as a hazardous waste.

ACC believes that additional precious metal-containing secondary materials would be reclaimed if it weren't for the hazardous waste classification. ACC recommends that any secondary material, sent for legitimate precious metals recovery, be exempted from the definition of solid waste. Such materials would be subject to the same evaluation of legitimacy criteria as other materials, as justified by criteria 1 & 3. Further, the inherit value of the material virtually insures it will be handled and controlled to minimize losses. ACC believes there should be no restrictions limiting such an exemption to "in a continuous process within the generating industry" as precious metals reclamation operations almost always have different 4-digit and even 3-digit NAICS codes. As ACC discusses earlier, the use of NAICS codes is both unnecessary and fraught with difficulties.

## VII. Technical Corrections

Below are some discrepancies and apparent errors noted in ACC's review of this proposal:

A discrepancy exists between the preamble and the proposed regulatory language relating to Sections 260.30(b) and 260.31(b). On page 61579, section C. of the preamble EPA describes only conforming changes to 260.30(b) and 260.31(b) that would maintain the existing variance for materials that are reclaimed and then reused in the original production process; yet on p. 61595 of the proposed regulatory language, EPA states it is deleting sections 260.30(b) and 260.31(b). As discussed in our comments above, ACC urges EPA to retain all existing exclusions.